IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL CAUSE NO.72 OF 2023

IN THE MATTER OF THE ARBITRATION ACT, 2020

AND

IN THE MATTER OF ARBITRATION

BETWEEN

ORYX ENERGIES TANZANIA LIMITED (formerly

Known as ORYX OIL COMPANY LIMITED..... 1ST PETITIONER

ORYX ENERGIES SA ..... 2ND PETITIONER

VERSUS

OILCOM TANZANIA LIMITED..... RESPONDENT

RULING

Date of last Order: 31/01/2024

Date of Ruling: 02/02/ 2024

GONZI, J.

The petitioners felt aggrieved by a Final Arbitral Award dated 30th November 2023; and therefore on 11th December 2023, the petitioners filed this petition seeking for the reliefs that this Honourable Court be pleased to:

(a) Set aside the final Award in whole for want of jurisdiction pursuant to section 74(1)(b) and (3) and/or;

(b)Declare the Award to be of no effect in whole and set it aside on the above-mentioned grounds pursuant to section 75(3) (b) for serious irregularity affecting the arbitral tribunal, the proceedings and the Final Award;

(c) In the alternative, remit the award for reconsideration and determination by an arbitral tribunal constituted of newly appointed members;

(d) Costs of this petition be provided for; and

(e) Any other relief as this Court may deem appropriate.

When served with copies of the Petition, the Respondent, pursuant to the orders of this Court, filed an answer to the petition on 22nd January 2024. The Respondent's answer to the petition was premised with Preliminary Objections that:

(1) The Petition is premature for having been filed before the Final Award was presented in the Court for filing and recognition.

(2) The objection of the Award for want of jurisdiction by the Arbitral Tribunal, is not legally tenable and renders the Petition on this ground incompetent and overtaken by events.

The Respondent therefore prayed that the petition be struck out with costs.

On 31st January 2024 when the case was called for necessary Orders, Dr. Ringo Tenga and Mr. Gerald Nangi, learned Advocates appeared for the Petitioners. The Respondent was represented by Mr. Thobias Laizer, learned advocate assisted by Anthony Mark and Oliver Mark both learned advocates too. Also in attendance was Mr. Mohamed Osama Mohamed Sheikh, the Principal Officer of the Respondent Company.

Dr. Ringo Tenga, Advocate for the Petitioners informed the Court that upon being served with the Respondent's answer to the petition with the preliminary objections therein, they had specific instructions from their client and which they wished to present to Court. Mr. Gerald Nangi, learned advocate proceeded to address the court that the Petitioners have decided to concede to the first preliminary point of objection but not the second one. He submitted that the petitioners concede to the 1st preliminary point of objection that the Petition has been filed in this court before the Final award was presented for filing in court. He submitted that actually the Final Award was filed in the Dar es Salaam Sub-registry of the High Court and not in the Commercial Division of the High Court. Mr. Nangi therefore concluded that the Petitioners' concession to the first preliminary point of objection has the effect of disposing of the petition at hand as the same ought to be struck

out in the circumstances even if the Petitioners do not concede to the 2nd point of preliminary objection.

Mr. Nangi, prayed that the petition be struck out but without an order as to costs. He submitted that the court should not order costs to follow the event in this case for the reason that by the Petitioners' conceding to the 1st preliminary point of objection, they have saved time and energy of the court going through full hearing. He added that the petitioners have conceded to the preliminary objection early on the first date of entering appearance after the Preliminary objection was raised. He argued that the Petitioners will take the necessary steps before the proper registry of the High Court where the Final Award has been filed.

Mr. Thobias Laizer, learned Advocate accepted the concession by the Petitioners to the first point in limine but resisted the Petitioners prayer to be exonerated from paying costs. Mr. Laizer argued that the Respondent has already suffered costs in terms of the legal fees to engage advocates to research, prepare and present a well-thought answer to the petition which has left the petitioners with no other option than to concede to the first preliminary objection. He added that the work done is what warrants the

award for costs to the Respondent. He insisted that it would be unfair if the court does not award commensurate costs for the well-thought answer.

In rejoinder, Mr. Nangi submitted that costs are within discretion and jurisdiction of the court. He submitted that it is too early now to conclude that there is a well-thought answer before the court although there are pleadings filed by the Respondent's counsel because there is a similar matter between the parties herein pending at the High Court of Tanzania (Dar es Salaam Sub Registry) which is yet to be decided. Mr. Nangi submitted that striking out of this petition will pave way for the proceedings to carry on at the High Court of Tanzania (Dar es Salaam Sub Registry) where the Final Award has been submitted and filed. He concluded that as not much has been done in the petition, therefore it is just and fair that the court exercises its discretion by letting the parties bear their own costs in this matter.

I have considered the prayers by the learned Counsel for the Petitioners to have their petition struck out and for the court to forgo costs in respect of this petition. In essence, the prayer by the petitioners' counsel to have the Petition struck out is not contested by the Respondent because that is the direct consequence of the preliminary objection raised by the

Respondent's counsel themselves. It is the consensus among the counsel for both sides in this case - a consensus which is legally correct that it was procedurally incorrect for the petitioners to prematurely file the present petition challenging enforcement of an arbitral award in court even before the respective award had been filed in court for the purpose of recognition and enforcement. What the Petitioners did was like putting a cart infront of the horse. In ***Luganuza Investment Company Ltd. v. The Trustee of Orthodox Church of Tanzania Holy Archdiocese of Mwanza,*** *Misc. Commercial Cause No.49 of 2020,* this court as per Hon. Magoiga, J., held at page 26 of the decision that:

> ***"Once an award is issued, it goes several steps before the same becomes capable of being recognized and enforceable by the court as decree. These are; filing, challenge (if any), recognition and enforcement as provided under section 68 read together with section 78 of the Arbitration Act, 2020."***

It goes therefore that a petition to challenge the recognition and enforcement of an arbitral award can only be made after that award has been filed in court for that purpose. The present petition was filed in this registry of the High Court before the Final award was filed hence the

preliminary objection by the Respondent, which objection has been conceded to by the Petitioners. This Court therefore upholds the first preliminary point of objection as conceded and I do hereby strike out the petition.

The contested prayer by the Petitioners' counsel is in respect of the order of costs. The Petitioners' counsel prayed that the striking out of their petition be done without costs while the Respondent's counsel insisted that the Respondent be awarded costs. I am aware that the court has discretionary powers to award costs. Section 30 (1) and (2) of the Civil Procedure Code [Cap. 33 R.E. 2019] provides thus:

> ***"30 (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.***

(2) Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing."

I have considered the rival arguments by the learned counsel for both sides. I find that their arguments are not directly focused at the relevant issue in the present proceedings but rather to the future proceedings for taxation of costs which can only arise if an order for costs is granted in the present proceedings. Their arguments, in my view, are mostly dealing with the issue of quantum of costs awardable rather than on whether or not this court should grant costs in the present proceedings. The rule is that a successful party is entitled to costs unless there are good reasons not to grant costs. In **Devram Nanji Dattani v. Haridas Kalidas Dawda, 16 EACA 35** the Court of Appeal for Eastern Africa held that:

"A successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit, has led to litigation which, but for his own conduct, might have been averted."

Admittedly I have not heard sufficient arguments on why in terms of section 30 of the Civil Procedure Code, costs should or should not follow the event.

As it can be deduced from the above referred case law, the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation. This principle was reiterated in the case of **Mohamed Salmini v. Jumanne Omary Mapesa,** Civil Application No. 4 of 2014, where the Court of Appeal of Tanzania at Dodoma, held that:

> ***"As a general rule, costs are awarded at the discretion of the Court. But the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of his costs. A successful party could lose his costs if the said costs were incurred improperly or without reasonable cause, or by the misconduct of the party or his Advocate."***

A similar holding was reached by this court in the case of **Juma Mganga Lukobora And 7 Others Versus Tanzania Medicine and Medical Devices Authority (TMDA) and 3 Others** Miscellaneous Civil Application No. 642 of 2020, (Dar Es Salaam District Registry) where Hon.

Mlyambina, J. quoted with approval Mulla's the Code of Civil Procedure thus:

> ***"The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The Court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation."***

As the law stands under section 30(1) and (2) of the Civil Procedure Code, the Court has discretion in matters of costs but that discretion like any other court discretion, must be exercised judicially. I have keenly considered the submissions by the Petitioners' counsel and asked myself as to whether or not there is a good cause in the present case for not awarding costs to the Respondent upon the petition being struck out. The good reasons in law as shown in the case law above, include the fact that the party in whose favour the order of the costs would have been issued is guilty of misconduct in the actual litigation or in the matters which led up to the litigation. Also, costs may not be awarded where the said costs were incurred improperly or without reasonable cause or there is some other good cause for not awarding costs to him.

In the case at hand, the petitioners have relied on the grounds that the petitioners by conceding to the first preliminary objection have saved time and energy of the court going through full hearing. Further that the petitioners have conceded to the preliminary objection early on the first date of entering appearance after the Preliminary objection was raised. The petitioners also have argued that the matter has ended at an early stage hence not much work has been done by the learned counsel as to deserve costs and that the same parties still have to battle it out in court over the same arbitral award where similar proceedings have been filed in the Dar es Salaam sub-registry of the High Court. These arguments sound good but then I asked myself as to whether or not they do fit in the applicable legal grounds for denying costs to the Respondent.

The Petitioners counsel have not shown that the respondent or the respondent's counsel, was or has been, guilty of misconduct prior to or during the conduct of the proceedings in the present petition. The relevant misconducts prior to or during the proceedings were elaborated in the persuasive decision of **Straker v Tudor Rose** [2007] EWCA 368 (CA) where Waller LJ mentioned the misconducts envisaged as including (a) a failure to follow a pre-action protocol; (b) whether a party

has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part. Put otherwise, the misconducts which may justify denial of costs include a wide range of conduct, both leading to and in the course of the conduct of the proceedings including but not limited to unfounded allegations of fraud or improper conduct; failure to provide proper discovery; making multitudinous amendments; behaviour which causes unnecessary anxiety, trouble or expense, such as failure to adhere to proper procedure; disregard of court orders and unnecessarily prolonging the proceedings. These instances were laid down by the Court of Appeal of New south Wales in ***Degmam Pty Ltd (in liq) v Wright*** *(No 2)* [1983] 2 NSWLR 354 at 358. In short, the misconduct envisaged refers to any conduct calculated to occasion unnecessary expense. Applying the principle of the law to the facts at hand, it is clear that no mention of such instances of misconduct was done by the counsel for the Petitioners in an attempt to move the court not to grant costs to the successful party in this petition. Equally, the Petitioners' counsel did not argue or allege the ground that in the present

case costs were incurred improperly or without reasonable cause by the Respondent. I think I need not spend much time on that ground.

The other legally acceptable ground for denying costs to the winner is where there is some "other good cause". This is a broad ground that accentuates the court's wide discretionary powers in granting or not granting costs. The arguments made by the Petitioners' counsel, in my view, can be fairly tested under this ground as an attempt to sail through the current of "other good cause" for not awarding costs to the Respondent. As summarized above the alleged "good causes" advanced by the Petitioners' counsel include their client's conceding to the 1st preliminary point of objection; the proceedings having not progressed much and that a similar case between the same parties is pending before the High Court of Tanzania Dar es Salaam sub-registry where the Final Award was filed. The Respondent's counsel did not dispute the pendency of proceedings in the High Court of Tanzania Dar es Salaam Sub-registry in respect of the same parties and involving the same arbitral award. He contested the argument that not much work has been done up to this stage in the present petition.

Does concession to a preliminary objection constitute a good cause and hence supply a tenable ground for depriving the winning party costs as a

result of that objection being upheld? That question has, in a way, been answered by the court of Appeal of Tanzania in the case of **Said Nassor Zahor and 3 others vs. Nassor Zahor Abdulla el Nabahany and Another**, Civil Application No. 169/17 of 2017 [2017] TZCA 237, where the 1st respondent's counsel conceded to the application but prayed not to be condemned to pay costs. The court held:

> ***"The mere fact that counsel for the first respondent has readily conceded to the application, cannot exempt the respondents from paying costs of the application. These are the usual consequences of litigation to which the respondents are not exempt."***

Therefore, it is trite that mere concession to a preliminary objection does not constitute a good cause for the court to deprive the winning party his costs of the case.

I now turn to consider the argument of pendency of another case over the same arbitral award in another court registry between the same parties. Is it a good cause for the court not granting costs in the present petition which is being struck out as a result of a successfully raised and conceded preliminary objection? In my view that does not exonerate the Respondent from incurring costs in defending the present petition. As it happens, the respondent has hired lawyers who have drafted pleadings and appeared for

him in this case. Inevitably, some expenses must have been incurred by the respondent. The argument that the current proceedings are terminated at an earlier stage without full trial is good but, in my view, it is misplaced at this stage. That argument is relevant in determination of the quantum of costs during taxation proceedings before the taxing Master. This is because, in essence, the argument underscores an admission by the losing party that indeed costs were actually incurred in the respective proceedings but not to a large extent as claimed by the winning party. However, the prayer by the Petitioner in the current proceedings is for the petitioners not to be condemned to pay costs at all. It is not a prayer to pay reduced costs due to the infancy of the proceedings at the level they were terminated by the successful preliminary objection.

Therefore, I decline the prayer by Mr. Nangi, learned advocate, for this court to deny the Respondent costs following striking out of the petition. I have seen no plausible factors as to convince the court to exercise its discretion to totally deny the Respondent its costs. I am mindful that although the court has discretion on granting costs under section 30(1) and (2) of the CPC, the onus lies on the unsuccessful party to demonstrate a basis for departing from the usual rule that costs follow the event. This was the holding in

Waterman v Gerling Australia Insurance Co Pty Ltd (No 2) **[2005] NSWSC 1111.** Further, I am mindful that the discretion to depart from the general rule on costs to follow the event must be exercised judicially and according to rules of reason and justice, not according to private opinion or even benevolence or sympathy. This was the rule in ***Williams v Lewer*** [1974] 2 NSWLR 91 at page 95. I therefore decline to grant the prayer of not granting costs to the Respondent because the Petitioner has not discharged its onus in law by not demonstrating the basis for departing from the rule that costs follow the event. I must add at this juncture that costs orders are necessary and should not be easily done away with as they play an essential role as a useful tool in case management. Though costs orders are not intended to be "punitive", but when effectively and properly used, they can help the court to dissuade and arrest defaults in compliance with procedural directions of the laws and of the courts. Procedural non-compliance and defaults occasion additional cost to the innocent party which merits compensation by way of an order for costs.

Having found that costs are payable consequent to the striking out of this petition, I still retain the discretion under section 30(1) of the Civil Procedure Code to determine the extent to which the costs are recoverable.

The relevant part of the provision provides that the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid. The counsel for petitioners have not asked for reduced costs. They have asked for full exemption from costs. That omission, however, in my view does not restrain the court from considering the question of grant of reduced or proportional costs. Logically, the question of reduced or proportional costs is inevitably embedded into the major prayer advanced by the Petitioners' counsel to have the Petitioners fully exempted from costs.

Can the court make an order for grant of reduced or proportional costs to a successful party even before taxation proceedings? My answer is in the affirmative. It is part of the discretionary powers contained under section 30(1) of the Civil Procedure Code which empowers the court to determine "the extent" to which costs are payable. As I have said above the discretion must be exercised judicially. To exercise discretion judicially requires adherence to reason and justice, not according to private opinion but according to law, and not humour. It is not to be arbitrary, vague, and fanciful, but legal and regular. Consistency is an essential aspect of the

exercise of judicial power. To this end, I resorted to the doctrine of precedent and stare decisis and borrowed leaf from decided cases with a view to maintaining consistence in the practice of courts granting reduced or proportional costs to the successful party under appropriate circumstances. The logic behind the courts granting proportional costs is recognition of the fact that the purpose of a costs order is to compensate the person in whose favour it is made, not to punish the person against whom the order is made. This was stated in the persuasive case of ***Northern Territory v Sangare*** **(2019) 265 CLR 164.**

The practice of courts granting proportional costs is common in the common law jurisdictions and it is well rooted in Tanzania as well.

Mrs. Justice O'Farrell in **Triumph Controls UK Limited v Primus International Holding Company** [2019] EWHC 2722 (TCC) (Queen's Bench Division), had the following to say in this aspect.

> ***"The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The Court may, however, make a different order. In deciding what (if any) order to make about costs, the Court will have regard to all circumstances, including: The conduct of all the***

parties; Whether a party has succeeded on part of its case, even if that party has not been wholly successful; and any admissible offer to settle made by a party which is drawn to the court's attention."

In the above case, Mrs. Justice O'Farrell after considering the relevant factors, decided that Primus should pay 85% of Triumph's costs. She reasoned that a proportional costs order was appropriate to reflect Primus' success on one of the claims.

Back home in the case of **Zawadi Bahenge Versus CRDB Bank Plc,** Civil Case No. 187 of 2022, High Court of Tanzania (Dar es Salaam District Registry) as per Hon. Bwegoge,J., this Court stated and held that:

"This court has taken into consideration the prayer made by the defence counsel herein in that the plaintiff has to pay costs on the ground that the defendant had hired their services. In fact, the prayer in the preferred objection is to the effect that the suit should be struck out with costs. This court finds it obvious that costs of this litigation have already been incurred by the defendant notwithstanding the initiative made by the plaintiff's counsel to concede to the objection at the earliest opportunity. Likewise, this court has taken

into consideration the fact that the plaintiff's counsel has been candid in conceding to the objection at the earliest opportunity when the matter was scheduled for mentioned at the first instance. It is obvious that the concession has saved precious time of this court which would otherwise be utilized to hear the arguments for and against, and composing ruling thereon....this court, in the interest of justice for both parties herein, hereby condemn the plaintiff to pay half of the costs of litigation incurred by the defendant as it shall be taxed by the tax master."

Maintaining consistence in line with the foregoing authorities, I am inclined to make recognition of the fact that by conceding to the first point of preliminary objection, the Petitioners' counsel have shown great diligence and have saved precious time of this court which would otherwise be utilized to hear the arguments for and against the petition, and composing ruling thereon. Although that does not entirely exonerate the Petitioners from liability to pay costs, it should surely not go unrecognized and unappreciated by the court and hence in my view it helps in reducing the extent of costs payable by the petitioners. I hold that the Petitioners should

pay the Respondent one half of the costs of petition incurred by the Respondent as it shall be taxed by the taxing master.

In the final analysis, I make the following orders:

1) The first preliminary point of objection, which was conceded to by the Respondent is upheld, the petition is hereby struck out with half costs.

2) The Petitioners shall pay 50% of the costs of this petition incurred by the Respondent which shall be taxed by the taxing master.

It is so ordered.

HIGH COURT OF TANZANIA COMMERCIAL DIVISION

A. H. GONZI
JUDGE
02/02/2024

Ruling is delivered in Court this 2nd day of February 2024 in the presence of Mr. Gerald Nangi learned Advocate for the Petitioners and Ms. Oliver Mark learned Advocate for the Respondent.

HIGH COURT OF TANZANIA COMMERCIAL DIVISION

A. H. GONZI
JUDGE
02/02/2024