

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CAUSE NO. 405 OF 2024**

**BETWEEN**

**M/S SHABBIRDIN & CO. LTD..... APPLICANT**

**VERSUS**

**TANZANIA NATIONAL ROADS AGENCY.....RESPONDENT**

**RULING**

**Date of Last Order: 28/03/2024**

**Date of Ruling: 18/04/2024**

**GONZI, J.**

By way of a letter dated 6<sup>th</sup> July 2023, from Mr. Suma Stephen Mwaitenda, Sole Arbitrator addressed to the Honourable Deputy Registrar, a Final Arbitral Award on Remission between the Applicant and the Respondent dated 24<sup>th</sup> August 2022 was filed for recognition and enforcement as a decree of this Court. The letter of the Sole Arbitrator was prompted by a request made to him by the Respondent in writing that he causes the final arbitral award be remitted for filing in Court. The Letter filing the final award in this court was annexed with a letter from the Arbitrator to the parties allowing them to file the final award in Court, a signed supplementary award dated 24<sup>th</sup> August 2022, Notices, Minutes of the

Meetings, records of the proceedings, submissions and other necessary documents pertaining to the arbitration.

Gathered from the arbitral Award filed in Court, the Applicant and the Respondent signed a construction contract on 26<sup>th</sup> July 2006 for rehabilitation of regional roads in Lindi Region which was terminated on 10<sup>th</sup> September 2008 by the Respondent. The Applicant acting pursuant to the terms of the dispute resolution clause in the Construction agreement, took the matter through the Project Manager, Adjudicator and ultimately the Arbitrator whereby Eng. Dr. Salewi was appointed the Sole Arbitrator. Upon conducting the arbitral proceedings, Dr. Salewi, Sole Arbitrator published his Final Award dated 11<sup>th</sup> December 2013 in which the Applicant prevailed and the following orders were made in favor of the Applicant against the Respondent herein. The Respondent was ordered to pay the applicant for:

- 1. Loss of fuel Tax Exemption amounting to TZS. 159,358,716/14;**
- 2. Delayed payments and interests amounting to TZS. 197,494,502/11;**
- 3. Rate Change Bill 61.02 amounting to TZS 729,739,810/75,**

- 4. Termination of human resources amounting to TZS 50,622,000/=;**
- 5. Loss of recovery of mobilization costs amounting to TZS. 32,537,963/94;**
- 6. Respondent to give back the seized equipment and plants plus any costs arising out of their use and seizure;**
- 7. Finance cost to loss of fuel tax exemption amounting to TZS. 26,092105/10;**
- 8. Interest as at the BOT Commercial borrowing rate from the time they ought to have been paid to time they are eventually paid.**

The Applicant was dissatisfied with the above Arbitral Award as it left some matters undecided especially on item No.6 above, hence the Applicant filed in this court Misc. Commercial Cause No.107/2017 challenging partly the Final award. This Court in its Ruling granted the application and ordered remission of the Final Arbitral Award to the Sole Arbitrator with directions that the sole arbitrator should quantify the costs for use and seizure of the equipment and plants in terms of monetary value.

Upon remission of the Final Arbitral Award to Dr. Salewi, the sole Arbitrator, he directed that two independent experts be appointed to

quantify the costs for use and seizure of the equipment and plants in terms of monetary value and submit to him their reports. Also, he directed the parties to submit their own expert reports on the quantification of costs for use and seizure of the equipment and plants in terms of monetary value. The two Court Appointed experts submitted their expert reports and the Applicant also submitted its expert report but the Respondent did not file the expert report. The Sole Arbitrator at the end, published a Supplementary Award. However, the Applicant challenged the issued supplementary award on the ground that the Sole Arbitrator had not taken into account the experts' reports submitted on quantification of the costs for use and seizure of the equipment and plants in terms of monetary value. This challenge was vide Misc. Civil Cause No.123 of 2016. The challenge was successful and this Court granted the application, and once again ordered remission of the Final Award to the Sole Arbitrator with directions that the Arbitrator should consider the experts' evidence in his Supplementary Award. Upon the second remission, the matter was placed before another Sole Arbitrator namely QS Modestus Lukonge. This time the Sole Arbitrator considered only the expert reports submitted by the two experts appointed by the predecessor sole arbitrator but rejected to take into account the expert report submitted by the Applicant pursuant

to directions of the predecessor sole arbitrator. QS Modestus Lukonge published his Supplementary Award on 13<sup>th</sup> December 2017 and awarded costs for the loss of use of and seizure of plant and equipment for six 6 years and 5 months only based on the rates set by the two experts appointed by the Predecessor Arbitrator. The Applicant was aggrieved once again and he challenged the Second Supplementary Award in this Court vide Misc. Commercial Cause No.118 of 2018. The grounds of the challenge this time were that the second Sole Arbitrator failed to consider and determine in his award, the total number of days that the plants and equipment continued to remain in the possession of the Respondent up to the date of returning them to the Applicant and that the second sole arbitrator had failed to issue an order compelling the Respondent to return to the Applicant the seized plants and equipment. On 16<sup>th</sup> July 2019, this Court, once again, granted the application and ordered remission of the Final Award for the third time to the sole arbitrator with instructions that the sole arbitrator should determine all the undetermined issues. The third remission landed on the table of Suma Stephen Mwaitenda as the 3<sup>rd</sup> Sole Arbitrator.

Upon his appointment and all formalities, Mr. Mwaitenda Sole Arbitrator on 24<sup>th</sup> August 2022, issued the present Supplementary Award on

Remission which is the third in a row. In his 12 pages long supplementary Award on remission and from the 40-pages long joint experts' report, the orders of the Sole Arbitrator which are otherwise scattered in the two documents can be gathered, summed up and reproduced as follows; that the Sole Arbitrator in the Supplementary Award on Remission has issued the following orders in favour of the Applicant as against the Respondent herein:

1. That the Respondent is given up to 6<sup>th</sup> October 2022 at 11:00am to release the Claimant's plants and Equipment and return them to the Applicant.
2. That the cost of the plant and equipment of the Respondent based on 3530 days from the date that the Respondent seized the Applicant's Plants and Equipment on 6<sup>th</sup> October 2008 up to 6<sup>th</sup> October 2022, excluding public holidays and Weekends is TZS. 3,396,462,963.54.
3. That the Respondent is ordered to pay the Applicant the costs of repairs/replacement of the Applicant's Plants and Equipment at the amount of Tshs. 102,724,250/= as set out by the experts QS Dr. Mushumbusi, Z. Medard and Eng. Lucas B. S. Chogo in their joint expert report dated 7<sup>th</sup> December 2015 and as awarded in

the supplementary award before returning the plants and equipment to the Applicant.

4. That should the Respondent fail to return the plants and equipment to the Applicant as ordered, the same daily rates for the plant and or equipment as tabulated at page 9 of the Supplementary Award on remission dated 24<sup>th</sup> August 2022 published by Suma Stephen Mwaitenda, Sole Arbitrator, shall be payable by the Respondent to the Applicant until the date of their return.
5. The Respondent shall pay the costs of the remission of the award to the Sole Arbitrator consisting of Arbitrator's fees and expenses plus VAT and the NCC fees and expenses inclusive at the amount of Tshs. 37,785,000/=.

Upon the filing of the said Supplementary Award in Court, the Court on 13<sup>th</sup> February 2024 directed that the Respondent be served with Notice to appear and show cause why the Award inclusive of the reliefs granted therein should not be recognized and enforced as a decree of the High Court. The Respondent was dully served on 1<sup>st</sup> March 2024 and has not filed any petition to challenge the application at hand. On 28<sup>th</sup> March 2024

when the case was called for hearing Mr. Rosan Mbwambo and Shani Juma, learned advocates, appeared for the Applicant and the Respondent appeared through Ms. Dora Komba Senior Learned Senior State Attorney who was assisted by Mr. Galusi Lupogo learned State Attorney. Mr. Mbwambo briefly submitted that the current supplementary Arbitral Award was made in addition to the final award issued by Engineer Dr. Salewi on 11<sup>th</sup> December 2013 and that the final arbitral award has been filed in this court as Misc. Commercial Cause No.107 of 2014. Therefore Mr. Mbwambo submitted that the Applicant prays for the final award and the present supplementary award to be recognized by the court as binding and enforceable under Section 83(1) of the Arbitration Act, Cap 15 of the Laws of Tanzania (R.E 2020).

Ms. Dora Komba, learned Senior State Attorney submitted in response that on the side of the Respondent they agree with the prayers sought and that they pray to know the final breakdown of the amounts in the final award and the supplementary awards. She submitted further that the Respondents are requesting for the Applicant to waive or relinquish the costs in the supplementary award because the matter has been in courts for at least 16 years.



In rejoinder, Mr. Mbwambo responded that the actual amounts will be dealt with after the award is recognized by the court that is when the amounts will become known. He submitted that it is at the time of execution when they both know the figures that they can listen to the prayers or request by the Respondent and thus at the time they do not accept that request.

At the outset, I should state that the Letter by the Sole Arbitrator QS Suma Stephen Mwaitenda to the Honourable Deputy Registrar of this Court transmitted and filed only the Final award on Remission dated 24<sup>th</sup> August 2022 for recognition and enforcement as a decree of this court. Pursuant to that letter, the present case namely Misc. Commercial Cause No. 405 of 2024 was opened and assigned to me. I am not presiding over the said Misc. Commercial Cause No. 107 of 2014 which Mr. Rosan Mbwambo mentioned in his submissions that he was also seeking to have the Final Award of QS. Modestus Lukonde, Sole Arbitrator be recognized for enforcement as a decree of this court. That case, if any, is not before me and as such I cannot made any orders in respect thereof. I will therefore proceed to deal with the present matter only.

The petition was filed under Section 83(1) of the Arbitration Act (Cap 15 R.E 2020). Section 83(1) provides that **"Upon application in writing**

**to the court, a domestic arbitral award or foreign arbitral award shall be recognised as binding and enforceable.”** The present arbitral award is domestic arbitral award.

The grounds to be used by the court in granting or refusing to grant an application for recognition and enforcement of a domestic or foreign arbitral Award as an Order or a Decree of the Court in Tanzania are stipulated under section 83(2) of the Arbitration Act, Cap 15 of the Laws of Tanzania. Section 83(2) provides that:

- (2) Notwithstanding subsection (1), a domestic arbitral award or foreign arbitral award shall be refused if**
  - (a) at the request of the party against whom it is invoked, that party furnishes to court proof that-**
    - (i) parties to the arbitration agreement, pursuant to the law applicable-**
      - (aa) lacked capacity to enter into the agreement;**  
**or**
      - (bb) were not properly represented;**
    - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the**

**law of the state where the arbitral award was made;**

- (iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;**
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that, if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced;**
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or**
- (vi) the arbitral award has not yet become binding on the parties or has been set aside or**

**suspended by a court of the state in which, or under the law of which, that arbitral award was made; (a) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence; or**

**(b) if the court finds that-**

**(i) the subject matter of the dispute is not capable of settlement by arbitration under any written laws; or**

**(ii) the recognition or enforcement of the arbitral award would be contrary to any written laws or norms.**

It is noteworthy that the 6 grounds stipulated under section 83(2)(a) are substantive grounds which can only be considered by the Court if the person against whom the award is sought to be enforced, invokes them as the grounds for his resisting the recognition and enforcement of the domestic or foreign arbitral award. On the other hand, the 2 grounds stipulated under section 83(2)(b) are ex officio grounds which can be considered by the court suo mottu even if the party against whom the award is sought to be enforced does not raise them. It is therefore the duty of the Court to always satisfy itself on whether or not the arbitral award sought to be recognized and enforced as a decree or order of the

Court is in conformity with the 2 ex-officio grounds even if neither party to the application or petition raises them.

It is trite that the current application is not opposed by the Respondent. The letter by the Sole Arbitrator transmitting the award for filing in court stated that actually it was being filed at the request of 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 were loud and clear that they were not opposing the recognition and enforcement of the award but were pleading with the Applicant to have leniency with regards to costs of the remission of the award. Therefore, the grounds under section 83(2)(a) are not going to be considered in this Ruling. It is the duty of the court in terms of section 83(2)(b) of the Arbitration Act, however, to assess the award and satisfy itself as to its conformity with the 2 ex-officio grounds prescribed under section 83(2)(b) of the Arbitration Act. I therefore proceed to consider whether *"the subject matter of the dispute is not capable of settlement by arbitration under any written laws in Tanzania or whether the recognition or enforcement of the arbitral award would be contrary to any written laws or norms of Tanzania"*? My answer is in the negative. The dispute that the Applicant referred to for Arbitration and

which was remitted to the Sole Arbitrator by this Court concerned a breach of road construction contract. The Supplementary Award on remission made by the Sole Arbitrator (arbitral tribunal) QS Suma Mwaitenda is with respect to the relative rights and obligations of the parties herein arising out of and in connection to their road construction agreement. I know no law in Tanzania that would make that subject matter not capable of settlement by way of arbitration; and hence the dispute was arbitrable.

The second test under section 83(2)(b) is whether the recognition or enforcement of the arbitral award would be contrary to any written laws or norms of Tanzania. Again, I am satisfied that the recognition and enforcement of the Supplementary arbitral award on remission in this matter, would not offend any laws or norms in Tanzania. The learned State Attorneys representing the Respondent, either, did not raise any such concern. The court also has found no violation of the laws or norms of Tanzania if the Supplementary arbitral award on remission is implemented. All the orders in the award are valid legal remedies in the courts and tribunals of Tanzania. There is no law or norm obtaining in the country that would be incompatible with recognition and enforcement of such kind of an award. I therefore find that the unchallenged Supplementary arbitral award in remission in the present application,

passes the dual ex-officio tests under section 83(2)(b) of the Arbitration Act, Cap 15 of the Laws of Tanzania.

Having found that there is no legal obstacle for the recognition and enforcement of the supplementary arbitral award on remission in the present application, I order that the same is hereby recognized and is enforceable in the same manner as a judgment or order of this court.

In *Ardhi University v. Kiundo Enterprises (T) Ltd.*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial Cause No. 272/2015 (Unreported), it was held that:

**an award alone cannot be enforced if it is not converted into a decree by a court order, and an order alone without the award would not amount to a decree. That is, an arbitral award, having been filed in court, must be tabled before a judge or magistrate, as the case may be, who will make necessary orders to render it a decree of the court.**

More often than not, an award is not written with the same precision and clarity of a High Court judgment. And certainly, an award is more like a judgment than a decree. The practice as can be seen in the decision of this court in the case of *Attorney General v Hermanus Philippus Steyn*, Misc Commercial Cause No. 11 of 2010 (unreported) has

explained the process as involving the Judge taking the award and extracting a decree from it. The decree is then signed by a judge.

After going through the Supplementary Award on remission by the Sole Arbitrator QS Suma Mwaitenda dated 24<sup>th</sup> August, 2022 between the parties herein, I have extracted the following Orders which constitute the decree/ Drawn Order of this Court:

Accordingly, I grant the application. I do hereby enter judgment in terms of the award and recognize the Supplementary Final Award on Remission issued by the Sole Arbitrator QS Suma Mwaitenda dated 24<sup>th</sup> August 2022 between the parties herein as binding and enforceable as a Decree of this Court. I proceed to make the following Orders.

1. That the Respondent is given up to 6<sup>th</sup> October 2022 at 11:00am to release the Claimant's plants and Equipment and return them to the Applicant.
2. That the cost of the plant and equipment of the Respondent based on 3530 days from the date that the Respondent seized the Applicant's Plants and Equipment on 6<sup>th</sup> October 2008 up to 6<sup>th</sup> October 2022, excluding public holidays and Weekends is TZS 3,396,462,963.54.



3. That the Respondent is ordered to pay the Applicant the costs of repairs/replacement of the Applicant's Plants and Equipment at the amount of Tshs. 102,724,250/= as set out by the experts QS Dr. Mushumbusi, Z. Medard and Eng. Lucas B. S. Chogo in their joint expert report dated 7<sup>th</sup> December 2015 and as awarded in the supplementary award before returning the plants and equipment to the Applicant.
4. That should the Respondent fail to return the plants and equipment to the Applicant as ordered, the same daily rates for the plant and or equipment as tabulated at page 9 of the Supplementary Award on remission dated 24<sup>th</sup> August 2022 published by Suma Stephen Mwaitenda, Sole Arbitrator, shall be payable by the Respondent to the Applicant until the date of their return.
5. The Respondent shall pay the costs of the remission of the award to the Sole Arbitrator consisting of Arbitrator's fees and expenses plus VAT and the NCC fees and expenses inclusive at the amount of Tshs. 37,785,000/=.
6. That due to the uncontested nature of the case, each party shall bear its own costs in the present application.

It is so ordered.



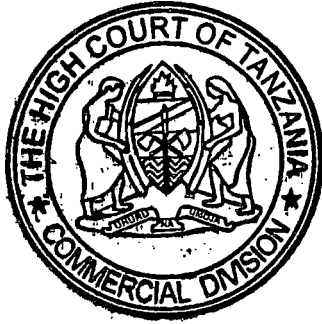
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**A. H. GONZI**

**JUDGE**

**18/04/2024**

Ruling is delivered in court this 18<sup>th</sup> day of April, 2024 in the presence of Mr. John James, Learned Advocate for the Applicant and Mr. Karoli Chambi learned State Attorney assisted by Mr. Gulisha Mwanga, Learned Senior State Attorney, for the Respondent.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

**A. H. GONZI**

**JUDGE**

**18/04/2024**