IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL CAUSE.39 OF 2022

IN THE MATTER OF ARBITRATION

AND

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

AND

IN THE MATTER OF MISC. COMMERCIAL CAUSE.39 OF 2022

BETWEEN

THE HIGHER EDUCATION STUDENTS' LOANS BOARD ……..…… CLAIMANT

AND

TANZANIA BUILDING WORKS LIMITED…… . RESPONDENT

Last Order: 30/06/2023
Ruling date: 03/08/2023

RULING

NANGELA, J.:

This ruling seeks to address one issue, namely:

> whether an award brought to the attention of this court for purposes of its filing under Regulation 51 (5) of the

Arbitration (Rules of Procedure) Regulations, GN. No. 146 of 2021, was properly laid before this court in accordance with the law.

To give context to that issue I will set out, albeit in brief, the facts constituting this matter. It all started when Mr., Evans Wapalila, a Sole Arbitrator, instructed to be filed in this court, on behalf of the Higher Education Students' Loans Board, a Final Arbitral Award dated the 29th day of April 2022.

The Sole Arbitrator's Award, which was forwarded to the Solicitor General vide a letter Ref. No. ESW/ARB/HELSB/TBW/07 dated the 19th of September 2022, was in respect of a construction contract, (Contract No.PA/030/2015-2016/HQ/W/01 for construction of Office Building at Mikocheni, Kinondoni Municipality).

In line with that instruction to file the Final Award in court, the Claimant, vide a covering letter from the Office of the Solicitor General, Ref. No. OSG/ DSM/ APPLN/ MAR/ 2022/ 1/111, dated the 26th day of September 2022, addressed to the Hon. Registrar of this Division of the High Court, submitted the said award (annexure to the letter) for

filing under Regulation 51 (5) of the *Arbitration (Rules of Procedure) Regulations,* GN. No. 146 of 2021.

On the 13th day of December 2022, the parties appeared before this Court. For the Claimant was Mr. Baraka Nyambita, learned State Attorney while Mr. Beatus Malima, learned Advocate, appeared for the Respondent.

On addressing the court, Mr, Nyambita submitted that, the business of the day was for the Respondent to show cause why the Final Award brought before the court under section 73 of the Arbitration Act and Rule 51 (5) of the Arbitration (Rules of Procedure) Regulations, GN. No. 146 of 2021, should not be registered and enforced as a decree of the court.

Since Mr. Beatus Malima, the Respondent's counsel, had not had the opportunity to file his responses to the matter, he sought for time to do so and was granted. Subsequently, Mr. Malima filed an affidavit affirmed by *Mr. Mohamed Iqbal Noray*, the Managing Director of the Respondent on the 8th of February 2023.

Besides, Mr. Malima did also file a Notice of Preliminary Objections, raising two main points of law which

are now the subject of this ruling. The points of law raised by Mr. Malima were as here below, that:

1. The Application is incurably defective for breach of Regulation 51 (5) of the *Arbitration (Rules of Procedure) Regulations, 2021*, GN. No. 146 of 2021.
2. That, the Application is incurably defective for breach of Regulation 63 (1) of the *Arbitration (Rules of Procedure) Regulations, 2021*, GN. No. 146 of 2021.

When the parties appeared before me on the 17th day of May 2023, I directed them to dispose of the preliminary legal issues by way of written submission and a schedule of filing such submissions was issued. The parties duly adhered to the schedule. I will thus summarize their submissions and proceed to determine the merits or otherwise of the objections.

Submitting in support of the 1st preliminary objection, it was Mr. Malima's contention that, an application preferred

under Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations, 2021, GN. No. 146 of 2021 as what is at hand, must be accompanied by the arbitral proceedings failure of which should not be entertained. He submitted that; such a requirement is a mandatory one.

Mr. Malima submitted further, that, whoever prefers an application under Regulation 51 (5) of the Regulations must not only file before the court a certified copy of the award but also the proceedings thereof. He argued that there can be no other option, such as attaching the award, without proceedings accompanying it.

Mr. Malima, the learned counsel for the Respondent, referred to this court paragraph 3 of the Letter Ref. No. OSG/ DSM/ APPLN/ MAR/ 2022/ 1/111, dated the 26th day of September 2022). He argued that, under that paragraph the Claimant was categorical, that, she was submitting not only a certified copy of the Arbitral Award but also the proceedings.

What Mr. Malima seems to insinuate is that, even the Claimant understands that, when causing the award to be filed in court, the proceedings of the arbitral tribunal which issued the award must also be filed to accompany the award.

For clarity, I will reproduce the 3rd paragraph of the Letter referred to by Mr. Malima. It reads as follows:

> "3. Pursuant to the said instructions, we hereby submit to you for filing under ***Rule 51(5) of the Arbitration (Rules of Procedure) Regulations, 2021, GN. No. 146 of 2021, certified copy of the Arbitral Award, Proceedings, and other documents*** in respect of the Arbitration conducted at Dar-Es-Salaam by the Arbitral Tribunal between the afore-mentioned parties". (Italics and underlining added by Mr, Malima).

Mr. Malima submitted that, it turns out the Claimant do not have the proceedings and so, there are no proceedings because, to date the Sole Arbitrator has never issued such proceedings to the parties. He contended that, without there being such proceedings, this court will not be able to determine if the Arbitral Award deserves to be registered.

To take his argument farther, Mr. Malima contended that, proceedings are meant to assist the court to satisfy itself that the arbitral proceedings were conducted in accordance with the law before granting leave to register it. He considered that position as being the rationale and the import of section 73 of the Arbitration Act, Cap.15 R.E 2020.

He surmised, therefore, that, the Claimant's (Petitioner's) failure to attach the arbitral proceedings, makes this application untenable for breach of the Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations, 2021.

Concerning the second objection, it was Mr. Malima's submission that, the application before me was as well in breach of Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations, 2021, GN. No. 146 of 2021. He contended that, that respective provision requires all applications to the court made under the Arbitration Act, to be made by way of petition, contain a summary of facts, and attach thereto, the arbitral proceedings.

Mr. Malima submitted, therefore, that, since the Claimant herein has not done that, it follows that, the present

application is incompetent and ought to be struck out with costs.

In reply, Ms. Neisha Shao, the learned State Attorney who prepared the Claimant's submission opted to commence by addressing the second objection. She submitted that, the Claimant was utterly opposed to what Mr. Malima asserted and contended that, the Arbitration Act, Cap.15 R.E 2020 and the Arbitration (Rules of Procedure) Regulations 2021, provide for two procedural approaches which may be relied upon when filing an arbitral award.

Ms. Shao contended that, the first approach is premised under Regulation 51 of the Arbitration (Rules of Procedure) Regulations 2021, specifically under sub-regulation (4) and (5) while the second approach is a filing made under Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations 2021.

According to Ms. Shao, under Regulation 51 (4) and 51 (5), the law vests powers on either the Arbitrator or any of the parties to the arbitration (with the permission of the Arbitrator) to file an award. She submitted, however, that, the

regulation 51 does not specifically state the mode of filing the award.

It was her view that, Regulation 51 (5) does provide that, the arbitral tribunal may in a letter transmitting the award, allow any party to the proceedings to file a certified copy of the award together with the proceedings thereof to the court for the purposes of registration.

As regards the second mode, she admitted that Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations 2021, does provide that all applications under the Arbitration Act or Regulation shall be made by way of petition and must set out brief statement of the material facts and annex to it minutes or proceedings of the tribunal and the award or ruling specifying the person affected by it and upon whom a notice is required to be given.

Ms. Shao submitted that, in filing this award, the Claimant relied on Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations 2021 and, that, the particular provision does provide for the filing of awards unlike Regulation 63 (1) of the Arbitration (Rules of Procedure)

Regulations 2021, which generally provides for all sort of applications.

She submitted, therefore, that, the correct procedure is the one provided for under Regulation 51 (4) of the Arbitration (Rules of Procedure) Regulations 2021, if the filing is done by the Arbitral Tribunal, or under Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations 2021, if the filing is done by any party to the proceedings. She contended; therefore, the application is not defective.

As regards the first objection, Ms. Neisha did concede that, the regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations 2021 does require a party filing an award in court for its recognition enforcement to as well file together with it, the underlying proceedings on which the award is premised.

However, it was Ms. Shao's contention, that, even if the said rule is to be considered impliedly as being mandatory in nature, a fact she strongly disputed, the filing done in court by the Complaint (Petitioner) involved not only a letter forwarding the award to this court but also a certified copy of the award, agreement to a single arbitrator, letter of

appointment of the arbitrator, letter of acceptance and minutes of preliminary meeting. She surmised, therefore, that, these documents sufficiently constituted the "proceedings" in the arbitration.

In the alternative, Ms. Shao was of the view that, should this court make a finding that the documents stated do not constitute "proceedings", then, it be pleased to invoke the provisions of Rule (2) (2) of the High Court (Commercial Division) Rules of Procedure, 2012 GN.250 (as amended, 2019), and section 3A of the Civil Procedure Code, Cap.33 R.E 2019 and cause the anomaly to be rectified.

The Respondent's counsel filed a brief rejoinder submission. He briefly rejoined that, in no way could an agreement to arbitration, a letter of appointment of the arbitrator and his acceptance letter as well as minutes of the preliminary meeting constitute arbitral proceedings. He contended that, they only qualify as part of the record of the proceedings, but they are not the entire proceedings.

Mr. Malima contended that, arbitral proceedings are made of the minutes of all meetings, all directives, and orders of the arbitral tribunal as well as the evidence before the

tribunal, both documentary and oral and the consideration of the tribunal on such evidential materials. He maintained his position that no such are available before this court.

As to whether the regulations are merely permissive or otherwise as far as attaching the arbitral proceedings to the award when filing the award for its enforcement, Mr. Malima rejoined that, the regulation is mandatory as it requires that the award be filed "*together with the proceedings thereof*". He insisted that, such a condition is mandatory in nature.

He submitted, further that, since the act of allowing the award to be registered is a judicial act under section 73 of the Arbitration Act, this court must be satisfied that the proceedings were conducted in accordance with the law before issuing an order of registering the respective award.

As regards the second objection, it was a rejoinder submission that, regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations 2021, is not applicable where the award is contested. He argued that, where an award is contested, the applicable provision is Regulation 63 (1) of the of the Arbitration (Rules of Procedure) Regulations 2021.

It was a further rejoinder that, since registration of an award is not an automatic process, the filing under Regulation 51 (5) entails making a petition as required under Regulation 63 (1) of the of the Arbitration (Rules of Procedure) Regulations 2021 except where an award is not contested.

Mr. Malima contended that, if the court was to disregard the making of a petition, it will not have material upon which a decision whether to allow or refuse registration of the arbitral award presented would be premised. He submitted therefore, that, in any scenario where an award is contested there must be a petition filed.

As far as the alternative prayer based on Rule 2 (2) of the High Court (Commercial Division) Rules of Procedure, GN.No.250 of 2012 (as amended) and section 3A of the Civil Procedure Code, Cap.33 R.E 2019, it was Mr. Malima's rejoinder that, this court should as well reject the prayer. He argued that, granting it will give unfair advantage over the Respondent.

He contended that, the absence of the proceedings has as well affected the Respondent as she has not been able to file her petition to challenge the award. He was of the view,

therefore, that, if this court will be inclined to grant the prayer made in the alternative, it should equally grant the Respondent time to file her petition to challenge the award within 60 days from the date when the arbitral proceedings will be availed to the parties since even the Respondent has not been given such proceedings.

Mr. Malima contended that, the Applicant has not filed the petition because she lacks the proceedings which, as per regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations, 2021, GN. No.146 of 2021. He, therefore, reiterated and maintained his earlier position.

I have carefully considered the rival submission made by the learned counsel for the Respondent and examined the submission made by the Learned State Attorney. The issue which I am called upon to address is whether, based on their submission, this court should uphold or overrule the objection and proceed to register the award. Put otherwise, was the award properly filed in court?

Before I respond to the issue which I raised herein above, I find it pertinent to commence my analysis from a conceptual understanding of what arbitration stands for,

what registration, recognition, and enforcement of an arbitral award are all about and finally what does the law say on these matters laid before me.

I have decided to take that route given that both the Arbitration Act, Cap.15 R.E 2020 and the Arbitration (Rules of Procedure) Regulations, GN.146 of 2021 are still new and not much has been said in terms of their provisions and their application. Bringing clarity to their provisions will be a helpful exercise when a court is seized with a fit case within which it can do so. I find, therefore, that; this is the fit case.

Essentially, an arbitral process is private in nature. It is premised on the agreement between the parties to have their dispute(s) resolved, not by way of litigation in a court of law, but by reference to an arbitral tribunal of their choice or preference. The outcome of the process is an award which has a binding effect on the parties.

An award is defined under section 3 of the Arbitration Act, Cap.15 R.E 2020. The section defines it to mean "a decision of the arbitral tribunal on the substance of the dispute and includes any interim or interlocutory decision.

Ordinarily, where a party who is required to satisfy the award fails to voluntarily satisfy it, usually the other party will proceed to the court with a view to have it registered/recognised as binding and enforceable as would be a judgment or order of the court.

In our jurisdiction, however, all that will be done in a staged process. From a legal point of view, there are, in essence, two main substantive provisions which will apply to that process. These are section 73 and section 83 of the Arbitration Act, Cap.15 R.E 2020.

I will start by looking at what section 83 (1) of the Act provides, since this is the first provision to consider before one turns to section 73 (1) of the Act. Section 83 (1) of the Arbitration Act, Cap.15 R.E 2020 provides as follows:

> "83(1) Upon application in writing to the court, a domestic arbitral award…shall be recognised as binding and enforceable."

In my humble view, the gist of section 83 (1) of the Act is "*recognition of an award*" as binding and enforceable. In our Arbitration Act, however, the law does not define what

amounts to "*recognition of award*". That fact, notwithstanding, does not hinder this court from relying on definitions provided for by those who are expert in the field.

In their book titled *Redfern and Hunter on International Arbitration,* 6th ed., Oxford University Press, 2015, **Blackaby, N., *et al,*** stated, on 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*."

Put differently, it refers to a process where a party seeks for an authoritative endorsement of the court, that, the award is "authentic" and, hence, confirmed to be final and binding. 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*.

Under the Arbitration Act, the section which deals with enforcement of an award as its kernel is section 73. This deals with the **second stage** of the post-award processes as alluded to hereabove. The section provides as follows:

> "73 (1) An award made by the arbitral tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court.
>
> (2) Where leave of the court is given, judgment may be entered in terms of an award.
>
> (3) Save as otherwise provided, leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award."

As I stated herein earlier, the above cited provision deals with "*enforcement of award*". It is worth noting, however, that, the Arbitration Act does not, as well, define what "*enforcement of award*" means. Even so, enforcement of an award entails a 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 awards, therefore, involves the act of converting the award into concrete relief for the claimant up which she/he can ably rely upon to commence execution proceedings. This process, therefore, is regarded as a step further than "*recognition of the award*". Even so, as **Blackaby N, *et al*** (supra) stated, it is worth noting 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."

Considering the above quotation in light of what the law provides in our jurisdiction, it is clear that, where a Petitioner seeks that an award be "***recognised***" by the court

and be "***enforced***" as would be a decree of the court, then, the application must be brought under section 83 (1) and 73 (1) of the Act, read together with the relevant provisions of the Arbitration (Rules of Procedure) Regulations, 2021, and, such relevant provisions of the Regulations will depend on whether the award is a "**domestic**" or "**foreign**" award.

For clarity, sections 83 (1) and 73 (1) of the Act are to be read together with the "relevant regulations" and such are to appear on the citation of enabling provisions under which the award caused to be filed in court is based. Such provisions may be Regulation 51 (4) or 51 (5) (depending on who caused the award to be filed in court) and Regulation 66 (in respect of foreign award).

In case the filing was made by way of a Petition under Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations, 2021, the relevant sections of the law should as well be cited, *i.e.,* section 83 (1) and 73 (1) of the Act.

I hold it to be the case due to what I stated earlier hereabove, that, an award is first "***recognised***" before it is "***enforced***." And it is to be "*recognised*" by the court where it is filed as having the status of being "***final***" and "***binding***" on

the parties. This is essentially the case because; in effect, an award may be "*provisional*" and, hence, not binding on the parties yet.

That kind of an inconclusive award may not be enforced. In principle an award is the final determination of a particular issue or claim in the arbitration. It may be contrasted with orders and directions which address the procedural mechanisms to be adopted in the reference.

It is, however, worth noting as well, that, an award may be termed "*partial*", meaning that, although the parties may still have issues to be determined, the partial award issued by the tribunal has conclusively determined a particular issue and, hence, has some form of *finality* and *binding effects* on the parties in respect of that issue. But if it is a merely "***provisional award***" it may lack such conclusiveness and binding effects, hence, cannot be "*recognised*" and "*enforced*."

It is also worth noting that, the process of ensuring that an award is enforced as would be a judgement or order of the court, "***is not automatic"***. Section 73 (1) of the Act makes it clear that, the Claimant seeking for its enforcement as would

be a judgement or order of the court "***must obtain the leave of the court"*** when she/he intends to go to that extent.

According to Regulation 51 (7) of the Arbitration (Rules of Procedure) Regulations, GN.No.146 of 2021, such leave od the court may be obtained from the court, either **orally** (oral application before the court) or **by way of a formal application**. If leave is to be sought by way of "**a formal application**", it means there must be adherence to Regulation 63 (1) which calls for an application in the form of **"a petition"** to be filed in court.

It is worth noting, however, that, once such leave is granted, section 73 (2) provides that, judgement may be "**entered in terms of the award**". This phrase "entered in terms of the award" does essentially mean that, what will be entered as a judgment or order of the court is not the entire arbitral award but "***only the dispositive portion of the award***". See for instance the case of ***Siemens Industry Software Gmbh & Co Kg (Germany) (formerly known as Innotec Gmbh) vs. Jacob and Toralf Consulting Sdn Bhd (formerly known as Innotec Asia Pacific Sdn Bhd) (Malaysia) & Ors.*** [2020] MLJU 363 (unreported) where the Federal Court held as here below:

"… the practice in the other jurisdictions serves as a good guidance and in this regard, suffice if we refer to the English cases of *Caucedo Investments Inc and Another vs. Saipem SA* [2013] EWHC 3375 (TCC) and *LR Aivonics* Technologies *Limited vs. The Federal Republic of Nigeria & Anor* [2016] EWHC 1761. These cases disclosed that the exercise of registering an arbitral award for recognition and enforcement of the same, was aimed only at entering the dispositive portion of the arbitral award. What was recognised and enforced and registered as a judgment of the court was that part of the award ordering the defendant to pay the sums awarded to the plaintiff."

As regards the granting of leave, the law does require that, leave should not be granted unless the court is clear that the party against whom the award is sought to be enforced intends to **challenge the substantive jurisdiction** of the tribunal which made or issued the respective award.

Section 73 (3) of the Arbitration Act, Cap.15 R.E 2020 which I cited here above is very clear on that and the challenge will only be in relation to **substantive jurisdiction** of the tribunal. In such a scenario, it follows, therefore that, the court will have to "*halt*" or rather "*stay the application for leave to enforce*" (i.e., leave to have the award be entered as judgement or order of the court) and proceed to hear and determine the other party's concern regarding the **substantive jurisdiction** of the arbitral tribunal.

As the architecture of the law indicates, such a jurisdictional challenge will be brought separately under section 74 (1) (a) or (b) of the Arbitration Act, Cap.15 R.E 2020. According to section 74 (1) (a) or (b) of the Act, the law provides that, a challenge based on substantive jurisdiction, is to be brought before the court "***by way of an application***". In my view, this will again be an application which will

procedurally attract adherence to what Regulation 63 (1) (a) to (e) of the *Arbitration (Rules of Procedure) Regulations*, 2021, G.N. No. 146 of 2021 provides.

Regulation 63 (1) (a) of the Regulations provides as follows:

> "63 (1) (Save s is otherwise provided, all applications made under the provisions of the Act, or these Regulation shall:
>
> (a) be made by way of petition and be titled "In the matter of Arbitration and in the Matter of Arbitration Act" and reference shall be made in the application to the relevant section of the Act."

As Regulation 63 (1) (a) provides hereabove the party opposing the granting of leave to enforce must file a petition in the manner provided for under Regulation 63 (1) "**save as it may have been provided otherwise**".

Later I will revert to this phraseology which opens the wording of Regulation 63 (1), but so far, that is a brief account

of what partly happens in a post arbitral-tribunal's award scenario, in relation to the award.

In the present matter before this court, two objections were raised whereby the first one is premised on the procedural route through which an award is to be brought to the attention of the Court, considering what Regulation 51 (5) and Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations, G.N. No. 146 of 2021 provide.

According to the facts of this matter which I earlier captured herein above, the Claimant did, by way of a letter addressed to the Registrar of this court, forwarded the award to this court for its filing before the court in terms of Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations, GN No.146 of 2021.

Attached to the letter, were other documents, to wit, a letter from the tribunal addressed to the Solicitor General, an agreement to a single arbitrator, a letter of appointment of the arbitrator, a letter of acceptance and minutes of preliminary meeting.

In her submissions, Ms. Shao has defended the correctness of the procedure adopted and that, what the

Claimant attached to the letter constituted "proceedings" of the tribunal. For his part however, Mr. Malima had a different opposing position arguing that no "proceedings" were attached and that the approach used by the Claimant is in breach of not only Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations but also Regulation 63 (1) which requires that all application under the Act and the Regulation be by way of a petition.

In my view, the above rival contentions need to be contextualised within the understanding of the earlier discussion I made herein above. In it I noted that, there are three post-award stages which need to be pursued if the Claimant in an arbitral award is to enjoy the fruits of the award, the first and foremost being to have the award "*recognised*" by the court as binding.

That stage, as I earlier stated, falls under section 83 (1) of the Act (though does run together with that of enforcement because one is a necessary part of the other). As such, one must be careful when a move is initiated given the architecture of the Arbitration Act and its Regulations to bring about a harmonious end rather than confusion.

To begin with, it is my humble view, that, the act of having the award recognized by the court will procedurally be initiated either under Regulations 49 (by the Arbitration Centre) or Regulation 51 (4) or 51 (5) of the Arbitration (Rule of Procedure) Regulations as the case may be. These deal with a situation where the award is transmitted to the court for filing or registration.

Essentially, that process will entail presenting the award before the court by any means, opening a file and assigning it a registration number as the registry officers would ordinarily do. All such steps will constitute the filing of the award.

In our context, however, Regulation 49 does not concern us for now. However, I have referred to it from a generality of things in relation to the filing of an award for purposes of its recognition. What is of particular concern to me is Regulation 51 (4) and 51 (5). If the filing is done under Regulations 51 (4) or 51 (5) (as the present matters herein stand to be), the arbitrator or the parties may transmit the award to the court for its filing/registration. In my view,

therefore, Regulations 49, 51 (4) and 51 (5), if applied, one must read any of them together with section 83 (1) of the Act.

As I stated, however, my focus excludes Regulation 49 and concentrate on what Regulations 51 (4) and 51 (5) provides. I will reproduce them here below. They read as follows:

> "51 (4) The arbitral tribunal shall, within time limit provided for under the Law of Limitation Act, at the request of any party to the award or any person claiming under him and upon payment of the fees and charges due in respect of the arbitration and award and of costs and charges of filing the award, cause the award or a signed copy of it, to be filed in the court; and notice of the filing shall be given to the parties by the arbitrators.
>
> 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."

Under the above cited regulations, either the Arbitrator or any of the parties may cause the award to be filed/registered in court. This position does not differ from the previous position under the Repealed Arbitration Act, Cap.15 R.E 2002 and its Arbitration Rule, 1957.

In fact, Regulation 51 (4) of the Arbitration (Rules of Procedure) Regulations, 2021, is to a large extent identical to what section 11 (2) of the Repealed Arbitration Act, Cap.15 R.E 2002 used to provide.

In that regard, it may be confidently stated, therefore, that, the position stated by the Court of Appeal in the case of **Tanzania Cotton Marketing Board vs. Cogecot Cotton Company SA** [1997] TLR 165 regarding who may file the

award still holds even under the current arbitration landscape. It may be the tribunal causing it to be filed by someone else as the case was here under Regulation 51 (5), or a party or a person claiming under him.

In that case of **Tanzania Cotton Marketing Board (supra)** the Court of Appeal was of the view that:

> "the receipt of the award by the Court Registry constitutes filing of the award. There after the court is required to notify the parties who may wish to challenge or to enforce the award in terms of the law."

Essentially, it is my humble view that, this position has not changed much even under the current legal regime. Regulation 51 (6) of the Arbitration (Rules of Procedure) Regulation, GN. No. 146 of 2021 does aptly provide for that. The said provision reads as follows:

> "51(6) Once an award is filed in court under this regulation, the court shall issue a notice to the parties and the Centre on the existence of the award and

require the parties to the notice to show cause as to why the award should not be registered and enforced pursuant to the provisions of section 68 (currently section 73) of the Act."

According to Regulation 51(6) the notice issued to the parties by the Registrar of the court serves two purposes: **one** is to inform them of the existence of the award filed in court and **two**, invite them to show cause why it should not **(i)** be registered/recognised or refused registration and **(ii)** (if no refusal to register) why the court should proceed to enforce under section 73 of the Act.

In essence, Regulation 51 (6) cited hereabove, does consider the fact that the process of dispensing arbitral justice to the parties does not sideline the basic principles of ensuring fairness or observing the rules of natural justice. (See **Afriq Engineering & Construction Co. Ltd vs. The Registered Trustees of The Diocese of Central Tanganyika**, Misc. Commercial Cause No.4 of 2020).

A party who wishes to challenge the recognition (registration) of the award will be at liberty to do so if he can show that what is stated in section 83 (2) does exist, if it be so, the court will refuse recognition/registration by striking out the award from its records.

However, if nothing was raised to block the award from being recognized as "***final, valid, and binding***" on the parties and, hence, enforceable, then the enforcement of the award will proceed under section 73 (1) of the Act provided that the legal requirements relating to enforcement of the award are taken into account.

Earlier I did point out that, Regulation 51 (7) of the Arbitration (Rules of Procedure) Regulations, 2021, does allow a party to seek leave to enforce orally or by a formal application to the Court. In my view, an oral application will be fitting in a circumstance where the award was "***transmitted to the court by the Arbitrator or any other person under his instruction"*** to cause it to be filed and the parties are invited by the court to show cause.

When a "*show cause appearance*" is made and the opposing party does not object to the filing, that is where the

Claimant may, pursuant to Section 73 (1) of the Act read together with Regulation 51 (7) of the Regulations, may "***orally seek leave of the court***" to have the award enforced in the same manner as Judgment or Order of the Court.

However, the opposing party is not prevented from challenging enforcement of the award because, as I stated earlier herein above, that room is available under section 73 (3). **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 **refused** under section 83 (2) of the Act.

As regards the filing of the award, it is my considered opinion, based on the above understanding, that, a formal letter transmitting the award to the Registrar of the Court with a request to have to have it filed, does constitutes or is akin to an "***application in writing***" envisaged under section 83 (1) of the Act and satisfies the requirement of that section.

That fact, however, does not prevent a party who wishes to approach the court with a "formal application" (a petition) requesting the court to refuse recognition of the award laid before it. In whichever way, the requirements of section 83 (1) of the Act will still be satisfied.

But one thing which needs to be noted, as I stated earlier here above, is that, section 83 (1) of the Act is (and should be) read together with either Regulation 49 (in case the award is transmitted to the court by "***the Centre***") or Regulation 51 (4) or 51 (5) of the Arbitration Regulations (where an award is transmitted to the court by either the arbitrator or any other person acting under him or a claimant).

As I stated earlier hereabove, the filing of the award makes the court recognise it and will proceed to either refuse the award under section 83 (2) (a) and (b) of the Act, if there is raised before the court such matters by a party to whom notice to show cause was issued, or have the award enforced subject to the requirements under the provisions of section 73 of the Act as earlier stated.

Having so stated, and, as I revert to the matter at hand, the question that I find pertinent to address is what should accompany an award caused to be filed in court?

Although Regulations 49 and 51 (4) of the Arbitration (Rules of Procedure) Regulations, 2021 (GN.No,146 of 2021) does not state that when causing the award to be filed in court

what needs to accompany it, when filed under Regulation 51 (5) the law is clear that, the party so filing it will also attach to the transmittal letter, not only a certified copy of the award but also the proceedings thereof.

It follows, therefore, that, even if an award was to be transmitted to the court under Regulation 49 or 51 (4), still, prudence would call for it to be filed together with the proceedings from which the award got derived. This is because, proceedings entail the process which the tribunal went through in arriving at the award and for a court required to recognise an award as binding and enforceable it must be satisfied that there was indeed a hearing which ended up with a decision lest it be taken for a ride.

Having noted that the matter at hand involves the filing of an award under Regulation 51 (5) and, that, the stated regulation requires that an award be filed together with its proceedings thereof, the next question is whether in the context of this matter, the Claimant complied with that requirement.

Ms Shao has vehemently argued that the Claimant did attach the tribunal's proceedings in the form of a letter from

the tribunal addressed to the Solicitor General, an agreement to a single arbitrator, a letter of appointment of the arbitrator, a letter of acceptance and minutes of preliminary meeting.

The immediate question that follows is whether the attached documents constitute "proceedings" of the tribunal as envisaged under Regulation 51 (5). While Ms Shao defends her position with an affirmative response, Mr. Malima does not agree with her. Perhaps there may be a need to reflect on what does the term "proceedings" mean when used in the context as the one referred to under Regulation 51(5).

According to **Black's Law Dictionary**, 10th ed., page 1398, 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 my view, the above definition fits as well to matters filed before arbitral tribunals or any other tribunals and not only courts of law. Having so held, can it be said with full confidence that the documents attached by the Claimant to the award transmitted to this court constitute "***proceedings***" in the sense the word stands for?

In my view, the answer is in the negative. What was attached was only part thereof but not the whole proceedings since other information relating to the pleadings and directives made from the time of initiating the arbitral process to the end ought to have as well been attached. As such, the Claimant failed to fully comply with Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations, GN.No.146 of 2021.

With such a noncompliance, it means that, the application has not been competently brought to the attention of this court for it to recognise it under section 83

(1) of the Act as final and binding, hence, ripe for enforcement under section 73 of the Act (if no challenge is raised against it). That will mean that the first ground of objection is upheld.

The second ground related to a non-compliance with Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations, GN.No.146 of 2021. In my earlier discussion I did state that, I will revert to this provision at some point, and this is the ripe time to comment on it in relation to the submissions made by the parties herein.

In essence, the provision of Regulation 63 has the following opening words: "**save as it may have been provided otherwise**". In my view, the provision does recognise that there could be other means other than by way of an application in form of a petition, through which a matter may be brought to the attention of the court.

As I laboured to indicate herein, Regulations 49, 51 (4) and 51 (5) are such other means by which an award may be filed in court without adopting the manner provided for under Regulation 63 (1), *i.e.,* without filing a petition. Likewise, an application to the court regarding enforcement of the award, may even, as per Regulation 51 (7) provides, be made orally.

For that matter, I tend to agree with Ms, Shao's submission that, the filing of an award under Regulation 51 (4) or 52 (5) of the Regulations will still be proper provided that the Claimant fully comply with the requirements therein. That filing or registration goes with the need to have the award recognised by the court in terms of section 83 (1) of the Act.

Where enforcement of that award is sought, one must comply with section 73 of the Act which, as Regulation 51 (7) provides, by making either an *oral* or a *formal* application, the latter being made pursuant to Regulation 63(1) of the Arbitration (Rules of Procedure) Regulations, 2021.

In the upshot of what I have laboured to unearth hereabove during my discussion, I find that, the first objection has merit and I hereby uphold it. However, the second objection is without merits and should be over-ruled.

Although Ms. Shao had urged this court to consider applying the overriding objective principle to rescue the Claimant in case an adverse finding is made against her, I do not think this is a fit case for the application of the oxygen principle as some refers to it.

In essence, and as the Court of Appeal stated in the case of **Mondorosi Village Council & 2 Others vs. Tanzania Breweries Ltd & 4 Ors,** Civil Appeal No.66 of 2017, (CAT) at Arusha (Unreported), the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which go to the very root of a matter.

According to Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations, the requirement to attach proceedings of the tribunal to the transmittal letter to the court, which proceedings will accompany the certified copy of the award sought to be filed, is mandatory and not merely directory.

For that reason, I find that, the prayer by Ms. Shao cannot be granted. The filing having been found to be incompetent the only remedy is to strike out the award. However, the Complaint may appropriately refile it if she so wishes.

With all that in mind, this court settles for the following orders:

1. That, the first preliminary objection is hereby upheld

while the second objection is hereby overruled.

2. The filing of the award was incompetent due to failure to attach the tribunal's proceedings when such award was filed in court.
3. That, having upheld the first objection and overruled the second objection, this court does hereby strike out the award filed in this court with leave to re-file it.
4. That, in the circumstances of this matter, I grant no orders as to costs.

It is so ordered.

DATED at DAR-ES-SALAAM, THIS 03RD 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. Beatus Malima, 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