IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
Consolidated Misc. Commercial Cause Nos.13 & 32 of 2020

IN THE MATTER OF ARBITRATION ACT, CAP.15 [R.E.2019]

AND

IN THE MATTER OF ARBITRATION

BETWEEN

MEDICAL STORE DEPARTMENT.....PETITIONER/RESPONDENT

AND

COOL CARE SERVICES.....RESPONDENT/CLAIMANT

Last Order, 20/07/2020.
Ruling, 15/09/2020.

RULING

NANGELA, J.:

This ruling arises from a petition filed in this Court on the 8th June 2020 to challenge an Arbitral Award made in favour of the **Respondent/Claimant** and presented for filing in this Court on 1st of April 2020. The filing of the Award was in line with Rule 4 of the Arbitration Rules, G.N.427 of 1957, with a view to have it enforced as a decree of this Court. The said award, arose from a dispute under a procurement Contract No.IE/009/2014/HQ/SS/26/16, which was concluded

between the Petitioner/ Respondent (to be referred hereafter as **"the MSD"**), and the Respondent/Applicant (referred here after as "**COOL**"). The two parties agreed that **COOL** should supply to MSD, Module Machine for cold room $25m^3$.

For clarity, some facts need to be given, albeit in brief. The **MSD** is an autonomous department under the Ministry of Health, Community Development, Elderly and Children, established by an Act of Parliament, No.13 of 1993. On the 7th of August 2014, the **MSD** advertised a public tender *No.IE-009/2013-14/HQ/G/26* for supply and installation of Module Machine for Cold Room $25m^3$ under the National Competitive Bidding (NCB) procurement method.

It is averred that, through a letter, *Ref. No CCSL/TA/21/14,* dated 18th August 2014, the Respondent/Applicant (referred here after as "**COOL**") requested for clarifications from **MSD** on two issues: (i) the correct volume of the cold room between $25m^3$ (under schedule of requirements) and $15m^3$ (under section VII Technical Specifications), (ii) internal dimension of the cold room., *i.e.,* length, width and height to be supplied. It is the **MSD**'s averments that, on 4th September 2014, a letter Ref. No. MSD/003/2014/2015/463 was issued to '**COOL**', clarifying the volume of cold room as being $25m^3$ and its internal dimensions as being 3.4 x 3 x 2.5m. With such clarifications, it is alleged that '**COOL**' submitted its bid documents with correct technical specifications, which is $25m^3$.

It is alleged that, in its bid documents, '**COOL**' offered to supply **Walk-in cold rooms** and provided picture samples of the same together with an **anticipated work programme** if the tender would be awarded to '**COOL**'. Fortunately, **'COOL'** won the tender and was awarded a Contract No. IE/009/2014/HQ/SS/26/16, for the supply of Module Machine for cold room $25m^3$ (for the supply of *Walk-in Freezer room with 2 pcs module machine*). The contract price was **TZS 182,187,500.00.** It has been alleged that **'COOL'** completed the contractual assignment and on 4th January 2016 submitted its invoices to the

MSD via a letter Ref. CCSL/MSD/01/16 for payment of the contract sum. However, it is alleged that, the contracted sum was not paid until 21st December 2016.

On 9th February 2017, **COOL** wrote a letter to the **MSD**, *Ref. CCSL/MSD/01/24* acknowledging to have been paid the said **TZS 182,187,500.00.** Subsequently, however, **COOL** is said to have filed a demand for **TZS 44,387,341.10**, being interest for late payment. It is alleged that MSD did not honour it. Consequently, a dispute ensued which was referred to an Arbitrator. After hearing the dispute, the sole Arbitrator, Mr Justice (Rtd) Thomas Mihayo, made an Award in favour of the **COOL** on 31st October 2019. The award was subsequently filed in this Court, in line with Rule 4 of the Arbitration Rules, G.N. 427 of 1957 on 1st of April 2020, as **Misc. Cause No.13 of 2020**. In that award, the arbitrator granted the following reliefs to **COOL**:

(a) THAT, MSD is in breach of the contract for failure to honour Cool Cares' Invoice.

(b) Award of TZS 17,565,634.98 as interest for delay of payment of TZS 44,376,341.

(c) Award of TZS 3,100,000; TZS 6,500,000; TZS 24,000,000;

(d) Award of interest of 12% from the date of Final Award till payment of (c) above.

On the 20th of May 2020, when **Misc. Cause No.13 of 2020** was called on for mention before me, Mr Benson Hoseah, Learned Senior State Attorney, together with Ms Dominica Meena, learned State Attorney, appeared before this Court representing the MSD (Petitioner/Respondent). However, on that day, the Claimant (Respondent/Petitioner herein) was absent. Mr. Hoseah prayed for orders that the Petitioner/Respondent be allowed to challenge the enforcement of the award. He prayed for sixty (60) days from the date when the award was

filed in this Court. I granted the prayer and made the following further orders, that:

1. The Respondent (Applicant/Respondent herein) has to file its Petition to challenge the award on or before 8th June 2020.
2. Any answer to the award be filed on or before 22nd June 2020.
3. Rejoinder if any be filed on or before 29th June 2020.
4. Mention on 29th June 2020.

On the 29th June 2020 Mr Hoseah appeared for the Petitioner/Respondent while Mr Musa Kyoba, a learned counsel, appeared for the Respondent/Claimant. Mr Hoseah informed this Court that the Petitioner/Respondent had filed its petition as ***Misc. Commercial Cause No. 32 of 2020*** on 8th June 2020. In the Petition, which was filed under section 15 and 16 of the Arbitration Act, Cap.15 [R.E.2019], rule 5, 6, 7 and 8 of the Arbitration Rules, G.N.427 of 1957, the Petitioner (MSD) prays for the following orders and reliefs:

(i) Declaration that the whole Arbitration Proceedings are a nullity.

(ii) This Hon. Court be pleased to set aside the award of the Sole Arbitrator for the reasons and grounds set under paragraph 20 (a) to (i) of the Petition.

(iii) Costs for the Petition be provided for;

(iv) Any other relief(s) as it may deem just and fit to grant in the interest of justice

On 18th June 2020, **COOL** filed its answer to the Petition, and, a rejoinder to **COOL's** reply was filed in this Court in compliance with the orders of this Court issued on the 20th May 2020. Since all pleadings were completed, Mr Hoseah requested the Court to allow the parties to argue the petition by way of written submissions. The prayer was granted and the parties duly filed their written submissions. Since there had been a desire to challenge the award, and, given that a Petition to challenge it was filed as Misc. Commercial Cause No.32 of

2020, this Court, acting *suo moto,* consolidated the ***Misc. Commercial Cause No.13 of 2020*** and ***Misc. Commercial Cause No. 32 of 2020.***

I made such a decision because; any of the orders that may be issued in respect of the *Misc. Commercial Cause No. 32 of 2020,* will necessarily affect the *Misc. Commercial Cause No.13 of 2020.* That being said, I will now proceed to examine the written submissions filed by the parties herein in respect of the *Misc. Commercial Cause No. 32 of 2020.* I will deal with each ground of submission separately as dealt with by the parties.

Concerning the **MSD's** written submissions, Mr Hoseah commenced its submission by adopting the contents of the petition and its rejoinder as part of the submission. He submitted that, the **MSD** is aggrieved by the Award of the Arbitrator and seeks that it be remitted or set aside on the **grounds of** misconduct as set out in paragraphs 20 (a) to 20 (i) of the Petition. He submitted that, according to the Contract, the number of walk freezer room with two (2) *pcs* module machine was two (2) and, as per clause 3, these were to be supplied '*in conformity with the provision of Contract*'. He argued further that, under clause 4 of the contract, the purchaser covenanted to pay the supplier in consideration of the provision of the goods and remedying the defects therein, the contract price or such other sum as may become payable under the provision of the contract at the time and in the manner prescribed by the contract.

Mr Hoseah submitted that, after the Respondent/Complainant handed over the project to the **MSD**, sometimes from December 2016 to February 2017, **MSD** carried out an auditing of its procurement activities and made a finding that, what was delivered and installed by the Respondent, was contrary to the Contract Ref. No.IE/009/2014/HQ/SS/26/16 signed and dated 29th June 2015. He contended that, instead of supplying that which the parties had agreed, **COOL**

supplied and erected two 15m^3 walk-in freezer with 1 pc of Module Machine each,(*i.e.,* it supplied two module machines and two 15m^3 cold rooms).

According to Mr. Hosea, when that anomaly was discovered, the **MSD** convened a meeting with **COOL** but the latter decided not to attend. Instead, **COOL** is alleged to have contended that, the supply and installation of two cold rooms with 15m^3 walk-in freezers, with 1 pc of Module Machine each, was an additional work and claimed for additional payment of TZS 24,000,000/, an amount which was above what MSD had already paid as contract price. Mr. Hoseah contended that, the **MSD** rejected the claim for lack of justification as per the contract and, subsequent to the rejection, **COOL** issued a Notice of commencement of Adjudication process through a letter dated 25th July 2016. The letter was annexed as Annexure OSG-2 to the Petition.

Mr Hosea contended, however that, to-date, no adjudication process had been commenced. Instead, **COOL** resorted to the filing of arbitration proceedings which culminated into an award the MSD is seeking to be set aside on grounds of jurisdiction and misconduct on the part of the sole arbitrator.

Submitting on the grounds for setting aside the award, Mr Hoseah contended, as **THE FIRST GROUND**, that, the Award was improperly procured because *the Hon. Arbitrator lacked jurisdiction to entertain the matter as the parties had agreed to channel their dispute to adjudication before arbitration.* Referring this Court to Clause 30.1and 2 of the General Condition of the Contract (GCC) Mr Hoseah argued that, the clause provides mutual consultation between the parties as a mandatory requirement and the first step, to be taken within 30 days subsequent to the dispute.

He contended that, on 21st June 2015 **MSD** invited **COOL** for a consultative meeting to discuss issues pertaining to the performance and deliverable under the contract but **COOL** failed to respond to the invitation

positively. Instead, on 25th July 2015, **COOL** issued a notice of adjudication in compliance with Clause 30.2 of the Contract by, (*Annexure OSG-2 to the Petition*). However, no adjudication took place and the Notice has never been withdrawn.

It was his further contention that, once a notice of adjudication is issued, the adjudication process is deemed to have commenced and, an adjudicator is supposed to issue a decision within 28 days. Thereafter a party aggrieved may within 28 days refer the decision of the Adjudicator to an Arbitrator as per **Clause 31.2 of the General Condition of Contract (GCC)**. Mr Hoseah contended that, under that Clause 31.2 of the GCC, there are two modalities provided, the first being adjudication which is to be followed by arbitration. He submitted that, the consent to arbitrate the matter was pegged on a requirement that parties must have exhausted the adjudication process and not otherwise. Consequently, he concluded, therefore, that, the appointment of the Adjudicator was a condition precedent for an arbitrator to entertain the dispute between the parties, and, in the absence of that, the Arbitrator lacked jurisdiction to determine the dispute.

Mr Hoseah further submitted that, it was erroneous on the part of the Arbitrator to have conferred jurisdiction to himself and proceed to arbitrate the matter contrary to the Agreement (*Annexure OSG-1 to the Petition*), by holding that the parties, having chosen the arbitrator and attended a "Preliminary Meeting" were deemed to have abandoned the process of adjudication. He argued the decision of the arbitrator is thus null and void.

To buttress his submission, Mr. Hoseah referred to this Court to the decision of the Court of Appeal in the case of **Mvita Construction Company v Tanzania Harbour Authority, CAT Civil Appeal No.94 of 2001(Unreported).** In that case, the Court of Appeal of Tanzania stated as follows, that:

> "We, also, at this juncture, and for the avoidance of doubt, wish to highlight the distinction and similarities between the jurisdiction of Courts of law and that of an arbitrator. In the case of a Court of law, a decision reached by a Court without jurisdiction is null and void because jurisdiction goes to the very root of the authority of the Court to adjudicate upon the case. Also, in a Court case, parties cannot by mutual consent confer jurisdiction on a court which does not have jurisdiction to adjudicate on the matter."

Mr Hoseah submitted that, the Arbitrator misconducted himself by proceeding to hear and determine the matter without the parties having undergone through the process of appointing an adjudicator. Mr. Hoseah further relied on the case of **M/s ISPAT Engineering & Foundary v M/S Steel Authority of India (2001) AIR SC 2516, 2001 (5) ALT 9 SC** to support his argument. In that case, the Indian Supreme Court had stated that:

> "The Arbitrator or Umpire as the case may be, has no authority or jurisdiction to abdicate the terms of the contract or what the terms of the contractor or what the parties desired under the contract and not beyond... It is settled law that, the Arbitrator derives authority from the contract and, if he acts in manifest disregard of the contract, the Award given by him will be arbitrary one."

In view of the above case, it was Mr Hoseah's submission that, the Arbitrator lacked jurisdiction, and the award should be set aside.

On 18th August 2020, **COOL** filed its written reply submissions opposing the Petition. **COOL** sought leave to adopt all facts contained in its answer to the petition as forming part of its submission. Taking note of the fact that the record of the arbitration proceedings and the award was filed in this Court by the arbitrator by virtue of Rule 4 of Cap.15 [R.E.2019], **COOL** submitted that, as a matter of law, an arbitrator's decision is open to challenge on the basis of the arbitrator's misconduct or jurisdiction.

COOL conceded further that, if grounds 20(a) to (d) on page 8 of the Petition may result in a decision to set aside the award if properly pleaded and

proved, grounds 20(e) to (i) on page 8 the Petition are dressed up as grounds of an appeal on the very merits of the Arbitration award. **COOL** argued that, in our jurisdiction, arbitral awards are not appealable in Courts but the Court's intervention is only limited to the extent provided for by the law. **COOL** submitted that, the contract between the parties (*Annex.OSG-1*) provided for a procedure for settling disputes under the GCC, (*page 66-67*) as amended/supplemented by the SCC (*page 73*). It was **COOL**'s submission, therefore, that, the SCC provisions are superior to the GCC provisions and a proper reading of the GCC must be aligned with the GCC.

Responding to **GROUND ONE** upon which arguments were based to challenge the petition, **COOL** submitted that, that ground is premised on Clause 30.1, 30.1 and 31.2 of the GCC. It was submitted that, the **MSD** failed to connect these Clauses with Clause 31 of the SCC, page 73 and for that reason the ground challenging the award is rendered baseless. It was **COOL**'s submission that, Clause 31 of the GCC was amended under the SCC at page 73 of the Contract and dispute could be submitted to adjudication or arbitration.

COOL contended that, it opted for arbitration under item 24 of the SCC and argued that, under that item, parties had agreed that the institution which will administer arbitration shall be mutually agreed and, that, if the parties agrees to that route, then arbitration will be out of court arbitration guided by the contract and rules of that institution. Further to that, **COOL** submitted that, if the parties fail to agree on arbitration institution, then, the arbitration institution will be the Court. **COOL** submitted, therefore, that, in view of the above, the parties were at liberty to opt for arbitration or adjudication by virtue of the SCC.

In the alternative, **COOL** contended that, at no time was the **MSD** in objection to the tribunal's jurisdiction. Instead, on 04th September 2018, **MSD**'s chief counsel communicated an email to the Tribunal (*Annexure CCSL-03 to the*

answer to the petition) to the effect that Arbitration was a proper forum in line with the contract provisions. **COOL** contended, therefore, that, **MSD** cannot challenge it at this time and the ground of jurisdictional challenge lacks substance. Relying on the case of **M/s ISPAT Engineering & Foundary v M/S Steel Authority of India (supra)**, it was **COOL's** submission that, since an arbitrator derives his/her authority from the contract, the arbitrator in this petition did the same and, for that reason, the first ground is baseless.

MSD made a brief rejoinder on the first ground. It denounced **COOL's** interpretation of the Contract as being improper since there is no amendment of Clause 31 under the SCC. The **MSD** contended that, Clauses 30 and 31 of the Contract, provide for mandatory requirements regarding how disputes should be resolved and, insisted, therefore, that, on proper construction, the procedure set out under those Clauses were not optional and **COOL**'s argument should be rejected.

In my view, and having examined the above rival submissions, the issue to be addressed is: ***whether the first ground raised by the MSD to challenge the award is meritorious***. Ordinarily, arbitral awards, once granted, are not easily open to challenge. Arbitration proceedings are somehow unique. Stephenson, D. A. (1993) "*Arbitration Practice in Construction Contracts*", Third Edition, p.1 notes that more than 250 years ago Lord Justice Sir Robert Raymond provided a definition of who is an arbitrator and said:

> "An arbitrator is a private extraordinary Judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have an arbitrary power; for if they observe the submission and keep within due bounds, their sentences are definite from which there lies no appeal."

It follows, therefore, that, arbitral proceedings are not easily open to scrutiny with the finesse of a toothcomb. (See the decisions of this Court in the cases of **Mahawi Enterprises Ltd v Serengeti Breweries Ltd, Misc.**

Commercial Cause No.9 of 2018 (HC Comm. Division) (unreported), and **CATIC International Engineering (T) Ltd v University of Dar-Es-Salaam, Misc. Commercial Cause No.1of 2020 (HC Comm. Division) (Unreported))**. However, it is also trite law that, in an appropriate case, an arbitral award can be set aside if it is established that the arbitrator misconducted himself or had proceeded without or beyond his jurisdiction. These are common but separate and distinct grounds for challenging an award.

On the other hand, where there are errors apparent on the face of the award, the award can only be set aside if such error is apparent on the face of the award, namely, in the award itself or any document incorporated in the award. **(See the case of Vodacom Tanzania Ltd v FTS Services Ltd, Civil Appeal No.14 of 2016, CAT (unreported).**) Looking at the instant Petition, essentially, the decisions cited by Mr Hosea, (i.e., **Mvita Construction Company v Tanzania Harbour Authority, (supra)** and the Indian case of **M/s ISPAT Engineering & Foundary v M/S Steel Authority of India (supra)** portray the correct legal position as regards the issue of jurisdiction and where an arbitrator derives his/her authority.

In essence, jurisdiction is a fundamental issue in any dispute and, whoever is called upon to decide must have jurisdiction to do so. In arbitration proceedings, the arbitrator derives his/her authority from the contract. He/she cannot act outside it as doing so will render the decision a nullity. However, do these cases assist the **MSD**'s case? I shall find out in the analysis of the record at hand and the parties' submissions in relation to the first ground regarding why the award should be set aside.

Having gone through the rival submissions and the record of the instant Petition, it is clear, from Clauses 30 and 31 of the contract, that, the contract which governed the parties' relations provides for dispute resolution mechanisms.

In particular, parties had an agreement to have their disputes settled, *first*, by mutual consultation and, *second,* if that fails, by adjudication and, *finally*, arbitration. The relevant Clauses read as follows:

> "30.1. If any dispute or difference of any kind whatsoever shall arise between the purchaser and the supplier in connection with or arising out of the contract, the parties shall make every effort to resolve amicably such dispute or differences by mutual consultations.
> 30.2 If after thirty days, the parties have failed to resolve their dispute or difference by such mutual consultation, then, either the Purchaser or Supplier may give notice for adjudication.
> 30.3 If either party believes the decision taken by the other was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the decision.
> 31.1 The Adjudicator shall stated (sic) in the SCC give a decision in writing within 28 days of receipt of a notification of dispute.
> 31.2 The Adjudicator shall be paid by the hour (sic) at the rate specified in the SCC, together with reimbursement expenses of the types specified in the SCC, and the cost shall be divided equally between the Purchaser and the Supplier, whatever decision is reached by the Adjudicator. **Either Party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision.** If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.
> 31.3 The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the SCC."

Items No.22 to 25 of the SCC, Clause 31.3 clarifies the dispute mechanism procedure under Clause 31 of the GCC by providing as follows:

	Procedure for Disputes (GCC Clause 31) "Contracts with Supplier national of the United Republic of Tanzania" *In the case of a dispute between the Purchaser and a Supplier who is national of Tanzania, the dispute shall be referred to adjudication or Arbitration in accordance with the laws of Tanzania."*	
22	31.1	The Adjudicator shall be PPRA
23	31.2	The rate of adjudicator fees shall be as per the PPRA Rate
24	31.3	"Arbitration Institution shall be amicably if impossible to Court of law" and "place of carrying out arbitration –

		Tanzania" (Clause 31.3 GCC).
25	32.1	Appointing Authority for the Adjudicator as per governing law

COOL has submitted that, Clause 31 of the GCC was '*amended under the SCC, at page 73*' of the Contract, and, parties' dispute could be submitted either to adjudication or arbitration. The MSD challenged that submission arguing that, what is contained in page 73 of the SCC concerning procedure for Disputes (GCC-31) (*see the chart above*), is a mere '*heading note*' and not an amendment of Clause 31 of the GCC. At page 69 of the Contract, the heading to the SCC provides that, in case of conflict, the SCC clauses will prevail over those in the GCC. Principally, whereas the GCC is the backbone of the entire contract as it defines each party's rights and duties as well as the rules that will govern the relationship, the SCC either amends or supplements Clauses in the GCC.

In my view, I am in agreement with the counsel for **MSD** that, what is provided for in the SCC at page 73, under the title "**Procedure for Disputes (GCC Clause 31)**" is not an amendment *per* se, but rather a clarification regarding the procedure set out in Clause 31 of the GCC and, principally in relation to a dispute which involves a supplier who is a national of Tanzania. Items 22 to 25 of the SCC, therefore, provide elaborations regarding who will adjudicate it, the rates to be paid and, where parties resort to arbitration, how they should do so and, if they do not agree, whether they can go to the Court. It has also defined the applicable law and the place of arbitration.

As it may be noted under **Clause 30.1** to **Clause 31.3** of the Contract (cited herein above), any dispute affecting the parties' relation was to undergo a staged-resolution process. The Clauses do not provide for options but provides for a sequential or an orderly approach, i.e., from ***mutual consultation*** to ***adjudication*** and, later on, ***arbitration.*** In view of that, I am in agreement with

the **MSD**'s submission, that, the consent to arbitrate any dispute between the parties was in the first place premised or conditioned upon the parties' exhaustion of the adjudication process and not otherwise.

Since **COOL** had issued a *'Notice of Adjudication'*, and which was still pending, the process was deemed to have commenced and, for that reason, triggering the arbitration process at the same time, was akin to gun-jumping. That process could only be triggered within 28 days of the Adjudicator's written decision as per **Cause 31.2** of the GCC. In that regard, what then is the effect of all that to the arbitration proceedings so triggered?

As I stated shortly herein, the arbitration proceedings were prematurely initiated as the process envisaged under **Clause 31.2** had not been concluded. That Clause provided that, once an adjudicator renders his/her decision, either Party was at liberty to refer that decision of the Adjudicator to an Arbitrator 'within 28 days of the Adjudicator's written decision', otherwise the Adjudicator's decision would be final and binding. It is no disputed that **COOL** issued a notice of adjudication and, that, while it was pending, **COOL** filed for arbitration. The effects of non-adherence to **Cause 31.2** of the contract are that, the arbitration proceedings were improperly and prematurely laid before the Sole Arbitrator since there was no decision of an adjudicator before him as per the requirement of Clause 31.2 of the GCC. In **Mvita Construction Company v Tanzania Harbour Authority, (supra)** the Court of Appeal of Tanzania stated in paragraph 3, at page 22 that:

> "...under the law of Tanzania, an arbitrator's authority, power, and jurisdiction are founded on the agreement of the parties to a contract to submit present or future differences to arbitration."

In view of the above, given the fact that the arbitration proceedings were initiated prematurely while the adjudication process was pending, hence contrary

to what the Contract had provided, the arbitrator's authority, power and jurisdiction to entertain the proceedings were all questionable.

As rightly stated in the Indian case of **M/s ISPAT Engineering & Foundary v M/S Steel Authority of India (supra)**, an arbitrator has no authority or jurisdiction to abdicate the terms of the contract or what the parties desired under the contract. If that happens, as it seems to be in this instant petition, it will mean that, the arbitrator conferred jurisdiction upon himself contrary to the requirements of the contract. That is improper and the best of what the Sole Arbitrator should have done was to decline from the proceedings and refer back the parties to follow their agreed procedures. Failure to do so makes the award invalid as it was held in the case of **Patty Interplan Ltd vs TPB PLC, Civil Appl. No.103/01 0f 2018**. In that case, the Court of Appeal held that, where procedures are not followed, then the decision resulting there from cannot stand. The first ground raised by **MSD**'s legal counsel, therefore, is valid and the arbitrator's award cannot stand.

THE SECOND and THIRD GROUNDS relied upon to challenge the award, (see *paragraph 20 (b) and (c)* of the Petition), were in the alternative. Mr. Hoseah submitted, that, the award was improperly procured as the arbitrator vested himself with jurisdiction contrary to the arbitration agreement; and second, the award was improperly procured as resort to arbitration was limited to amicable settlement if impossible parties would have to refer the matter to the court of law.

He contended, in respect of those two grounds above, that, the issue which needs to be looked at is whether it was the intention of the parties that the arbitrator should determine the disputed between them. Referring to Clause 24 of the Special Condition of Contract (SCC) (attached to the Petition as Annexure OSG-1), the invocation of the arbitration process is to settle the dispute amicably

and not to determine the dispute. It was argued that, the arbitrator acted without jurisdiction when he opted to determine the dispute instead of supervising amicable settlement. Mr. Hosea argued that, according to the contract, any conflict between the GCC and the SCC, the SCC will prevail.

In its brief rebuttal, **COOL** submitted that, the two grounds raised by the MSD are devoid of merit as the MSD is applying hair-splitting style to argue them. Referring to Clause 24 of SCC, it was **COOL**'s submission that, Clause 31.3 was very clear and was not a stand alone as it is a creature of the GCC. It simply required parties to amicably agree to the institution for arbitration and if they fail, then the Court will be their choice. It was contended that, when the dispute ensued, **COOL** referred the matter to Tanzania Institute of Arbitrators as an arbitration institution and for an appointment of an arbitrator, and, that, the MSD did not object to that. It was **COOL**'s conclusion that the parties agreed to arbitration institution.

In a brief rejoinder, the **MSD** counsel rejoined that the parties never agree that the Tanzania Institute of Arbitrators will be their arbitration institution or that the rules of that institute should govern the proceedings. He submitted that, the decision was a unilateral one.

Looking at the submissions of the parties herein, I think I need not be detained much on these two grounds. Since I have upheld the first ground, as I found that the arbitration was prematurely triggered contrary to what the parties agreed under the contract, thus denying the arbitrator the requisite authority to arbitrate, it follows that the second and third grounds will also be upheld based on the reasoning in ground number one above.

Alternatively, even by looking at the contract, nowhere is it stated that the Tanzania Institute of Arbitrators will be the arbitration institution. What the SCC provides, in item 24, is that: *"Arbitration Institution shall be amicably if impossible to*

Court of law" and *"place of carrying out arbitration –Tanzania" (Clause 31.3 GCC).* So it was for the parties to agree about the arbitration institution and once agreed, as per Clause 31.3 of the GCC, the arbitration shall be conducted in accordance with the arbitration procedure of the agreed institution. However, as I stated, since the arbitration process was triggered prematurely contrary to what the parties had intended in their contract, it deprived the arbitrator of the rightful authority to preside over it. An award made without proper authority is invalid. No doubt about that.

THE FOURTH GROUND relied upon to challenge the award is that; *it was issued out of time and without jurisdiction as the arbitrator did not extend his time of making an award as per the Arbitration Act, Cap.15 [R.E.2019].* Mr. Hoseah argued that, an award issued outside the prescribed time limit is an award made without jurisdiction and hence a nullity and unenforceable. Mr. Hoseah referred to this Court section 4 of the Arbitration Act, Cap.15 [R.E.2019], read together with Items 3, 4 and 5 of the 1st Schedule to the Act. All these provide for an enlargement of time and that eventuality is implicitly by way of a mutual consent. This means that, an arbitrator gets his powers to enlarge or extend time to make an award only in a case where, after setting the arbitration on motion, the parties to it agree or consent to such enlargement of time. Mr Hoseah submitted that, in the proceedings before the arbitrator, there was no different intention expressed in the Contract (*Annexure OSG-1*) between the parties to revoke the implication of the First Schedule.

It was Mr. Hoseah' contention that, the Arbitrator ought to have complied with item 3 of the 1st Schedule to Cap.15 R.E.2019 by making his award within three months or extend the period in writing. According to Mr. Hoseah, whereas the Sole Arbitrator confirmed his appointment on 28th June, 2018, (**Annexure OSG-3**) he delivered his award on 31st October, 2019. He argued that he ought

to have delivered it on 25th September 2018 but proceeded without extending his time as required by the law. He concluded, therefore, that, by failing to extend the time, the arbitrator acted without jurisdiction and the award was delivered outside the prescribed time, hence improperly procured. He cited for the Court, **the Indian case of National Small Scale Industries Corporation v V.K Agnihotri & Others (High Court of Delhi), Civil Misc. (Main) No.174 of 1976** in which it was held that the Arbitrator could not proceed after expiry of four months' time without getting extension of time.

In a brief reply, **COOL** submitted that the **fourth ground** challenging the award is also misplaced. It was argued that the arbitration process was governed by the Tanzania Institute of Arbitrators Arbitration Rules which formed part of the parties' agreement. **COOL** referred to item 24 of the SCC and maintained that the parties intended to be bound by the Arbitration Rules under the Tanzania Institute of Arbitrators.

In my view, I do not think **COOL's** submission is merited. As I stated in respect of grounds 2 and 3 above, the parties' contract does not make an express mention of the Tanzania Institute of Arbitrators as the arbitrator in case of dispute. As I stated, item 24 of the SCC, which makes reference to Clause 31.3 of the GCC, stated that: *"Arbitration Institution shall be amicably if impossible to Court of law"* and *"place of carrying out arbitration –Tanzania" (Clause 31.3 GCC).* Consequently, as correctly pointed out by MSD's counsel, although **COOL** has argued, in paragraph 16 of its answer to the Petition, that, there were in place rules to govern the arbitration process, such submission is unfounded because it is not supported by the contract (**Annexure OSG-1**). Moreover, the contract does not state that the Tanzania Institute of Arbitrators will be the appointing authority of an arbitrator.

It is my settled view, however, that, any question touching on the need to resort to arbitration process will be valid and proper if such is derived from what the contract governing the parties provides. In this instant case, the Contract had stipulated that, in case a party is aggrieved by the decision of an adjudicator, that party was at liberty to initiate arbitration proceedings (Clause 31.2 of GCC) and, if that subsequent route is pursued, parties were to amicably agree on arbitration institution (item 24 of SCC) and, the arbitration shall be conducted in accordance with the arbitration procedure of the agreed institution (Clause 31.3 of the GCC).

However, as I said earlier, **COOL** had 'jumped the gun' since arbitration was a last resort having exhausted the agreed stages of consultation and adjudication, for which a notice had been issued. Consequently, I need not be trapped into a discussion regarding whether the arbitral award was rendered outside the prescribed time without first extending the period agreed under the contract or not. I have already said the award was invalid as the matter ought to have been preceded by adjudication as per the requirements of the contract and a notice to that effect was pending. What I may just say, in passing, is that, if an award is issued outside the prescribed time under the contract without first seeking for an extension of time, it will surely be set aside since an Arbitrator will be acting outside his mandate. An arbitrator, therefore, cannot act outside prescribed time within the contract without first getting an extension of such time within which he can act.

I will here below consider together the rest of the grounds relied upon by the Petitioner to challenge the award are the grounds set out in paragraphs 20(e), (f), (g), (h) and (i). As regards the **FIFTH and the SIXTH GROUNDS** (paragraphs *20(e) and (f) of the Petition),* which are to the effect that the Arbitrator came into wrong conclusion in determining issue of supply of different volumes

and visitor passbook and dispatch book, Mr. Hoseah submitted that, the arbitrator misconducted himself by concluding that **COOL** did not require an addendum or consent to supply different volume after their being made a finding that the volume of cold room required is $25m^3$.

Mr. Hoseah contended that the arbitrator misconducted himself, when he stepped into the shoes of **COOL** and argue her case by reasoning that the visitor's pass and dispatch book produced by the Petitioner needs further evidence that signature on the two documents is of the same person despite the fact that the two signatures are similar and COOL never disputed that fact.

Referring to **paragraph 74, page 29**, the Petitioner contended that, the Arbitrator made a finding thereon that, **COOL** was contracted to supply one cold room $25m^3$ with two modules. Mr Hoseah contended that, the basis for such a finding is the tender document and the Contract. It was contended, however, that, on **paragraph 84, page 33** the Arbitrator made a finding that **COOL** had a choice of the volume of the cold room despite having held that the Respondent was contracted to supply cold room of $25m^3$.

It has been contended further by the Petitioner that, the Arbitrator went ahead to hold that **COOL *"did not need addendum or consent in writing as provided under Clause 20.1 of the GCC to supply a different volume from stipulated in the contract."*** Mr. Hoseah contended that, such findings were based on **COOL's** letter Ref. No. CCSL/TA/21/14 of 18th August 2014 seeking for clarification on the internal dimension of the cold room, and which received a reply through a letter with Ref. No.MSD/003/2014/2015/463 dated 4th September 2014, which letter is said not did not reach **COOL** . Mr Hoseah contended that, although the Arbitrator reasoned that the letter was not sent to **COOL** within the meaning of Clause 34 (1) of the GCC, he proceeded to find that **COOL** had an option regarding the volume of cold room or justified to supply and install

15m^3 cold rooms. Mr Hoseah submitted that, such reasoning was the own making of the arbitrator since **COOL** never disputed that fact of communication of the letter dated 4th September 2014 through its pleadings or witnesses or cross examination of **MSD's** witnesses.

He submitted further, that, on paragraph 88, page 35 of the award, the arbitrator stated that the reasons for the supply and installation of the 15m^3 cold room instead of 25m^3 measurements given by one Mwaisemba were not contradicted. Mr Hoseah contended that the contract was very clear on what was to be supplied, i.e., the volume of cold room was 25m^3. It was also argued that, the arbitrator agreed with the reason of unavailability of space without there being any proof hence failure to uphold the principle that he who alleges must prove. Mr Hoseah challenged the arbitrator's findings on **paragraph 91, page 36 of the award**, on which the arbitrator states that the measurements specified as per the contract was either 25m^3 or 15m^3 notwithstanding the clear expression of the contract which requires cold room 25m^3. He submitted that, even if it is to be believed that **COOL** never received clarification of volume of cold room, the contract itself binds **COOL** to supply a cold room 25m^3 and not otherwise. Besides, he contended that, **COOL** did not bring any evidence to challenge the Visitor's Pass and Dispatch showing that Rose Isemba visited **MSD's** offices and collected the letter in dispute on 8th September, 2014 and neither did **COOL** bring the said Rose Isemba to testify.

Mr. Hoseah further challenged **paragraph 80, page 32 of the award**, contending that, the Sole Arbitrator misconducted himself by stepping into the shoes of **COOL** and argued its case that the documents submitted by **MSD** (the MSD-4) were not genuine despite the fact that **COOL** did not dispute that there is an officer from **COOL**, in the of Rose D. Isemba nor was she line-up by **COOL** to testify in respect of the documents, MSD-4. Mr. Hoseah argued,

therefore, that, there is a clear error on the face of the award which is self-evident, the Sole Arbitrator having held that the **COOL** was contracted to supply cold room of $25m^3$, he erred that **COOL** had an option of supplying cold room of $15m^3$ and, that, the Sole Arbitrator's conclusion is not premised in any term of the contract.

THE SEVENTH GROUND relied upon to challenge the award is that the arbitrator was not supposed to agree with verbal promise of issuing addendum without any proof. Mr Hoseah argued that the Arbitrator misconducted himself on that point because it was contrary to the clear terms of the contract. Referring to page 36, paragraph 90 of the award, Mr Hoseah submitted that, although the Arbitrator stated that parties are bound by their contract and that courts do not write contracts for the parties, on the other hand, the arbitrator went ahead to write the contract for **MSD** and **COOL**.

On that point, Mr Hoseah contended that, having established that there was no Addendum to the Contract (page 36, Paragraph 89 of the Award) the arbitrator was wrong to hold that it cannot outcast the different supply of room volume by the Respondent (page 37, paragraph 93 of the award). Citing clause 21.1 of the GCC, Mr. Hoseah contended that the contract is very clear on how to vary the terms of the contract could be done. Nevertheless, he argued that, the Sole Arbitrator ignored Clause 21.1 and relied on mere words of **COOL**, thus treading to an erroneous legal proposition of accommodating words against clear terms of the contract, all of which constitute misconduct on that part of the Sole Arbitrator.

The EIGHT and NINETH GROUND relied upon by **MSD** to challenge the award are on paragraph 20 (h) of the Petition, that, firstly, **COOL** was in clear breach of contract when it supplied two module machines and two

rooms of 15m^3, and secondly, that, the sole arbitrator misconducted himself by awarding **COOL** TZS 3,100,000; TZS 6,500,000; TZS 24,000,000 without proof.

As for the first limb of the above two grounds, Mr. Hoseah argued that, the Arbitrator misconducted himself when he held that **COOL** was not in breach of the contract by supplying two modules machines and two cold rooms of 15m3 each as **COOL** did not get their clarification it had sought from **MSD**, yet **COOL** signed a contract which requires her to supply cold room of 25m^3 without option. He made reference to page 29 paragraph 74 where a finding was made that **COOL** was contracted to supply cold room of 25m^3 and contended that, the arbitrator was wrong, having so found, to make yet another contradictory finding in page 36 paragraph 91 of the award that the measurement specified as per the contract was either 25m^3 or 15m^3. He concluded that, since the contract speaks for itself on that, the arbitrator's finding was erroneous.

As regards the 2nd limb concerning the award of damages without proof, Mr. Hoseah submitted that, the amount awarded ought to have been strictly proved. He referred to this Court the case of **Attorney General v Amos Shavu [2001] TLR 134** which held that, any decision of a decision maker, must be based only on the evidence on record and not on information privately obtained in the absence of the parties. He also insisted on the need to prove every fact as required by section 112 and 115 of the Evidence Act, Cap.6 [R.E2019]. He also cited the Court of Appeal decision in the case of **Future Century Limited v TANESCO, Civil Appeal No.102 of 2008 (unreported)** and submitted the **COOL** failed to prove its claims. He contended, therefore, that, the arbitrator's decision to issue the award in favour of **COOL** amounted to misconduct and, should the Court sees it fit to remit the award; it should remit it to a different arbitrator.

Finally, on the basis of the above grounds, **MSD** prayed for the following prayers:

(i) That, this Court be pleased to set aside the award for the reasons and grounds set out herein above;

(ii) That, this Court be pleased to set aside the costs awarded by the arbitrator;

(iii) Costs for the Petition be provided for;

(iv) Any other relief(s) as it may deem just and fit to grant in the interest of justice.

In its rebuttal submission to the above grounds relied upon to challenge the award, **COOL** submitted that, grounds five, six, seven, eight and nine (i.e., grounds set out in paragraphs 20(e), (f), (g), (h) and (i) of the Petition) are all premised on misconduct of the arbitrator. It was **COOL's** submission; however, that, these grounds are misconceived because they probe on matters which were well within the powers of the arbitrator.

COOL relied on the case of **Permanent Secretary Ministry of Water and Irrigation v Mega Builders Ltd, Misc. Commercial Application No.84 of 2015, HC Comm. Div.DSM (Unreported)** to support its views. In that case, the Court expressed the general reluctance of Courts to interfere on matters which an arbitrator is vested with powers to handle whether he did so rightly or wrongly. In that case, the Court had the following to say:

> "The rationale for limiting the court intervention in arbitration award is easy to understand; being that, it is parties themselves, who have on their own choice, chosen the alternative dispute settlement, instead of court and have pursued it. So, the role of the court is to satisfy itself, if parties have agreed to go to arbitration, if the arbitration was fairly conducted, and parties were accorded a fair and adequate opportunity of being heard. The court does not like to sit like an appellate court of arbitration."

The above is indeed a correct position of the law. Indeed, Courts, while dealing with an award, would not ever go to the extent of re-appreciating the

evidence as if it was an appellate court. Besides, an award containing reasons also may not be interfered with unless the reasons are found to be perverse or based on a wrong proposition of the law. Generally, as I stated earlier, arbitral awards are not easily disturbed. Nevertheless, that does not mean that they are completely insulated or immunized from the attention of the Courts. Where there are justifiable grounds, such as want of jurisdiction, misconduct or error apparent of the face of the record, the Court can step in to provide the necessary intervention.

As regards the rival submissions in relation to the **fifth**, **sixth**, **seventh**, **eighth**, and **ninth** grounds relied on by the Petitioner herein, I will not enquire into their merits. Since they are probing the conduct of the arbitrator in relation to the arbitration proceedings and the eventual award rendered by him, and, given that I have upheld the **FIRST, SECOND** and **THIRD GROUNDs** to the effect that, the arbitrator lacked jurisdiction to entertain the matter (as the parties had agreed to channel their dispute to adjudication before arbitration), I see no reasons why I should analyse at length the said grounds.

As I stated in respect of the first three grounds, the issue of jurisdiction is crucial and once it is established that the arbitrator did not have jurisdiction to entertain the proceedings, this Court need not be trapped into a discussion of the rest of the grounds raised by the Petitioner because the award was invalid. An invalid award is altogether void. In the upshot, this Court makes the finding that:

1. The learned Arbitrator lacked jurisdiction to entertain the proceedings referred to him because reference of dispute to arbitration was a stage which was resorted to contrary to what the parties had agreed under the contract.
2. Since the Arbitral Award filed in this Court as Misc. Cause No.13 of 2020 was issued while the arbitrator lacked

jurisdiction to do so, the same is bound to be set aside as being invalid. Consequently, I hereby set aside the said arbitral award and all orders made there in.

3. The Petition is hereby granted on the reasons set out herein.
4. Costs to follow the event.

It is so ordered.

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DEO JOHN NANGELA
JUDGE,

High Court of the United Republic of Tanzania
(Commercial Division)
15 / 09 /2020

Ruling delivered in chamber on this 15th day of September 2020, in the presence of the Ms Catherine Masinda, State Attorney, for the Petitioner, and Ms Janeth Bisanda, Advocate, holding briefs of Mr. Musa Kyoba, Advocate, for the Respondent.

Right of Appeal Explained.

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H. Mushi.
DEPUTY REGISTRAR,

High Court of the United Republic of Tanzania
(Commercial Division)
15/09/2020