IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 74 OF 2023

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

AND

IN THE MATTER OF ARBITRATION

BETWEEN

ZAWIYA TANZANIA TRADERS LIMITED.....PETITIONER

VERSUS

COCA-COLA KWANZA LIMITED.....RESPONDENT

RULING

April 19th, 2024 & May 31st, 2024

Morris, J

The petitioner has preferred this matter with the view to challenging an arbitral award (**the award**) of the arbitral tribunal. The tribunal was duly composed of three arbitrators: Hon. Justice (Rtd) Robert Vincent Makaramba (Chairman), Hon. Mr. Rosan Senzia Mbwambo and Hon. Justice (Rtd) Dr. Fauz A. Twaib. The petition is brought under section 70 (1) (a) (b) and (2) (b), (d) (f) and (i) of ***the Arbitration Act***, Cap. 15 R.E. 2020 (**the Act**) and

regulation 63 of ***the Arbitration*** (***Rules of Procedure***) ***Regulations***, G.N. No. 146 of 2021 (**the Regulations**).

The petitioner advanced one ground that there exist serious irregularities on face of the award. However, before I proceed further, it is notable that the law upon which the instant petition is brought is incorrect. The relevant provision is section 75 of ***the Act*** (not section 70). As matter of clarity, ***the Act*** was revised in 2020 which step made rearrangement of sections therein. Consequently, other provisions referred to by the petitioner in these proceedings (sections 35, 60, and 63 of the Act) now read as sections 37, 65 and 68 respectively. Hence, the petition is brought under the wrong provision of law. In line with the principle of overriding objective; and in view of the reasons given later in the present ruling, I will not pursue this preliminary matter further.

The undisputed facts of the case are easy to discern from the presented documents by the parties. I will briefly account them here. On February 11th, 2020 the parties herein executed two agreements: "Master Agreement for Truck Leasing Services" and "Transportation of Goods Agreement". The agreements were to run for 48 months from February 1st,

2020 to January 31st, 2024. In 2021, however, the respondent terminated the said agreements.

Disgruntled with the foregoing termination, the petitioner initiated arbitration proceedings before the tribunal. He won the award of Tshs 9.5m/- and 50m/- specific and general damages respectively. However, he was denied costs of the arbitration. But the respondent was awarded costs to the tune of Tshs 2,250,000 for the petitioner's default in the conduct of the arbitral proceedings. The cost-element in the award aggrieved him leading to this petition. The circumstances upon which he alleged serious irregularities include;

i. The award exempted the losing party (the respondent) from obligation to pay the successful party (the petitioner) arbitration costs.

ii. The award has shown open favouritism and bias against the petitioner.

iii. The tribunal failed to appreciate the impact of the amply established Tshs 1.3 billion loss of business and awarded a nominal Tshs 50

million in general damages which is not commensurate with the loss suffered by the petitioner.

Thus, the petitioner prayed for the orders that "costs to follow the event" and Tshs 200m/- general damages. Naturally, the respondent opposed the petition. Hearing was conducted by way of written submissions. The petitioner and the respondent were respectively represented by Messrs. J. R. Kambamwene and G. H. Nyange, learned counsel. In his submissions, the petitioner argued that circumstances that constitute "serious irregularity" pursuant to ***the Act*** are vivid in the award. That the award fully declared him successful but the reliefs in the award were not supported by law; and the tribunal showed clear bias against him. To him, the claim of Tshs 1.885 billion being loss of income was proved fully; and that he paid Tshs 82m/- as his part of the arbitration fees but the tribunal did not award him such reliefs. Hence, the reliefs in the award were deliberately skewed to help the respondent and to punish the petitioner; which anomalies seriously affected the tribunal's fairness and impartiality.

To support his arguments, he cited section 73(1) of ***the Law of Contract Act***, Cap. 345 R.E. 2019 to the effect that the breaching party

should pay compensation; and section 35 of ***the Act*** to substantiate that the impugned award was arrived at unfairly and partially.

On his part, the respondent's counsel commenced his submissions in opposition of the petition by raising various preliminary "concerns". He outlined them that: the award which the petitioner seeks to challenge had not been registered and endorsed by the Court; and the petition was incomplete for not being accompanied by the Arbitration Agreement. He cited the cases of ***Regional Manager TANROADS-Simiyu v M/S Nyanguruma Enterprises Co. Ltd***, Misc. Commercial Cause No. 39 of 2018; ***AG v Hermanus Philippinus Steyn***, Misc. Civil Cause No. 11 of 2010; ***Kigoma Ujiji Municipal Council v Nyakirang'ani Construction Ltd***, Misc. Commercial Cause No. 333 of 2014; and ***CRDB Bank PLC v Syscon Builders***, Misc. Commercial Application No. 65 of 2018 (all unreported).

I will not do justice to the legal profession if I condone the foregoing mode adopted by the respondent's counsel. Instead of raising the so-called concerns in the form of preliminary objection (elsewhere PO) at the earliest, he has presented them in the reply written submissions meant for hearing

of the application on merit. This approach is not only professionally unhealthy but also unacceptable. I will give the reasons. **One**, the approach tends to surprise the opposite party. Given the timeline for filing the submissions, the opposite party against whom notice of the 'PO' was not served, he is without adequate time to respond to such point. Consequently, his right of being heard and/or fair hearing is prejudiced.

Two, such party will file submissions on the matter not before the court. **Three**, the party is engaging the court and/or the opposite party with afterthoughts and extraneous matters thereby distracting the coherence of the proceedings. **Four**, the objective of the PO is being defeated. Ordinarily, a successful PO leads to defeating the suit/trial without wasting time by determining the merit of the matter. When the purported PO is raised inordinately late, the mischief is far from being cured. **Five and most serious of all**, the party raising and arguing such 'PO' is illegitimately usurping the powers of the court by giving himself the mandate to submit on the matters not before the Court.

On the basis of the foregoing analysis, it is my view that the respondent was not justified to raise his 'ostensible concerns' in the reply submissions; the merit of such points notwithstanding.

Nevertheless, the respondent's counsel continued to submit on the merits of the petition. He contested allegations of favouritism and bias. To him, the petitioner did not exhibit such claims. He thus argued that, the petition does not meet the legal criteria upon which the court could entertain the petition and grant the reliefs sought. He also argued that the court's intervention should be confined to curing errors of law manifest on the face of the award. He cited and relied on ***Vodacom Tanzania Limited v FTS Services Limited***, Civil Appeal No. 14 of 2016; and ***Catic International Engineering (T) Ltd vs University of Dar es Salaam***, Civil Appeal No. 162 of 2020 (both unreported).

In the brief rejoinder submissions, the petitioner's counsel stated that the respondent's concerns were misplaced; the authorities were cited out of context; and the tribunal was utterly partisan in favour of the respondent.

It is undisputed that throughout the submitted documents and rivalry submissions of the parties, the matter at hand concerns whether the award

is tainted with serious irregularity on the face of the record. Though I commend the research and efforts of the learned counsel for each side in this matter, both lawyers laboured in a futile mission.

As I was writing this ruling, it came to my attention that the proceedings herein involve the award which was successfully registered, recognized and enforced by this Court through Misc. Commercial Cause No. 69 of 2023; ***Zawiya Tanzania Traders Ltd*** v ***Coca-Cola Kwanza Ltd*** (unreported). The ruling of this Court, judicial notice of which I take, was delivered by my learned brother; Hon. Gonzi, J on April 29th, 2024. In part, the same reads that:

> *"It is trite that the current application is **not opposed** by the Respondent. The Respondent did not file any petition to **challenge the recognition and enforcement of the arbitral award** in question. During the hearing, the learned counsel for the Respondent was loud and clear that they are **not opposing** the recognition and enforcement of the award. Therefore, the grounds under section 83(2)(a) were not raised by the parties and thus are not going to be considered in this Ruling..., and having **granted** the application at hand, I have extracted from the Final Award dated 29th August 2023 the*

following Orders which shall now constitute the ***Decree/Drawn Order*** *of this Court..."*(bolding rendered for emphasis).

Incontestably, the excerpt above clearly indicates that the award in these proceedings is non-existent. It is already the Court's Decree. Further, this Court is already *functus officio* regarding the status of the award [see, ***Tanganyika Land Agency Ltd & 7 Others v Manohar Lal Aggrawal***, Civil Appl. No 17 of 2008; ***Leopold Mutembei v Principal Assistant Registrar of Tittles, Ministry of Land, Housing and Urban Development and Another***, Civil Appeal No. 57 of 2017; ***Mohamed Enterprises (T) Ltd v Masoud Mohamed Nasser***, Civil Appl. No. 33/2012; and ***The International Airlines of the United Arab Emirates v Nassor Nassor***, Civil Appeal No. 379 of 2019 (all unreported)].

In addition, the present matter is not the medium through which the subject Decree can be challenged or executed. That is, turning against the parties' mutually consented decision of the Court in Misc. Commercial Cause No. 69 of 2023 will amount to disrespect to oneself, uncertainty of law, abuse of judicial processes by the litigants and ridicule to the noble profession.

Thus, the parties' pursuit of these proceedings has by now been overtaken by events.

Nonetheless, I fail to comprehend the motive behind pursuit of these proceedings by the parties and/or their respective counsel herein. It is crystal clear that the present petition was filed subsequent to the above application (Misc. Commercial Cause No. 69 of 2023) between same parties. It is so weird that in the latter proceedings, the same petitioner, sought to and did cause recognition and enforcement the award that he was dissatisfied with. Further, both advocates, in the sheer risk of committing the professional offence of misleading the Court, connived and argued that none of the parties was contesting the award howsoever.

Moreover, instead of withdrawing the present application or praying to stay it pending the outcome of the previous proceedings; the parties pressed and proceeded with hearing of this petition. To record the least, the insincerity exhibited by both learned minds hereof is the grammy-award-winning mockery to the Court of justice. Obviously, the dereliction on the part of the advocates herein has deprived the parties of their resources. The Court's time and engagement is also midst the equation. I hold that such

professional iniquity is unacceptable in any civilized society and should be weeded out forthwith.

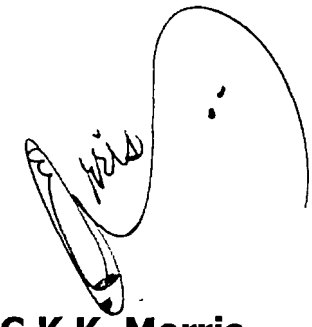
In fine, I proceed to strike the petition out for want of competence. For avoidance of any doubts, the application is struck out for want of the award to be challenged. None of the parties earns costs. However, parties and/or respective counsel shall pay costs to the Court. It is so ordered.

C.K.K. Morris

Judge

May 31st, 2024

Ruling delivered this 31st day of May 2024 in the presence of Advocate January R. Kambamwene for the petitioner.



C.K.K. Morris

Judge

May 31st, 2024