IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 104 OF 2023

(Arising from Misc. Commercial Cause No. 17 of 2019)

Between

TANGANYIKA WATTLE COMPANY LIMITED.....APPLICANT

VERSUS

DOLPHIN BAY CHEMICALS (PTY) LIMITED.....RESPONDENT

RULING

Date of last Order: 05/12/2023

Date of Ruling: 13/12/ 2023

GONZI, J.;

The genesis of this case is a supply agreement signed by the Applicant at Kibena Village, Njombe region in Tanzania on 21st day of November 2016; and counter signed by the Respondent on 27th January 2017 at Voorbaai Crescent, Bayview Industria, Mossel Bay, Republic of South Africa. Under the said agreement, the Respondent agreed to supply to the Applicant, a specified quantity of chemicals annually used for treatment of Applicant's timber which the Applicant was producing and supplying to the Tanzania Electricity Supply Company (TANESCO) for use as electricity poles. Under

clause 4.1 of the Supply Agreement, the Applicant committed itself to purchasing all its monthly needs of the chemicals solely and exclusively from the Respondent during the pendency of their agreement. The parties to the Supply Agreement included in it a dispute resolution clause that provided as follows:

> ***14. DISPUTE RESOLUTION***
>
> *14.1 If any dispute shall arise in respect of any provision contained in this agreement, then such dispute shall:*
>
> *14.1 If it shall be of a legal nature, be referred to a senior partner having not less than ten (10) year's experience in commercial law of any of the larger law firms in Cape Town, Republic of South Africa; and*
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> *14.1.2 if it shall be of an accounting nature, be referred to a senior partner of any of the international firms of accountants practicing in Cape Town, who shall act as an expert and who, in determining such dispute shall, if he deems it necessary, be entitled to receive oral or written representations from the parties and whose decision shall be final and binding upon the parties and, in the absence of manifest error, not be subject to review.*
>
> *14.2 The parties shall jointly nominate the expert provided that if the parties shall be unable to agree within seven (7) days of the nomination being called for in writing, then the expert shall be nominated by the President for the time being of the Law Society of*

the Western Cape or the Executive Director of the South African Institute of Chartered Accountants, as the case may be.

14.3 it is the intention of the parties that any dispute referred to an expert in terms of this clause shall be resolved within twenty-one (21) days of the date of the expert being nominated. Accordingly, if the expert shall be unable to resolve the dispute within such period, then the party who shall have raised the dispute shall be entitled to withdraw the mandate of the expert and shall be entitled to institute proceedings in respect of the dispute in any court of competent jurisdiction.

14.4 Without derogating from the aforegoing, either party shall be entitled to approach any court of competent jurisdiction for relief of an urgent or injunctive nature.

Sometimes in 2018, the Applicants allegedly breached the terms of the supply agreement whereby they unilaterally started to procure the same chemicals from another supplier. A dispute ensued between the parties whereby the Respondent requested the President of the Western Cape Law Society to appoint an Arbitrator to determine the dispute in terms of clause 14 of the supply agreement with the Applicant. One Terrence Matzdortff was appointed the Sole Arbitrator on 31st day of October 2018. The Arbitrator notified the parties of his appointment and then held a pre-arbitration meeting in his offices in Cape Town on 14th November 2018. Pursuant to

what was agreed in the pre-arbitration meeting, the Respondent herein filed her statement of claim on 19th November 2018 and the Applicant filed its reply to the statement of claim on 30th November 2018. On 30th November 2018, the Arbitrator sent letters to the parties pursuant to their *'domicilia citandi et executandi'* disclosed in clause 15.1 of their agreement, inviting them to attend arbitration in his office in Cape Town on 10th December 2018. On 10th December 2018, only the Respondent appeared and hence the arbitration hearing proceeded exparte against the Applicant. In the end, the Sole Arbitrator decided in favour of the Respondent; and I reproduce his orders verbatim that:

> *A) "The Respondent to pay the Claimant the sum of US$90215,00 (United States Dollars Ninety Thousand two hundred and fifteen) together with interest on the aforesaid sum at the rate of 10% per annum with effect from 10th December 2018.*
> *B) That Mr. Darren Marillier be declared a necessary witness and that his travelling costs from Durban to Cape Town and back be costs in the arbitration.*
> *C) That the Respondent should bear the costs of the arbitration including my fees."*

After winning the arbitral award, the Respondent instituted in this Court Misc. Commercial Case Number 11 of 2019 in order to have the foreign arbitral award recognized and enforced against the Applicant in Tanzania. The Applicant on the other hanc ɪ Misc. Commercial Cause No.17 of 2019 arising from the Misc. Commercial Case Number 11 of 2019 resisting the recognition and enforcement of the foreign arbitral award. The Applicant, by way of petition, vide Misc. Commercial Cause No.17 of 2019, in particular, moved the Court to grant the following prayers:

1. *That this honourable Court be pleased to set aside the exparte foreign arbitral award as the sole arbitrator conducted the same illegally and irregularly and hence making the same to have been improperly procured.*
2. *Costs be borne by the Respondent.*
3. *Any other order(s) this honourable court may deem fit to grant.*

The sole ground argued by the Applicant in attempting to set aside the foreign arbitral award (which actually were proceedings for resisting recognition and enforcement of the foreign arbitral award in Tanzania) was that the Sole Arbitrator acted without jurisdiction when he conducted the arbitration beyond the 21 days' timeframe stipulated in the Arbitration clause. After hearing the parties, this Court on 13th December 2019 delivered

its Ruling whereby it dismissed the petition resisting recognition and enforcement of the foreign arbitral award and with costs. Reading through the Ruling of this Court dated 13th December 2019, the basis of the court's decision, inter alia, can be seen at page 15 thereof:

> *"It is true that failure to comply with the requirement of a time limit will destroy the claim and if arbitrator acted without observing time limit he will be acting without jurisdiction but the said clause is distinguishable as the clause itself clearly gives out discretional power on the party who wish to withdraw the matter after lapse of time, then the obvious interpretation is that if the party did not exercise that discretion then the award cannot be said it was improperly procured because it was his or her discretion to withdraw or not".*

The Court concluded and made orders as follows:

> *"In conclusion, therefore, I do agree with counsel for the Respondent that the grounds set out by the Petitioner in support of this petition is untenable. I therefore dismiss this petition with costs. Further, in terms of section 17 of the Act I do hereby proceed to register the award as presented through Misc. Commercial Case No.17 of 2019 and decree is hereby entered as follows:-*
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> *(a) The Petitioner Tanganyika Wattle Company Limited shall pay the Respondent, Dolphin Bay Chemicals Limited the total sum of US$90,215.00 (United States Dollars Ninety Thousand Two hundred*

and fifteen) being amount awarded by Sole Arbitrator to the Respondent.

(b) The Petitioner Tanganyika Wattles Company Limited shall pay the Respondent, Dolphin Bay Chemicals Limited the interest of aforesaid sum at the rate of 10% per annum with effect from 10th December 2019.

(c) The Petitioner shall pay the costs in Miscellaneous Commercial Case No.17 of 2019 to the Respondent which shall be taxed.

The Applicant was aggrieved with the above Ruling of the High Court (Commercial Division); and therefore, lodged a Notice of Appeal on 10th January 2020 to the Court of Appeal of Tanzania. The Applicant successfully applied for, and was granted, *exparte* and then *interpartes*, orders for stay of execution of the decree of this court, pending determination of the appeal in the Court of Appeal. However, a sudden turn of events happened. On 21st February 2023, the Applicant's Notice of Appeal was struck out by the Court of Appeal for failure by the Applicant to take essential steps in that the Applicant had served copies of the Notice of Appeal and letter requesting for proceedings of the High Court upon the Respondent outside the prescribed time of 14 days under the Court of Appeal Rules. The Respondent, therefore, successfully applied to have the appeal struck out.

Upon the Applicant's Notice of Appeal being struck out, the applicant returned to this Court and filed the present application under section 11(1) of the Appellate Jurisdiction Act, Cap 141, RE 2019; Rule 47 of the Court of Appeal Rules GN. No. 368 of 2009 and Section 14(1) of the Law of Limitation Act, Cap 89 of the Laws of Tanzania. The applicant's prayers, reproduced verbatim from the chamber summons, are as follows:

(a) *That this Honourable Court be pleased to extend time within which to allow Applicant to file and serve to the Respondent the notice of intention to appeal from a Ruling and Drawn Order of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial Cause No.17 of 2019 delivered by Hon.Magoiga,J., on 13th December 2019.*

(b) *That this Honourable Court be pleased to extend time within which to allow the Applicant to file an application for leave to appeal to the Court of Appeal against the Ruling and Drawn Order of the High Court (Commercial Division) at Dar es Salaam in Misc.Commercial Cause No. 17 of 2019 delivered by Hon.Magoiga,J., on the 13th December 2019.*

(c) *That this honourable Court be pleased to extend time within which to allow the Applicant to file and serve the letter requesting for Ruling, Drawn Order and proceedings of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial Cause No. 17 of 2019 delivered by Hon.Magoiga,J., on the 13th December 2019.*

(d) Costs of this application be provided.

(e) Any other relief(s) this court will deem just and fit to grant.

When the Respondent was served with the application at hand, she filed a preliminary objection on a point of law that the application is bad in law for being instituted without attaching Board resolutions authorizing the filing of the case. Also, the application was objected to for being an omnibus application combining several incompatible prayers. After hearing both parties on the Preliminary Objection, on 26th October 2023, this Court (Hon. Mkeha, J.) delivered its Ruling in respect of the Preliminary Objections whereby the preliminary objections were dismissed. The dismissal of the preliminary objections paved way for the hearing of the application on merits, and the Court file was re-assigned to me by the Honourable Judge Incharge to proceed with hearing of the application for extension of time on merits.

During the hearing of the application, the applicant was represented by Mr. Bakari Juma, learned Advocate. The Respondent was represented by Mr. Jeremiah Tarimo, learned Advocate. Mr. Bakari adopted the affidavit of the Applicant affirmed by himself as the Applicant's Counsel, then submitted that for an application for extension of time to succeed, the Applicant must

demonstrate a good cause. He submitted that the first good cause for extension of time in the current case is that the delay at hand is a technical delay. He submitted that, throughout, since 13th December 2019, when the Ruling in Commercial Cause No.17 of 2019 was delivered, the Applicant has been in Court corridors in the High Court and the Court of Appeal seeking for justice. Mr. Bakari relied on the case of **Elly Peter Sanya versus Esther Nelson** (2018) where at page 26 the Court of Appeal recognized that a technical delay caused by the applicant prosecuting the matter in court constitutes a good cause for extension of time.

The applicant's counsel submitted that the second good cause for extension of time is illegality. He submitted that the Sole Arbitrator adjudicated the dispute beyond the 21 days stipulated period in total disregard of Clause 14.3 of the Supply Agreement and hence the arbitrator lacked jurisdiction. He submitted that where illegality is disclosed, it constitutes a good cause for extension of time even where the Applicant does not manage to account for every single day of the delay. He relied on the case of **Mary Rwabizi t/a Amuga Enterprises versus National Microfinance PLC (2019)** to support his point that where the point at issue is one of illegality of the decision being challenged, the court has a duty to extend time so as to

ascertain the point and take appropriate measures to put the matter and records straight.

Mr. Tarimo, on the other hand, adopted the counter affidavit deponed by Gerald Nangi, legal counsel for the respondent and went on to submit in response. He submitted that prayer (c) in the chamber summons where the applicant seeks to extend time to serve the Respondent with a letter requesting proceedings, is legally untenable as the High Court lacks jurisdiction. He submitted that the prayer could only be granted by the Court of Appeal of Tanzania under Rule 10 and the proviso to Rule 90(1) of the Court of Appeal Rules. He submitted that once the prayer (c) is not granted in this case, it will have far-reaching, trickle down consequences to the other prayers in this application because even if, eventually, the Applicant is granted an extension of time to file the Notice of Appeal or to apply for leave, the Applicant still will not be able to file the intended appeal without having timely served the Respondent with the letter requesting for proceedings.

In the second place, Mr. Tarimo submitted that the first Notice of Appeal by the Applicant was filed within time but then the Applicant became negligent in not taking the essential steps to prosecute the appeal. Therefore, he argued, the applicant should not be given an extension of time because the

Applicant did not act diligently. He submitted that the Applicant lodged a notice of appeal in the court of appeal, then she applied for, and obtained, an order for stay of execution of the decree of the High Court; and yet the applicant decided not to timely serve the respondent with the notice of appeal and letters requesting for proceedings of the High Court. Mr. Tarimo argued that a party cannot seek amnesty of technical delay if she acted negligently. He argued that there is a difference between merely being present in court and a technical delay. He relied on the case of **Esther Baruti versus Sethi Senyael Ayo and Mrisho Ramadhani (2023)** to buttress his foregoing arguments.

Mr. Jeremiah Tarimo submitted further that, in the present application, the Applicant is seeking an extension of time to file the notice of appeal and to file an application for leave to appeal; but that the Applicant had never before lodged an application for leave to appeal. He argued that whereas the Applicant lodged the former notice of appeal on time, and which notice of appeal was struck out by the Court of appeal, the applicant never before lodged an application for leave to appeal against the Ruling of this court. He argued that, in that regard, the avenue of technical delay even if plausible, cannot shield the Applicant with respect to the applicant's delay to lodge the

application for leave to appeal. Mr. Tarimo therefore reasoned that the Applicant has not at all accounted for the delay or failure to file the application for leave on time. Mr. Tarimo argued that the same reasons for being late to file the notice of appeal, that is being in courts corridors, do not apply to the applicant's delay to apply for leave to appeal. He submitted that these are different applications, that there are different time limitations for each and that there are different considerations and grounds for each. Mr. Tarimo concluded that prayer (b) in the chamber summons is therefore not substantiated and should not be granted.

The learned Advocate for the Respondent submitted further that there is already an ongoing execution process in respect of the decree emanating from the foreign arbitral award; and that it is the very decree that the applicant is seeking an extension of time to appeal against. He argued that, as we speak, already a court broker has been appointed by this court to execute the decree. He, therefore, submitted that granting the extension of time in the present application, will not be in the interest of justice.

On illegality of the foreign arbitral award, Mr. Tarimo submitted that the alleged illegality is no illegality in the eyes of the law. He argued that the argument of lack of jurisdiction on the part of the Sole Arbitrator, due to

exceeding the time limit stipulated in the arbitration clause, was pleaded in this court in Misc. Commercial Cause No.17/2019 and was decided by this court after hearing both parties. He submitted that as the issue of jurisdiction of the arbitrator was pleaded, argued and determined, it follows therefore that anybody who wishes to raise it again, is essentially challenging the decision on merit for not being satisfied with it. It cannot be an illegality. Mr. Tarimo referred the Court to the case of **Charles Richard Kombe versus Kinondoni Municipal Council** (2019) to buttress his argument that to constitute an illegality, the alleged act of illegality should involve an act not authorized by the law hence leading to court's lack of jurisdiction or where it results to a denial of the right to be heard. Mr. Tarimo prayed for dismissal of the application at hand, and with costs.

By way of rejoinder, Mr.Bakari submitted that under Rule 47 of the Court of Appeal Rules, the High Court is the court of first instance for applications which can be made either to the High Court or to the Court of Appeal. Hence, he argued, this court has jurisdiction to grant all the prayers sought in this application, including the prayer (c) which seeks an extension of time to serve the respondent with a letter requesting proceedings.

On the issue of notice of appeal being struck out by the court of appeal, he submitted that the notice of appeal was struck out due to the Applicant not taking essential steps to serve the respondent; but not due to negligence. That since the appeal was struck out and not dismissed, it could be re-instituted.

On the pendency of execution proceedings to execute the decree emanating from the foreign arbitral award, Mr. Bakari submitted that indeed there are execution proceedings going on in this court but that the same do not bar the present application. He argued that these are two different applications which do not affect each other.

On illegality of the decision of the Sole Arbitrator, Mr. Bakari submitted in rejoinder that the Arbitrator acted beyond the 21 days period authorized by the parties in their agreement within which the arbitrator should have resolved the dispute to finality. Thus, Mr. Bakari submitted, the arbitrator, in effect, lacked jurisdiction because issues of time limitation are typical jurisdictional issues. He went on to submit that the circumstances of the case at hand on lack of jurisdiction on the part of the sole arbitrator, fit perfectly well in the definition of illegality as it was defined in the case of Charles Kombe versus Kinondoni Municipal Council. This is because the Arbitrator by

exceeding the limitation of time, acted without jurisdiction and hence it constituted an illegality which is a good cause for extension of time. Mr. Bakari therefore, once again, prayed that the application be granted and with costs.

I would like to thank counsel for both sides for their insightful authoritative submissions. In determining the present application, I will firstly consider whether or not there is a good cause for extension of time for all the substantive prayers (a) to (c). This is because there is commonality in respect of them all as they all seek an extension of time; and the grounds for extension of time are relatively common. In case I find that there is a good cause for extension of time, then I will proceed to consider which prayers for extension of time are properly sought which can be granted by this court and which prayers, if any, cannot be granted by this court and why. On the other hand, if I find that there is no good cause for extension of time, the matter will rest there.

Section 11(1) of the Appellate Jurisdiction Act, Cap 141 of the Laws of Tanzania R.E 2019 provides that:

> *"11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the*

subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired."

Being an application for extension of time to appeal to the Court of Appeal, I find the above to be the relevant provision in the present application and not the Law of Limitation Act although it was also cited as among the enabling laws in the chamber summons. The applicant has advanced two major grounds constituting good cause for extension of time. These are technical delay and illegality. I will start with the ground of illegality. In **VIP Engineering and Marketing Limited and 2 Others versus Citibank Tanzania Limited**, Civil References No.6,7 and 8 of 2006 the Court of Appeal of Tanzania held that: ***"where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reason" for extension of time".***

A similar position was reiterated in the case of **William Mpalange versus Lilian Bavu in Misc. Civil Application No.501/2020** where the court added that:

"While I agree with the principle that where illegality is set as a ground seeking extension of time, court will always grant the application, but a party asserting illegality must sufficiently substantiate his/her assertions. Court will not grant an extension of time simply because illegality is mentioned. The applicant must go a step further and demonstrate what has been done which is forbidden by the law. The applicant is required to prove illegality of the proceedings."

What constitutes illegality for the purpose of an application for extension of time? In the case of **Charles Richard Kombe versus Kinondoni Municipal Council,** Civil Reference No. 13/2019, the Court of Appeal held that where illegality is put forward as a ground for extension of time, the applicant must substantiate the illegality in terms of lack of jurisdiction on the part of the court; that the case was barred under some law of limitation or that there was a denial of the right to be heard. The position of the law was made clearer by the recent decision of the Court of Appeal of Tanzania in **Attorney General versus Micco's International (T) Limited and another, Civil Application No.495/16 of 2022,** delivered on 21st November 2023, where the Court held that:

"the words illegally or material irregularity do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to

material defects of procedure and not errors of either law or fact after formalities which the law prescribes have been complied with.... Mere decisional errors, however plausible and obvious they may be, or matters touching on improper evaluation of evidence would not fall in the realm of illegality."

With the foregoing position of the law in mind, I am called upon to look at the decision of this court in Misc. Commercial Cause No.17 of 2019 arising from the Misc. Commercial Case Number 11 of 2019, which decision recognized and ordered enforcement in Tanzania, as a decree of this Court, the foreign arbitral award passed in Cape Town, Republic of South Africa, by one Mr. Terrence Matzdortff - Sole Arbitrator, dated the 10th day of December 2018. Is there any indication of illegality apparent on the face of record? Without much ado, my answer would be in the affirmative, though not decisive. Looking at the record, immediately at least two jurisdictional issues become apparent on the face of record and are striking to the eye: (a) The Sole Arbitrator acted beyond the 21 days mandate specifically given to him by the parties in their agreement; (b) The Sole Arbitrator was appointed and conducted the arbitration in absence of any arbitration agreement at all between the parties who had specifically indicated their intention was to use an expert in law or in accounting, "***who shall act as an expert,"*** hence not as

an arbitrator. Therefore, it appears that the foreign arbitral award that was dealt with in Misc. Commercial Cause No.17 of 2019, was not a valid foreign arbitral award and in effect its recognition and enforcement was actually a recognition and enforcement of a decision emanating under expert determination process. This was done under the auspices of the Arbitration Act while no jurisdiction is conferred upon the High Court to recognize and enforce expert's decisions under the legal machinery of the Arbitration Act. It is my view that the implications of both jurisdictional anomalies pointed above, if proved, would go to the root of the matter and deprive the jurisdiction of the Arbitrator to make the award, and of this court to recognize and enforce it under the provisions of the Arbitration Act or the relevant treaties for recognition and enforcement of foreign arbitral awards.

The issues of an Expert suddenly turning into an Arbitrator, and exceeding his mandate as such, fall under the question of jurisdiction for which both parties were given an opportunity to be heard while supporting or opposing the extension of time on the ground of illegality.

I will now simply highlight on the jurisdictional issue of the lack of mandate on the part of the sole arbitrator to conduct the arbitration while the parties had specifically agreed on expert determination as the mode of resolving

their dispute. I am of the view that the Arbitrator was appointed in the absence of an arbitration agreement between the parties who had specifically indicated to use Expert Determination services rather than arbitration, and thus the Sole arbitrator lacked jurisdiction. It is trite in law that the jurisdiction of the arbitrator emanates from the arbitration agreement also known as an agreement to arbitrate. In the absence of an arbitration agreement, an arbitrator being a private person, cannot assume powers to make binding decisions upon other persons. It is noteworthy that, in the case at hand, the Arbitration before the Sole Arbitrator as well as the proceedings for recognition and enforcement of the foreign arbitral award vide Misc. Commercial Case No.17/2019, were conducted to completion before the new Arbitration Act of 2020 came into force. The matter was therefore governed by the former Arbitration Act of Tanzania. But the need for existence of a valid underlying arbitration agreement before valid arbitration proceedings can be conducted, has always been there because the foundation of arbitration process is parties' agreement. Under the old Arbitration Act, an arbitration agreement was defined in the context of a submission agreement, which was the practice then. Section 2 of the former Arbitration Act provided:

"submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

The current Arbitration Act of 2020 on the other hand under section 3 defines arbitration agreement thus:

"arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not;

The UNCITRAL Model Law on Arbitration under ARTICLE 7(1) defines the arbitration agreement as:

"An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

The term arbitration agreement is further defined under Article II (1) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards,1958 in the following words:

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".

It follows, therefore, from the above provisions, that for there to exist a valid arbitration agreement, the following minimum requirements should be met:

(a) The arbitration agreement must arise out of **mutual consent**. The parties' consent is the basic requirement for the arbitration agreement.

(b) The parties' intention to submit to arbitration must **unequivocally** arise from the arbitration agreement.

(c) There must be an **obligation** on the parties to submit their dispute to arbitration. This sense of obligation to submit themselves to arbitration is underscored by the use of the words "agreement by the parties **to submit to arbitration**" or the phrase that the parties "**undertake** to submit to arbitration", their disputes. These expressions mean that the arbitration agreement must contain a mandatory, rather than permissive, undertaking by the parties to refer their dispute to arbitration.

(d) The agreement must specifically provide for "arbitration", rather than another process of dispute resolution. All the four sources I have displayed above, contain this requirement of **clear reference to arbitration** as the chosen ADR process. That is, the parties to the agreement must explicitly have mentioned and agreed on arbitration as the process of dispute resolution.

(e) The agreement must have originated from the parties' **free will.** Therefore, if one of them has acted while induced by error or as a consequence of fraud, coercion or undue influence, there has been no real consent and the agreement to arbitrate is not valid. This requirement for parties' free will arises naturally given that it is an arbitration "agreement". There can be no valid and enforceable **agreement** in the absence of the parties' free will.

I have looked at the purported "Arbitration Agreement" under which the Sole Arbitrator Mr. Terrence Matzdortff derived his jurisdiction to determine the dispute under the supply agreement between the parties. The "arbitration agreement" is contained in clause 14 of the Supply agreement between the parties. Under the doctrine of separability, that clause is severed from the rest of the supply agreement in which it is contained and is deemed to be an independent agreement. It provides as follows:

> *14.1 If any dispute shall arise in respect of any provision contained in this agreement, then such dispute shall:*
>
> *14.1 If it shall be of a legal nature, be referred to a senior partner having not less than ten (10) year's experience in commercial law of any of the larger law firms in Cape Town, Republic of South Africa; and*

14.1.2 if it shall be of an accounting nature, be referred to a senior partner of any of the international firms of accountants practicing in Cape Town, ***who shall act as an expert*** *and who, in determining such dispute shall, if he deems it necessary, be entitled to receive oral or written representations from the parties and whose decision shall be final and binding upon the parties and ,in the absence of manifest error, not be subject to review.*

14.3 it is the intention of the parties that any dispute referred to an expert in terms of this clause shall be resolved within twenty-one (21) days of the date of the expert being nominated. Accordingly, if the expert shall be unable to resolve the dispute within such period, then the party who shall have raised the dispute shall be entitled to withdraw the mandate of the expert and shall be entitled to institute proceedings in respect of the dispute in any court of competent jurisdiction.

14.4 Without derogating from the aforegoing, either party shall be entitled to approach any court of competent jurisdiction for relief of an urgent or injunctive nature."

Did the above agreement, in law, constitute a valid arbitration agreement? I would right away answer that question in the negative. It appears like it doesn't fit in the legal requirements for a valid arbitration agreement. There was neither an intention of, nor an obligation for, the parties to submit themselves to arbitration. The agreement did not explicitly mention

arbitration as the chosen process of dispute resolution. Conversely, the agreement unambigously mentioned expert determination as the parties' chosen process of dispute resolution. Not arbitration. Hence it did not unequivocally show parties' intention to submit their dispute to arbitration.

I asked myself, whether or not an arbitrator and an expert are one and the same person in the law of alternative dispute resolution? My answer would again be in the negative. These are two different persons and the dispute resolution processes attributed to each of them are very distinct. The International Law Office, in their article: ***Expert Determination or Arbitration?*** (hhtp://www.internationallawoffice.com/newsletters) have described expert determination as:

> *" a dispute resolution process in which an independent expert in the subject matter of the dispute is appointed by the parties to resolve the matter. The expert's decision is thus binding on the parties. This mode of dispute resolution is often used in valuation, construction and manufacturing disputes and is reputed for its efficiency, speed, confidentiality, privacy, flexibility, expert- based outcome and its binding nature."*

The Chartered Institute of Arbitrators of Ireland in their online publication available at www.ciarb.ie, have the following to say about the distinction between an expert and an arbitrator:-

"Expert determination is a private and confidential method of dispute resolution whereby disputing parties appoint an expert to determine a matter of fact, valuation or law, in a final and binding manner. Unlike arbitration: there is no right of challenge to have the expert's determination set aside or remitted before the High Court. Expert Determination is final in every sense; there is no right of the expert to state a case on a point of law to the High Court; there is less emphasis on due process and natural justice; there is usually no oral hearing or pleadings. Instead, the expert will seek written submissions from the parties; the process is informal, quick and cost efficient; the expert cannot rule on his own jurisdiction; there are no back up rules of procedure or support from the High Court in relation to process in expert determination, e.g. the extent to which courts are open to give preliminary rulings on points of law is uncertain; the enforcement of an expert's decision trans-nationally is not recognised as it is for arbitration decisions. There are no international conventions for the recognition or enforcement of experts' decisions abroad and so it may not be appropriate for international contracts; the expert has no authority to summon a witness."

From yet another work entitled: **"Expert or Arbitrator? Resolving Purchase Price Adjustment Disputes,"** which is available online at www.corporatesecuritieslawblog.com/ we can gather the following:

"Courts across the United States have long recognized a distinction between expert determinations and arbitrations...courts have been

clear that expert determination is a third-party dispute resolution mechanism that is separate and distinct from arbitration. As Vice Chancellor McCormick explained in Ray Beyond Corp. v. Trimaran Fund Mgmt., L.L.C., *expert determination provisions are fundamentally different from arbitration provisions. The former limit the scope of the third-party decision maker's authority to factual disputes within the decision maker's expertise. The later typically confers upon the third-party decision maker broad authority similar to that of judicial officers. By engaging an accountant to act as an expert and not an arbitrator, the parties limit the scope of the accountant's review and ensure that the accountant is not given the authority to interpret the contract or make legal determinations. In July 2023, in the case of* Sapp v. Indus. Action Servs., LLC, *the Court looked to other aspects of the purchase agreement including (i) the narrow scope of authority granted to the accounting firm, (ii) the short (30 day) time period to review and render a decision, and (iii) the failure to include arbitration-like procedural rules, and held that in the absence of an election of a dispute resolution procedure, such provisions evidenced the parties' intent to engage the accounting firm to act as expert not arbitrator."*

With the above understanding of expert determination, I am increasingly of the view that, the parties herein, in clause 14 of their Supply agreement, actually had agreed to resolve their disputes by way of expert determination; and not arbitration, as the dispute settlement process. The parties specifically indicated that they would choose an Expert "***who shall act as***

an expert," as the neutral third party with regard to his expertise in law or in accounting, depending on the nature of the dispute that would arise. They indicated that the neutral third party would either be a Senior Lawyer or a Senior Accountant. The parties in their agreement intended to give the neutral third party a short period of time to review their dispute and render a decision within only 21 days. The parties did not stipulate any arbitration-like procedural rules to govern the conduct of their dispute resolution before the neutral third party. The parties expressly excluded their right to be heard by the neutral third party, unless where the neutral third party himself opted to receive oral or written representations from the parties. The parties gave the neutral third party a narrow scope of authority by prescribing that where the dispute would be of a legal nature, it would be referred to a senior partner having not less than ten (10) years' experience in commercial law; and if it would be of an accounting nature the dispute would be referred to a senior partner of any of the international firms of accountants. This means that the scope of the expert depended on the nature of the dispute. There was no possibility for one person to determine both disputes of law and of accounting. The party referring dispute to the expert was given power to unilaterally withdraw the mandate of the neutral third party and was free to

commence legal proceedings in court. When all these typical features of clause 14 of the Supply Agreement between the parties herein are taken into consideration, in my view, they irresistibly point towards the conclusion that the parties herein had an agreement to refer their contractual disputes to an expert who should have acted as an expert; and not as an arbitrator at all. I am of the view that jurisdiction of an arbitrator stems from what the parties agree in their arbitration agreement. It is absolutely true that arbitration is based on an agreement between the parties and that party autonomy has a central and fundamental role. The central position of an arbitration agreement/ clause was well captured in ***Heyman v. Darwins Ltd. (1942) AC 356 at page 375*** which was quoted with approval by the Court of Appeal of Tanzania in Civil Appeal No. 115 Of 2005, between **Tanzania Motor Services Ltd & Presidential Parastatal Sector Reform Commission Versus Mehar Singh T / A Thaker Singh** that:-

> *"I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party*

has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement."

It is clear that, in order to have arbitration, there must be an agreement of both parties to refer their contractual disputes to arbitration. In the case at hand, there existed no arbitration agreement at all. There was an agreement to appoint an expert who was supposed to act as an expert. Not as an arbitrator. To give a judicial flavour to the differences between arbitration and expert determination, I would like to make reference to the prominent words of Lord Esher MR in ***Re Dawdy*** (1885)15 QBD 426; 54 LJQB 574; 53 LT 800, who classically explained the distinction between arbitration and expert determination as follows:-

"An arbitration is to be conducted according to judicial laws, where the person who is appointed arbitrator is bound to hear the parties, the evidence if they desire it and to determine judicially between them. He must have a matter before him which he is to consider judicially. As a consequence of this, it has been held that if a man is, on account of

his skill in such matters, appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skills, he is not acting judicially, he is using the skill of a valuer, not a judge".

The above passage succintly describes an arbitrator in the first part and an expert in the second part. It sums up the differences between an arbitrator and an expert. Clause 14 of the supply agreement between the parties herein, when scrutinized under the eyes of the law, undoubtedly and imperatively directed that any disputes of law or accounting arising from the supply agreement had to be resolved by an expert **"acting as an Expert";** and not as an Arbitrator. The principle of party-autonomy in ADR requires that parties be given control of their dispute.

Once it is established that the parties herein by virtue of clause 14 of the Supply Agreement intended and conferred jurisdiction to an Expert rather than an Arbitrator, as their chosen neutral third party in the process of alternative dispute resolution, it would follow therefore that Mr. Terrence Matzdortff, the Sole Arbitrator, who delivered the foreign Arbitral Award in Cape Town, Republic of South Africa on 10th December 2018, acted without jurisdiction at all. The Sole Arbitrator did not have the requisite mandate from the parties herein under the supply contract, to conduct the arbitration;

and that therefore appears to have tainted the resultant foreign arbitral award which was illegally born out of expert determination process. The resulting foreign arbitral award was a mule rather than a horse, due to the illegal cross-breeding of arbitration and expert determination processes contrary to what was agreed by the parties in their contract. The tainted foreign arbitral award born out of expert determination process, is what was unknowingly and coincidentally recognised as enforceable in Tanzania by this Court vide Commercial Cause No.17 of 2019. It is necessary that the Court of Appeal be seized with the intended appeal so as to ascertain this fundamental question of jurisdiction. Extension of time is the only avenue for that to happen.

I should hasten to add here that, arbitration, and particularly international arbitration, involves jurisdictional issues beyond those normally encountered in traditional judicial proceedings. The first and most obvious, applicable to both domestic and international arbitration, is whether there is an operable agreement to arbitrate. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. In other words, there must be an agreement by the parties to arbitrate disputes arising between them. It follows then that an initial, three-

fold determination must be made by the arbitrator, and be ascertained by the court whenever an award is sought to be recognized and enforced: (1) Is there a valid contract between the parties? (2) If so, does it contain a valid, enforceable arbitration provision? (3) Are the issues in dispute referable to arbitration? The Award by the Sole arbitrator in the present case shows that neither the Arbitrator nor the parties paid adequate attention to the issue of jurisdiction of the arbitral tribunal. Clause 14 of the supply agreement did not contain any arbitration agreement at all. The issue of jurisdiction was barely raised and canvassed by the parties in the Misc. Commercial Causes No.11 and No.17 of 2019. Being a matter of jurisdiction, it can be raised at any time.

I have asked myself as to whether, by not raising an objection to the lack of jurisdiction on the part of the Sole Arbitrator; and by filing the Statement of Claim and the Reply to statement of claim when the arbitral proceedings commenced and proceeded exparte before the Sole Arbitrator Mr. Terrence Matzdortff; can the parties be deemed to have thereby tacitly agreed to arbitrate? In other words can an agreement to arbitrate be entered into by the parties by their conduct or necesary implications? While I aunderstand that sometimes a valid tacit agreement may arise from the parties' conduct,

still in my view there has to be a valid agreement resulting from the conduct of the parties. If one of them has acted while induced by error or as a consequence of fraud, coercion or undue influence, there could be no real consent and therefore the resultant implied agreement to arbitrate would not be valid. In the present case, the parties submitted their dispute before the Sole Arbitrator, Mr. Terrence Matzdortff, as an arbitrator, on the mistaken belief that they were doing so pursuant to their contractual obligations under Clause 14 of their Supply Agreement. Even the Arbitrator in his award mentioned this fact that the parties had construed an expert under clause 14 as an arbitrator. Now that their belief was mistaken or induced by an error, it would appear to me that no valid and enforceable tacit agreement could result from the parties' conduct influenced by an error or mistake in the circumstances. The position would have been different, in my view, if the parties had firstly acknowledged the fact that clause 14 of the supply agreement didnt cover arbitration, but that the parties were nevertheless desirous of engaging in arbitration and thus had consciously submitted their dispute to arbitration by mutual consent after occurence of the dispute and without relying on clause 14 of their supply agreement. They would possibly have been deemed to have formed another agreement by their conduct by

which to refer their dispute to arbitration, but not acting under clause 14 of the Supply Agreement.

I wish to emphasize that an arbitration agreement is subjected to the same rules applicable to the validity of contracts in general. The parties acting under mistake or error could not thereby create a valid agreement to arbitrate. Absence of an agreement to arbitrate, in my view, deprived Mr. Terrence Matzdortff, the sole Arbitrator, the requisite jurisdiction to make the purported foreign arbitral award that was recognized as enforceable by this court vide Misc. Commercial Cause No.17/2019.

It is trite that jurisdiction of an arbitrator stems from the arbitration agreement. By entering into an arbitration agreement, the parties commit to submit certain matters to the arbitrators' decision rather than have them resolved by law courts. Thus, the parties waive their right to have those matters resolved by a court; and grant jurisdictional powers to a private individual (the arbitrator). In arbitration law these are called the "negative" and "positive" effects of the arbitration agreement, respectively and they occur simultaneously upon the making of the arbitration agreement. Without an arbitration agreement, the arbitrator lacks jurisdiction and any resulting

award by him is a nullity. I am still stressing the point that in my view there is a need to extend time so that this point of jurisdiction can be ascertained.

Another area where it seems that the applicant has an arguable case is with respect to the Sole Arbitrator having acted beyond the 21 days mandate specifically given to him by the parties in their agreement. Like the jurisdiction of the arbitrator is conferred by the arbitration clause/agreement, the same arbitration agreement also circumscribes the arbitrator's jurisdiction. The arbitration agreement contains the will of the parties and enables them to take control of their chosen dispute resolution process. Therefore, assuming that there was a valid arbitration agreement between the parties, and therefore that the sole arbitrator was properly seized with the dispute under the supply agreement between the parties, the argument by the applicant is that still the arbitrator exceeded the 21 days' time limit which the parties had expressly given him in their purported agreement to arbitrate. It is trite that the jurisdiction of the arbitrator is conferred by the arbitration agreement. The autonomy of parties in arbitration is first expressed in crafting their arbitration clause. The scope of the powers of the arbitrator is also confined to the terms contained in the arbitration clause or such subsequent agreement the parties may, by mutual consent, agree. In

the supply agreement in this case, the arbitrator was given 21 days' time to complete the dispute resolution. Mr. Terrence Matzdortff was appointed the Sole Arbitrator on 31st day of October 2018 and rendered his final award on 10th December 2018. That was, undoubtedly, much beyond the 21 days period given to him by the parties. There was no extension of time given to him by the parties. Mr. Tarimo, advocate for Respondent has submitted that the issue of the arbitrator exercising powers outside the 21 days' time limit agreed upon by the parties, was raised in, and determined by, this very court where that practice was found to be proper. Hence, he was of the view that it cannot be raised again in the same court now. I do not agree with Mr. Tarimo on this point because this court now is not sitting to reconsider correctness or otherwise of its own decision. This is not an appeal, revision or review. It is simply an application for extension of time to appeal. Illegality is one of the grounds constituting a good cause for extension of time. This court cannot decisively declare any part of the holding made by this very court to be correct or illegal. It can only point out the features indicative of illegality which are apparent on the face of record so that the superior court can scrutinize them and make a tangible decision thereon as to whether or not they indeed constituted illegality as alleged by the applicant. If extension

of time is granted on the ground of illegality, it doesn't guarantee that the applicant will succeed on that ground on an appeal. It is still the duty of the Applicant to raise and substantiate the ground of illegality before the Court of Appeal. On my part, I think that if the arbitrator acted beyond the stipulated time limit, he thereby divested himself of the jurisdiction, and that is suggestive of illegality on the decision of the arbitrator. It is a point worth reconsideration by the court of appeal especially given that the arbitration proceedings continued in the absence of one party. The Arbitration proceeded exparte against the Applicant and therefore the Applicant, practically, could not object to the continued exercise of powers by the arbitrator nor could she withdraw the mandate of the arbitrator. Actually, clause 14 of the supply agreement seems to have only given the power to withdraw the mandate of the expert neutral third party only to the party who had initiated the proceedings. As the proceedings were initiated by the Respondent, the Applicant had no room to withdraw mandate of the arbitrator after lapse of the 21 days. Actually the very powers given exclusively to one party to the proceedings to unilaterally withdraw the mandate of the expert before a final decision is reached, and institute judicial proceedings in respect of the same matters, confirm further that what was

happening before Mr. Terrence Martzdotff was not arbitration; as that practice is alien to arbitration law.

Could the Applicant tacitly agree by her conduct, on the continued arbitration proceedings beyond the 21 days while she was not participating in the arbitral proceedings which were being conducted exparte against her? The issue is whether or not by virtue of the omission of the party (Respondent), who had referred the dispute to the Arbitrator pursuant to clause 14 of the supply agreement; opting not to withdraw the mandate from the arbitrator after lapse of the stipulated 21 days, then both parties were thereby presumed to have impliedly extended the arbitrator's mandate over the matter. Whether or not an absent party in arbitral proceedings which are conducted beyond the agreed time frame, is deemed to have tacitly agreed to the continued exercise of jurisdiction thereon by the arbitrator, is an arguable issue that calls for the higher court to decide; and it is a point of public interest in this developing area of arbitration law. Arbitration law is still developing in this country. The prayers made by the Applicant in Commercial Cause No.17/2019 seeking this court "to set aside the foreign arbitral award", is a vivid indicative example of the fact that arbitration law and practice is still a developing field to many lawyers in Tanzania. Guidance

by the Highest Court on controversial issues is necessary. Only extension of time in this matter can help the general public and the lower courts to the Court of Appeal to benefit.

While I have no definite answers to the herein posed questions, I am of the view that these issues affected the jurisdiction of the arbitrator and of this court. They are plausible and arguable points susceptible of illegality. Hence, in my view, this is a fit case for extension of time to Appeal.

To bring the point home, it is noteworthy that in Misc. Commercial Cause No.17/2019 this Court recognized as enforceable in Tanzania, a foreign arbitral Award delivered in Cape Town, Republic of South Africa on 10th December 2018. The Award was delivered by Mr. Terrence Matzdortff, the Sole Arbitrator who, as it turns, appears to have acted without jurisdiction for there being no underlying arbitration agreement. Did the High Court in turn have jurisdiction to recognize and order the enforcement of that arbitral award? As I have stated elsewhere herein, in 2019 the current Arbitration Act of 2020 was not yet in force. The then applicable Arbitration Act had a provision under section 30 on enforcement of foreign arbitral awards which provided:

> *"30. Conditions for enforcement of foreign awards*

(1) In order that a foreign award may be enforceable under this Part, it must–

(a) have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;

(b) have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;

(c) have been made in conformity with the law governing the arbitration procedure; (d) have become final in the country in which it was made; and

(e) have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania, and its enforcement must not be contrary to the public policy or the law of Tanzania'

If the purported foreign arbitral award in this case was not made in pursuance of an agreement for arbitration which was valid under the law by which it was governed; if the purported foreign arbitral award in this case was not made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties; if the purported foreign arbitral award in this case was actually made out of a process of expert determination instead of arbitration; If the purported foreign arbitral award in this case was made beyond the prescribed 21 days, at a time when the purported arbitrator had ceased to have jurisdiction; then it follows that, in my view, it

would be illegal for this court to recognize and enforce the foreign arbitral award resulting therefrom. This court would lack jurisdiction. Hence, in my view it is necessary to grant the applicant an extension of time to appeal to the Court of Appeal of Tanzania so that the Court of Appeal can examine whether or not this court in Misc. Commercial Cause No.17 of 2019 was truly vested with jurisdiction to recognize and enforce the purported foreign arbitral award of the sole arbitrator who was categorically appointed by the parties to act only as an expert. Can the High Court recognize and enforce foreign decisions made under expert determination under the provisions of the Arbitration Act? I would answer in the negative.

On the other hand, the application is based on the ground of technical delay. I have considered the argument by the Applicant's counsel Mr. Bakari that the delay in this matter was technical. He argued that he lodged the former notice of appeal on time but that it was later struck out by the Court of Appeal for failure on the part of the applicant to take essential steps. While I acknowledge that technical delay is excusable, I do not propose to address in detail the arguments of the parties in this respect because I am convinced that the Application at hand already succeeds on the basis of the ground of illegality only. Illegality, once established, is a sufficient cause for extension

of time. In **VIP Engineering and Marketing Limited and 2 Others versus Citibank Tanzania Limited**, Civil References No.6,7 and 8 of 2006 the Court of Appeal of Tanzania held that:

> *"Where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reason" for extension of time".*

Therefore, I am inclined to grant the present application on the ground of illegality so that the allegations of illegality can be ascertained by the higher court.

The next question in my Ruling is what prayers can I grant in the circumstances? In the Chamber summons, the Applicant has made three substantive prayers, all of them for extension of time to wit:

> *(a) That this Honourable Court be pleased to extend time within which to allow Applicant to file and serve to the Respondent the notice of intention to appeal from a Ruling and Drawn Order of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial Cause No.17 of 2019 delivered by Hon.Magoiga,J., on 13th December 2019.*
>
> *(b) That this Honourable Court be pleased to extend time within which to allow the Applicant to file an application for leave to appeal to the Court of Appeal against the Ruling and Drawn Order of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial*

Cause No. 17 of 2019 delivered by Hon.Magoiga,J., on the 13th December 2019.

(c) That this honourable Court be pleased to extend time within which to allow the Applicant to file and serve the letter requesting for Ruling, Drawn Order and proceedings of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial Cause No. 17 of 2019 delivered by Hon. Magoiga,J., on the 13th December 2019.

In my view, the prayer in paragraph (c) above is prematurely made. To some extent, I agree with Mr. Tarimo, counsel for the Respondent. I hold that the prayer for extension of time to serve the letter requesting proceedings of the High Court would have to be made in the Court of appeal; but I hasten to add that, in my view, only if the struck-out appeal were still pending in the Court of Appeal. Now that the applicant's notice of appeal has been struck out, there is no appeal pending anymore. The applicant cannot be granted an extension of time now to serve the Respondent with a copy of the letter requesting proceedings pursuant to the Court of Appeal Rules, while, as it stands, presently, there is no pending appeal in the court of appeal in respect of this case, and to which the letter would relate, to exclude the waiting period of delay by way of a certificate of delay. In my view, upon the Applicant being granted an extension of time to lodge a new notice of appeal, time within which to take essential steps will start to run afresh against him.

Under Rule 90 of the Court of Appeal Rules, "an appeal shall be instituted by lodging in the appropriate registry, within sixty days **of the date when the notice of appeal was lodged**".

The letter requesting proceedings should be filed within 30 days of the date of the decision of the High Court in order for it to justify the issuance by the Registrar of the High Court, a certificate of delay and which certificate in turn may justify the memorandum of appeal being filed beyond the 60 days time period since the date when the Notice of appeal was filed. So, in essence, the relevant time limits in this case, in my view, would be calculated from the lodging of notice of appeal. In other words, in the present case, the relevancy of the applicant serving upon the Respondent copies of the letter requesting proceedings of the High Court will arise only where the Applicant, after obtaining the extension of time, files the Notice of Appeal but then fails to lodge the memorandum of appeal and record of appeal within 60 days after filing the Notice of Appeal. If that happens, and the Applicant then needs a certificate of delay, he will be obliged to prove that he had written a letter to request for proceedings within 30 days of the date of the decision. Also he will have to prove that he served upon the other party copies of that letter, as it is for the other appeal documents, within 14 days. But all this is

when the notice of appeal is filed in the court of appeal. At the moment, there is no notice of appeal yet filed in the court of appeal. This matter is now before the High Court. Rule 10 of the Court of Appeal Rules is not applicable to the High Court. It applies to "the court" as defined in the Rules. In simple terms, the Applicant ought to know that at times a party to the case may possess the certified copies of the judgment, decree and proceedings of the High Court even before lodging the Notice of Appeal and he may have obtained them without having written a letter requesting to be supplied with them. In such a situation, writing a letter requesting for proceedings and serving it upon the other side, might become dispensable as the letter requesting proceedings does not mandatorily always form part of the records of appeal. The Applicant's prayer for extension of time to serve the respondent the letter requesting for proceedings, is therefore, in my view, prematurely made and it is superfluous. I decline to grant it.

Mr. Tarimo was of the view that without the Applicant being granted an extension of time to serve the letter requesting proceedings, the Applicant cannot be able to institute the appeal, and that therefore, I should not grant an extension of time to lodge notice of appeal or to apply for leave to appeal. In my view, even if Mr. Tarimo had been right, still that would have been the

problem of the Applicant herself to deal with. If this court cannot grant the applicant an extension of time to serve upon the Respondent the letter requesting proceedings because it is a prayer that is grantable by another court, then it will be the duty of the Applicant to go and apply for it in the proper court. I cannot presume, predetermine and hold now, that even when the applicant goes to make her application for extension of time to serve copies of the letter requesting proceedings, in the proper court, she will not be granted that extension of time and that therefore, I, too, should take a short-cut by not granting an extension of time in respect of notice of appeal or leave to appeal, which are matters otherwise within my legal mandate.

On prayer (b) the Applicant is seeking for extension of time to apply for leave to appeal against the Ruling of this Court delivered on 13th December 2019 in Misc. Commercial Cause No.17/2019. Mr. Tarimo very strongly, logically, and persuasively submitted in opposition to this prayer and concluded that the Applicant has not accounted for the delay. I was impressed by the arguments made by the learned counsel, however, from another angle, I find that Mr. Tarimo was actually flogging a dead horse because it is no longer a legal requirement for the applicant to apply for leave of this Court in order to appeal to the Court of Appeal to challenge the Ruling in question. Although

both counsel addressed the court on this aspect of extension of time to apply for leave to appeal, neither Counsel was alive to the effect of the Legal Sector Laws (Misc. Amendments)Act, Act No.11 of 2023 which, inter alia, under section 10 thereof, has amended section 5 (1) of the Appellate Jurisdiction Act by removing the hitherto legal requirement to obtain leave of this court to appeal against decisions of this Court in circumstances like the ones prevailing in the present case.

The Amendments brought by Act No.11/2023 became operational on 1st December 2023 after Publication in the Government Gazette while the present application was filed in Court much earlier on 12th July 2023. The changes in law found this application already pending in court. But I am alive to the fact that the amendment in respect of removal of the legal requirement to obtain a leave to appeal, is a procedural one. As a rule, procedural laws operate retrospectively. In **Benbros Motors Tanganyika Ltd versus Ramanlal Haribhai Patel** (1967) HCD 435 it was stated:

> *"when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away, but when it deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."*

Hence, I hold that the amendments brought by Act No.11/2023 which became operational on 1st December 2023, and which removed the leave requirements in this case, had a retrospective effect to the case at hand. This makes the applicant's prayer (b) redundant in the circumstances of this case. I decline to grant it.

In respect of prayer (a), that is the one for extension of time to file notice of appeal, I grant it. I grant the Applicant 14 days from the date of delivery of this Ruling to file notice of appeal against the Ruling and Drawn Order of the High Court (Commercial Division) at Dar es Salaam in Misc. Commercial Cause No.17 of 2019 delivered on 13th December 2019.

Given the protracted nature of the case, which is still likely to cost both parties more; and given that some prayers of the applicant are not successful as well as the fact that the root cause of all this legal fracas is the initial mistake of the sole Arbitrator, I make no order as to costs in this application. It is so ordered.

A. H. Gonzi

JUDGE

13/12/2023

This Ruling is delivered in Court this 13th day of December 2023 in the presence of Mr. Alexander Robert Learned Advocate for the Respondent also holding brief for Mr. Bakari Juma Learned Advocate for the Applicant.

A. H. Gonzi

JUDGE

13/12/2023