IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 22 OF 2020

IN THE MATTER OF ARBITRATION ACT CAP 15 R.E. 2002

AND

IN THE MATTER OF A PETITION TO SET ASIDE THE SOLE ARBITRATOR'S (MR. ADONIS MWIJAGE KAMALA) FINAL AWARD MADE ON 20TH MARCH 2020 AND PUBLISHED ON 31ST DAY OF MARCH 2020

BETWEEN

RAMANI CONSULTANTS LIMITED ---------- PETITIONER

AND

SWISSPORT TANZANIA PLC ----------RESPONDENT

RULING

B.K.PHILLIP,J

This petition arises from an award in respect of the disputes between the petitioner and the respondent that was made on 20th March,2020 by the sole Arbitrator, Mr. Adonis Mwijage Kamala.

The background to this matter is that in 2013 the respondent had a project for construction of cargo handling facilities at Julius Nyerere International Airport. On the 19th June 2013 the petitioner and the respondent signed a Consultancy Agreement (herein after to be referred to as " the Agreement") whereby the respondent appointed the petitioner

as the architectural consultant in project. In the course of implementation of the Agreement disputes arose. The petitioner was claiming for payment of outstanding invoices for the services rendered whereas the respondent refused to pay the same and also was dissatisfied with the quality of the services rendered. Consequently, they referred their disputes to arbitration as per the terms of the Agreement. Mr Adonis Mwijage Kamala was appointed as the sole Arbitrator. On 20th March 2020, Mr. Kamala issued the final award in which reads as follows;

On the claim

I therefore, Award, Order and Direct that:

(a) Prayers to order the respondent to rectify defective roofing sheets and all defects discovered in the facility are rejected, and

(b) Each party to bear his/her own costs and expenses of this arbitral proceeding.

On the Counter Claim

I therefore, Award, Order and Direct that:

(a) The claimant shall on or before the 60th day from the date of this Award give the respondent withholding Tax Certificates total sum of USD 11,736.41 as the amount withheld on previous payments, failure of which any amount which the withholding Tax Certificate is not

given will be paid either to Tanzania Revenue Authority retrospectively (if tax laws allow) or to the respondent independent of item 4.3(b) below; and

(b) The claimant shall on or before the 6-th day from the date of this award pay the respondent USD 28,857.77 (inclusive of withholding Tax and value added Tax) as the balance of Remuneration (fee), fee of Additional Services and Reimbursable Expenses; and

(c) If the claimant shall fail to implement 4.3(a) and 4.3(b) above, the respondent shall be allowed to charge interest from the 61st day of this Award at the rate stated on clause 9.02 of the consultancy Agreement between the Claimant and the Respondent dated 19th June 2013 until the date of full and final settlement and

(d) Each part to bear his/her own costs and expenses of this arbitral proceeding.

The petitioner being aggrieved by the decision of the sole arbitrator lodged this petition alleging that the Arbitrator misconducted himself on the following grounds;

i) That in determination of the issues in dispute the Arbitrator disregarded the law applicable, in particular the Architect and Quantity Surveyors By-laws 2015 and the schedule thereto. He replaced the provisions of the By-Laws with his *"experience and*

expertise" and misinterpreted the laws on entitlement of the architect with regard to travelling time, expenses and the basis for rate of charges.

ii) That he interfered into portions of facts, data and issue which were not in dispute and not counter opposed by the parties and made adverse decisions on them.

iii) That he based his award not on the documents submitted before him, but on extraneous sources not known to parties, in that, instead of calculating fees payable to the architect on the total cost of works (final account) USD 8,210,644.13 as per the agreement are based his calculations on the contract sum of USD 4,200,000. He did not give reasons for the departure from the terms of the agreement.

iv) That the Arbitrator failed to observe the rules of natural justices for failure to accord opportunity to the parties to address him on the applicability of the provisions of the By-laws and the schedule thereto in relation to the claims and instead, unilaterally making interpretations of the said by laws

v) That the Arbitrator breached the rules of natural justices for making his decision on the basis of his "belief" without calling for evidence, if there was such a need .

vi) That the Arbitrator failed , to award costs of the arbitral proceedings to the petitioner who won the matter without giving any reasons.

In reply to the petition, the respondent disputed the allegations leveled against the Arbitrator. He maintained that the Award was justified. It was issued on the weight of evidence adduced by the parties and no any relevant law was disregarded.

The hearing of this petition was done by way of written submissions. The learned Advocates Samson Edward Mbamba and Peter Amos Mwelelo filed the submissions for the petition and respondent respectively.

Submitting in support of the petition , Mr. Mbamba started his submission by referring this Court to a quotation at page 835, from a text book titled **"Law relating to Arbitration and Conciliation", 8th Edition,2013, by Dr PC Markanda, Naresh Markanda, and Rajesh Markanda**, which reads as follows;

'Court cannot review an award of the arbitrator and correct any mistake in adjudication unless objection to the legality of the award is apparent on face of the award in the decision of a domestic tribunal chosen by the parties, and the courts which are entrusted with the power to facilitate arbitration and to make the awards, cannot exercise appellate powers over the decision'

Having stated the position of the law as explained in the text book cited herein above, Mr. Mbamba went on to submit that he was not intending to challenge the merits of the award, but the invalidity of the award due to the misconduct of the Arbitrator. He submitted that Arbitrator disregarded the law applicable in respect of what amount was payable to the Architects, that is, the Architects and Quantity Surveyors By-Laws, 2015 and the schedule thereto, (Henceforth "the By-Laws") , instead he applied what he expressed in his decision as " *experience and expertise"* . To cement his arguments Mr. Mbamba referred this court to the concluding remarks of the award which reads as follows;

'Having given the above analysis it is evident that the dispute existed on the amount either payable or outstanding to be paid to the respondent for this Tribunal to consider. Since there was no hearing and witnesses on this arbitral proceedings, the tribunal derived its deliberations based on the documents submitted to it, experience

and expertise of the arbitrator. The award thereof is set out in Section IV of this document'.

Further, he insisted that the arbitrator had a duty to act judiciously and not to ignore the law or misapply it in order to do what he thinks is just and reasonable. He cited the case of **Thawardas Plurumal Vs Union of India , AIR 1953 Sc 468** and **Continental Construction Co.Ltd Vs State of Madhya Pradesh AIR (1988) Sc 19688.**

Expounding more on this point, Mr Mbamba submitted that the Arbitrator ignored and /or misapplied the law entitling the Architect for the payment of travel expenses. He referred this court to section 138 (6) and (7) of the By-Laws and contended that the Arbitrator misapplied the By- Laws by holding that the provision of section 138(6) and (7) of the By-Laws is applicable only if the works is situated more than 80 kilometers from the Architect's office and if that work is visited by road or rail and 400 Kilometers by air, while the law does not provide for entitlement of the payments but it provides for the mode of payments only.

Another concern raised by Mr. Mbamba was that the Arbitrator deviated his way and failed to act judiciously when he decided to search by google map the distance from Askari Monument to the site. Thus, he engaged himself

in searching for evidence which was not availed to him by the parties and he did so without involving the parties on that issue, contended Mr Mbamba.To substantiate his argument he quoted part of the award at page 23 which reads as follows;

> *'The respondent having indicated that, the travelling time charged was from City Centre to the site, the Tribunal established the distance (using Google map) from kilometers. Therefore, the distance of travel by the respondent did not meet requirements of the By-laws, 2015. This Tribunal has not considered charges related to travelling time from the office of the respondent to site and return thereto.'*

According to Mr. Mbamba, the respondent had not counter opposed the facts and issues relating to both the entitlement for payments and the distance. So, there was no dispute on those issues. He cited the case of **Top Shop Estates Vs C. Danino (1985) 1 EGLR 9 Rep 514,** in which the court set aside the Arbitral award on the ground that the Arbitrator decided to collect evidence from pedestrian so as to assess the shop rents, to buttress his arguments.

Mr. Mbamba contended that it was a gross misconduct for the Arbitrator to rule out that the petitioner's claims were not proved while he determined

the petitioner's claims based on his own expertise and experience not the evidence adduced before him.

Mr. Mbamba also contended that it was a gross misconduct to the Arbitrator to determine the issues in dispute basing on his belief not the evidence adduced by the parties. He submitted that among the issues which were to be determined by the arbitrator was the amount of consultancy fees payable to the petitioner by the respondent with or without VAT or Withholding fees. In resolving this dispute the Arbitrator assumed and deemed some fact on which he based his decision. To cement his arguments Mr. Mbamba quoted part of the award in respect of the consultancy fees which reads as follows;

> *' the respondent submitted that USD 276,979.21 had been received from the claimant between 4th April , 2014 and 10th July , 2017.The claimant did not either offer any comment or raise any objection to the respondent statement about the amount paid therefore the Tribunal adopted it. The payment received by the respondent ,unless proved otherwise is deemed by this tribunal to have taken into consideration of withholding Tax and Value added Tax. This Tribunal has established that the agreed basic remuneration in Agreement signed on 19th June 2013 up to the date of completion of the project (including extension of time thereof) is USD 74,637.82'*

Furthermore, Mr. Mbamba submitted that the Arbitrator misconducted himself for failure to give reasons for not awarding costs to the winner. He contended that petitioner was a winner to both the main claim and the counter claim but no costs were awarded to it, contrary to the clear position of the law that costs normally follows that event unless the court orders otherwise for good cause. To cement his arguments he referred this court to the following cases; **Itex Sarl Vs The Chief Executive , Tanzania Roads Agency (TANROADS) & another, Civil Application No. 14 of 2015,** (unreported) , **Ramani Consultant Ltd Vs National Social Security Fund & Another , Civil Application No. 184 of 2014** (unreported) and **Huwai Shamte Vs Pili Marwa, Civil Application No. 475/01 of 2020** (unreported).

In conclusion of his submission Mr. Mbamba contended that he has disclosed gross misconducts on part of the Arbitrator which are sufficient to move this court to set aside the award with costs and order that another Arbitrator be appointed to determine the dispute between the parties herein.

In rebuttal Mr. Mwelelo submitted that it was agreed by the parties that in the conduct of the arbitration proceedings the applicable rules would be

The Architects and Quantity Surveyors Registration Rules of 2017 (hence forth "the Rules') . He went on to submit that Rule 13.5 of the Rules provides that " *when accepting his mandate , the Arbitrator shall be able to perform his task with necessary competence according to his professional and qualification* ".So, he contended that when discharging his duties as an Arbitrator the rules give full mandate to the arbitrator to use his expertise according to his professional qualification. Mr. Mwelelo was of the view that there was no any misconduct on part of the Arbitrator whatsoever. The experience and expertise used by the arbitrator in the determination of the issues was not a misconduct, but among his obligations as an Arbitrator when performing his tasks as he is permitted by the rules to apply his experience and expertise.

As regards the application of the By-Laws, Mr. Mwelelo submitted that the Arbitrator applied and interpreted the laws correctly. He used google map to establish the distance between the City Center and the site, and found out that the same was 11.5 kilometers only. So, the distance travelled by the petitioner did not meet the requirements stipulated in the By-Laws as it was less than 80 Kilometers, contended Mr. Mwelelo. He insisted that the distance from the Petitioner's office to the site, that was

found by the Arbitrator through the Google Map has not been disputed by the petitioner.

Moreover, Mr. Mwelelo submitted that during Arbitration the petitioner did not refute, offer any comment or raise any objection to the respondent's statement regarding the amount it paid to the petitioner. Under the circumstances the Arbitrator deemed the matters related to payments of withholding tax, Value Added Tax (VAT) to have been taken into consideration and the onus of proving otherwise was on the petitioner, and that was not done. Further, he explained that it was agreed in the Agreement that all the payments made had to include VAT and the respondent was supposed to retain Withholding Tax only. Mr. Mwelelo insisted that the Arbitrator never used the word "assumed" in his decision or assumed any fact.

As regards the concern on the Arbitrator's decision not grant costs to any party, Mr. Mwelelo submitted that , the Arbitral award is not in favour of any party both in the main claim and counter claim. The respondent herein was awarded some of its claims in the counter claim since the Arbitrator also rule out that the petitioner was not negligent in its conduct as an Architect in supervising the works because he did not approve the

disputed roofing sheets to be used in the project by another contractor and there were interferences in the role of project quality management by another entity employed by the respondent. On the other side, the Arbitrator ruled that the respondent was not obliged to pay the whole amount claimed by the petitioner in the fees notes (USD 271,660.87),contended Mr. Mwelelo.

In conclusion of his submission, Mr. Mwelelo invited this court to dismiss this petition for lack of merits with costs.

In rejoinder to his submissions, Mr. Mbamba reiterated his submission in chief and pointed out that the fact that the Arbitrator in discharging his duties was guided by the provisions of Rule 13.5 of the Rules, which requires him to perform his duty with necessary competence according to his professional qualification, it did not remove his duty to arbitrate the disputes brought before him within the scope of the established norms, especially to act judiciously , that is to be impartial , not engage himself in search of evidence and facts in excess of what has been brought before him and misapply or ignore the law. Mr. Mbamba insisted that the issue in this petition is not whether the arbitrator was right or wrong in his decision, but what he was demonstrating in this petition that there was a

misconduct on part of the Arbitrator in reaching his decision, regardless whether the decision was right or wrong.

Before embarking on the determination of the merits of this petition, I wish to point out that I have noted that the law under which this application is preferred has been referred to as " The Arbitration Act, Cap 15, R.E. 2002" instead of " The Arbitration Act Cap 15, R.E. 2019" as stipulated in GN.No.140 of 2019, published on 28th February 2020, whereby the 2019, Revised Edition of Cap. 15 which incorporates all amendments including and up to November ,2019 came into force. In the case of **Mayuma Investments Co Ltd Vs Attorney General, Land Case No. 9 of 2018**, this court was confronted with a similar issue to the one I have raised herein above, whereby the counsel in that case cited the Law of Evidence as "the Evidence Act, Cap 6, R.E 2002" instead of "The Evidence Act , Cap 6, R.E 2019", Hon. Mongela ,J had this to say,

> *'...Even though this edition supercedes all the previous editions of the Laws, listed in the schedule, I find the citing of R.E. 2002 instead of R.E 2019 in the notice filed by the defendant to be minor and can be cured by the overriding objective principle under section 3A of the Civil Procedure Code, R.E 2019,this is because the Evidence Act, Cap 6 was not repealed by the Law Revision Act , Cap 4'*

Similarly, it is the finding of this Court that the error I have pointed out herein above is not fatal. Thus , I will proceed to determine the merits of this petition.

Having analyzed the submissions made by the learned advocates, let me state from the outset that as submitted by Mr. Mbamba this court has no powers to decide on the merits of the award. The powers of this court to set aside or remit an Arbitral award and the conditions under which this court can exercise those powers are provided under section 16 of the Arbitration Act. For ease of reference, let me reproduce the provisions section 16 of the Arbitration Act;

Section 16

> *'Where an Arbitrator or Umpire* ***has misconducted himself or an arbitration or award has been improperly procured****, the Court may set aside the award*'.
>
> (Emphasis is added)

There are number of decisions of this court on the application and interpretation of the provisions of section 16 of the Arbitration Act. For instance in the case of **Holtan Builders Limited Vs Cool Care Services Limited, Misc Civil Cause No. 826 of 2016**, Honourable Mwandambo

J, as he then was said that the Court's power to set aside an arbitral award can only be exercised if one or both of the conditions set out under section 16 of the Arbitration Act, are in existence, namely; proof that the Arbitrator has misconducted himself or an Arbitrator or an award has been improperly procured. The Court has no power under section 16 of the Act, to substitute its own decision.

In the case of **D.B Shapriya and Co Ltd Vs Bish International Bv (2) 2003 E.A 2002** the court said the following;

> *'Courts cannot interfere with the findings of the fact by the arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the ground of misconduct. The court's intervention is limited to errors of law which are apparent on the face of the award.* ***It is only when an erroneous proposition of law is stated an award and forms the basis of that award that a court can set aside the award or remit it'***
> *(Emphasis added)*

In this petition the petitioner has enumerated a number of points to demonstrate that the arbitrator misconducted himself. However, upon perusing the arbitral proceedings and the award, I have noted that the grounds of complaints raised by the petitioner are all related to the evaluation of the evidence adduced by the parties during arbitration with

exception of one complaint only on the interpretation and the application of the By-Laws in respect of the petitioners claims for travel charges/expenses. For instance, the petitioner's complaint that the arbitrator disregarded the law and made his decision basing on his *"experience and expertise"*, basically is challenging the analysis and evaluation of the evidence adduced by the parties. In fact , the records show that the arbitrator stated that his deliberations were based on the " the documents, experience and expertise". With due respect to Mr Mbamba, it is not proper to omit the fact that the arbitrator stated that he used the documents tendered before him to decide the disputes between the parties and contend that the Arbitrator replaced the provisions of the laws with the "experience and expertise" only. Likewise, Mr. Mbamba's contention that the arbitrator based his decision on belief and assumed some of the facts is unfounded because the arbitral proceedings and the award, show that the arbitrator took into consideration the fact that the petitioner herein did not dispute the amount that was acknowledged to have been received by the respondent. So, whatever conclusion he reached was based on the analysis of the evidence before him.

In addition to the above, I have taken into consideration the petitioner's complaint on the Arbitrators failure to observe the rules of natural justice because he did not accord the parties opportunity to address him on the applicability of the rules and the schedule thereto. This complaint has no merits since the arbitrator was not legally bound to invite the parties to address him on the application of the Architect and quantity Surveyors By – laws,2015.

As regards the complaint on the Arbitrator's decision that each party should bear its own costs, in my considered opinion, the Arbitrator's decision cannot be faulted by this court because the issue of awarding costs or denial to award costs cannot be termed as a misconduct on part of the Arbitrator since costs was not part of the dispute between the parties that can lead to setting aside the arbitral award as per the provisions section 16 of Cap 15. Moreover, award for costs is consequential to the decision of the Arbitrator. To my understanding, the misconduct or wrong procurement of the award as envisaged in Cap 15 has to be related to the disputes between the parties.

The petitioner's complaint that the arbitrator embarked in an exercise for search for evidence in the google map also lacks merits because it is all

about the evidence and goes to the merits of the decision of the arbitrator, that is whether or not the arbitrator was justified to rely on the information he obtained from the google map.

However, I am in agreement with the second limb of the arguments raised by Mr. Mbamba in respect of this issue, that is, the Arbitrator misconducted himself in the interpretation and application of the By-Laws in respect of time charge fees. As correctly submitted by Mr. Mbamba, the provisions of section 138 (6) and (7) of the Architects and Quantity Surveyors By-Laws, 2015, provide for the mode of calculations of the fees, not the entitlements for payment of the fees. Therefore, the findings made by the Arbitrator in the award, that according to section 138 (6) and (7) of the Architects and Quantity Surveyors By-Laws, 2015 travelling time charges are only permissible and applicable when the work is situated more than 80 Kilometers from the Architect's office is a misinterpretation and misapplication of the law. Thus, it is not correct. The correct position of the law as provided under provisions of the section 138 (6) and (7) of the Architects and Quantity Surveyors By-Laws, 2015 is that if the distance from the Architect's office to the site is less than 80 Kilometers, then the formula for the charges will not be on hourly basis, but it does not mean

that the Architect is not entitled to any payments. I do not want to indulge myself in the exercise of making an order on how should the charges should be if the distance of between the Architect's office and the site is less than 80 Kilometers, as by so doing I will be stepping into the mandate of the arbitrator, but this suffices to show that the Arbitrator misapplied the said provision of the law. Since the aforesaid erroneous proposition and application of law is stated in the award and can be seen on the face of record ,as well as forms the basis of the award, I am of the settled opinion that under the circumstances, the ground of complaint in this aspect has merits. Therefore, I hereby set aside the award and order that the dispute between the parties should be determined by another Arbitrator. I give no order as to costs.

Dated at Dar es Salaam this 20th day of November, 2020.

B.K. PHILLIP

JUDGE