IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 1017 OF 2024

(Arising from Misc. Civil Cause No. 27821 of 2023)

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

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

ORYX ENERGIES TANZANIA LIMITED

(Formerly known as ORYX OIL COMPANY LIMITED) **……. 1ST PETITIONER**

ORYX ENERGIES SA ……. 2ND PETITIONER

AND

OILCOM TANZANIA LIMITED ……. RESPONDENT

RULING

S.M. MAGHIMBI, J:

The petition beforehand was lodged in this court under the provisions of Section 65(2), 73(3), 83(2)(a), (iii), (v), (vi), (vi)(a),83(b)(ii) and 83(5)(b) of the Arbitration Act, Cap. 15 R.E 2020 and Regulations 63(1)(a)(b)(c)(d) &(e) of the Arbitration (Rules of Procedure) Regulations 2021 ("the Regulations"). The petition emanates from Misc. Civil Cause No. 27821 of 2023 lodged by the Administrative Secretary of the Arbitral Tribunal ("Tribunal") under Rule 51(4) of the Arbitration (Rules of Procedure) Regulations 2021, G.N. No.149

of 2021 ("the Regulations") between OilCom Tanzania Limited the Claimant, and Oryx Energy Tanzania Limited (Formerly known as Oryx Oil Company Limited) as the first respondent and Oryx Energies SA as the second respondent. In the application, the Secretary is requesting the Court to receive and register the Final Award of the Arbitral Tribunal dated 30th day of November, 2023. In response to the notice to show cause, the petitioner has lodged this petition moving the court to issue the following orders:

1. An order refusing the recognition and enforcement of the final award made on 30th day of November, 2023.
2. Costs of this petition be provided for; and
3. Any other relief as this court may deem appropriate.

The orders sought above were premised on the following grounds:

1. The arbitral tribunal lacked substantive jurisdiction to make the award.
2. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and or, failing any agreement by the parties, was not in accordance with the law.
3. The arbitral award has not yet become final and binding on the parties as it is being challenged under the law which it was made.

4. The making of the arbitral award was induced or affected by undue influence from one of the Members of the Tribunal.
5. The enforcement of the arbitral award would be contrary to the law, norms and the public policy.
6. The petitioners were not given a proper notice prior to the appointment of an arbitrator appointed by the respondent.
7. The petitioners were unable to fairly and adequately present their case before the Arbitral Tribunal.

In their reply to the petition, the respondent opposed the petition tabling their prayers for the following orders:

1. An order dismissing the Petition in its entirety.
2. An order declaring that the Award dated 30th November, 2023 is Final and Binding on both the Petitioners and the Respondent.
3. An order confirming all the findings and reliefs made by the Tribunal through the Award.
4. An order registering the Final Award dated 30th November, 2023 as a Decree of this Honorable Court;
5. An order that the Respondent's legal fees and costs be borne and paid for by the Petitioners; and

6. Any other relief or Order this Honorable Court may deem just, fit and necessary to grant in the circumstances of this matter.

Before I proceed to determine the merits of this petition, it is only prudent that a brief background that led to the current petition be narrated. The parties herein signed a framework agreement on 18th November 2016. The said Framework Agreement required the contracting parties and, in some of the clauses, their affiliates, to sign performance agreements. The performance agreements envisaged by the Framework Agreements included Transit Transport Agreement, Local Transport Agreement, Hospitality Agreement for Rwanda, Hospitality Agreement for Dar es Salaam, 19 Lease Agreements and Profit-Sharing Agreement.

In the Framework agreement, it was provided that in case of any dispute between the parties the same shall be referred to a binding arbitration under the Arbitration Act of which the arbitral tribunal shall consist of three arbitrators. Accordingly, when the dispute subject of all these proceedings arose, the parties resorted to arbitration as agreed. In the arbitration proceedings, the Respondent's claim were based on allegations that the Petitioners had breached a framework agreement signed in 2016 and subsequent performance agreements entered into for the purpose of (i)

allocating to the Respondent, for transportation in Tanzania, 48,000 m3 volumes per year of Oryx's oil products (Local Transportation Agreement), (ii) allocating a minimum of 40% of a reference volume determined by Petitioners' indicative total volumes for their regular customers in transit as listed (Transit Transportation Agreement), (iii) allocating the storage of Petitioners' oil products to Respondent's facilities in Tanzania and Rwanda (Hospitality Agreements), and (iv) sharing with the Respondent the profits from Petitioners' sale of its products in the petrol stations leased to Petitioners by the Respondent (Profit Sharing Agreement).

Before the Arbitral Tribunal, the Petitioners filed a counterclaim claiming for the rescission of the Framework Agreement and subsequent contracts on account of misrepresentation. The Petitioners further claimed for USD 3.7 million as indemnification for the losses and damages suffered for the breaches of the Framework Agreement or, alternatively, the Petitioners claimed for USD 4.9 million for losses and damages suffered and USD 5.7 million for the expected losses and damages for the period from 2021 to 2023.

On the 30th day of November, 2023, the Arbitral Tribunal delivered its award in favour of the Respondent uttering the following reliefs to the Respondent as against the Petitioners:

(i) Payment of USD $ 132,480,198.90 as 90% of the claim (comprising of 60% of fixed costs, 30% of profit margin leaving out 10% of variables);

(ii) Payment of general damages at the tune of USD $ 20,000,000;

(iii) Interest on (a) and (b) above at the commercial rate of 5% per annum from the date of the Claim to the date of the Final Award;

(iv) Interest of 3% per annum from the date of the Final Award to the date of full satisfaction of the Final Award; and

(v) Costs of the arbitration.

Through Misc. Civil Cause No. 27821 of 2023, the Arbitral Tribunal forwarded the award to this court for its recognition and enforcement. Having been notified by the court of the existence of the Misc. Application No. 27821/2023, the Petitioners filed the current Petition, to wit, **Miscellaneous Civil Cause No. 1017 of 2024** on 19th January 2024, whereby in their detailed petition, the Petitioners prayed, inter alia, for this

Court to refuse recognition and enforcement of the Final Award of the Arbitral Tribunal dated 30th November 2023.

Hearing of the petition proceeded by way of written submissions following an order of this court dated 22nd February, 2024. Senior Counsel Dr. Ringo Tenga and Mr. Gerald Nangi, learned Advocate fended for the petitioners while the respondent was represented by Mr. Thobias Laizer, learned Counsel and Mr. Antony Mark, learned Advocate.

Having considered the submissions of all parties, my determination of the application will conveniently base on the grounds of petition as raised and argued by the petitioners in their petition. In the case of **Vodacom Tanzania Ltd vs Fts Services Ltd (Civil Appeal 14 of 2016) [2019] TZCA 514 (27 December 2019)** the Court of Appeal had set the parameters within which the court interfere with the award of the tribunal whereby having cited Section 16 of the Act, the court held at page 15-:

> *"It is clear from a reading of the above section that the court (that is, the High Court as defined by section 3 of the Act) is vested with limited jurisdiction to review and set aside an arbitral award if the petitioner seeking to have it set aside can establish*

either that the arbitrator or the umpire "misconducted himself" or that the "arbitration or award has been improperly procured. We hasten to say that any application to the High Court for review of an arbitral award is not an appeal and, therefore, cannot be disposed of in a form of a rehearing."

With above cited principle in mind, it is now my duty to determine, within the parameters that the courts are allowed to interfere with the award of the Arbitral Tribunal, as outlined in the cited case above, and see whether the raised grounds challenging the award in this petition have actually established a "serious irregularity", which justifies this Court to refuse recognition of the Final Award.

As outlined in their petition, specifically paragraphs 29 (i) to 29 (vii) of the Petition; the Petitioners' have moved the court to reject/refuse the registration and recognition of the award on the following grounds of complaints: -

1. The arbitral tribunal lacked substantive jurisdiction to make the award.
2. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and or, failing any agreement by the parties, was not in accordance with the law.

3. The arbitral award has not yet become final and binding on the parties as it is being challenged under the law which it was made.
4. The making of the arbitral award was induced or affected by undue influence from one of the Members of the Tribunal.
5. The enforcement of the arbitral award would be contrary to the law, norms and the public policy.
6. The petitioners were not given a proper notice prior to the appointment of an arbitrator appointed by the respondent.
7. The petitioners were unable to fairly and adequately present their case before the Arbitral Tribunal.

In my determination of the grounds raised, I find it prudent, for reasons that shall soon be apparent, to start with the second, fourth and sixth grounds of petition that the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties and or, failing any agreement by the parties, was not in accordance with the law and that the making of the arbitral award was induced or affected by undue influence from one of the members of the Tribunal. The petitioners also challenge the sufficient notice issued before an appointment of an arbitrator.

In all the three grounds, the petitioners are challenging the partiality of one of the arbitrators, Prof. Assad, which according to them has caused undue influence to other members of the tribunal. The complaint was premised on the ground that that the Petitioners were not given a proper notice of the appointment of an arbitrator appointed by the Respondent, and that the said arbitrator had an interest in the outcome of the arbitrator having allegedly worked for the respondent at some point in time. Now; my reason for determining the two grounds first is the obvious fact that this ground of complaint was tabled before this court and finally determined in **Misc. Civil Cause 138 of 2022** reported as **Oryx Oil Company Ltd & Another vs Oilcom Tanzania Ltd (Misc. Civil Cause 138 of 2022) [2022] TZHC 13966 (18 October 2022).**

In their reply submissions as well, the respondents brought it to the attention of the court that the issue of Prof. Mussa J. Assad's bias and impartiality was the subject of a Petition in this Court, Miscellaneous Civil Application No. 138 of 2022 and that following this Court's ruling on the matter, this Court is functus officio to entertain the same claim in these proceedings. They further brought to note that the Petitioners have appealed to the Court of Appeal against the said decision and invited this Court to take

judicial Notice of the pendency of an appeal lodged by the Petitioners in the Court of Appeal of Tanzania, namely Civil Appeal No. 47 of 2024, between Oryx Oil Company Limited & Oryx Energies SA versus OILCOM Tanzania Limited. That according to the Petitioners in that appeal, the grounds of appeal revolve around the central question of whether, under the circumstances of the matter, there were justifiable doubts of Mr. Assad's (sic) impartiality and independence as an Arbitrator in a dispute involving the parties.

In their rejoinder, the petitioners undoubtedly avoided to address the fact that the court is functus officio to determine the issue of impartiality of one of the arbitrators. They just maintained that the making of the arbitral award was induced or affected by undue influence from one of the members of the Tribunal. At this point of rejoinder is when the petitioners are arguing that despite the objection taken and pending in the Court of Appeal, the Arbitral Tribunal proceeded with the hearing and issued the impugned Final Award. I wonder what the petitioners expect this court to come up with at this point in the light of what has previously been decided by this court. As a matter of fact, they also agree the matter has been previously objected in this court and pending at the court of appeal. They however failed to

demonstrate how this court can now re-open the issue and re-determine it. My question is whether the omission to do so was by default or by design as a trial and error kind of technique to unfairly consume court's time.

Having said so, I shall now elaborate how the court is functus officio in determining the issue relating to the impartiality and undue influence of one of the arbitrators, Prof. Assad. In the ruling of this court in **Misc. Civil Cause 138 of 2022,** the opening words in the ruling of Hon. Ismail, J (as he then was) were that:

> *"In this petition, I am called* ***upon to accede to the petitioners' prayer from removal of Prof. Mussa Juma Assad from serving as an Arbitrator in the arbitral proceedings*** *that are pending between the parties herein. The reason for the removal is that the Arbitrator previously worked for the respondent, an act which is feared that it may compromise his impartiality. Resort to court action stems from the allegation that the Petitioners' motion for Arbitrator's recusal was given a wide berth. The embattled Arbitrator found nothing that would be said to constitute a justifiable reason to call for his recusal."*

This Court, having analysed the grounds of petition at page 14 of his ruling, this court held:

"As widely stated in the submissions, the arbitrator's liner in his CV is what has cast aspersions on his fitness to take part in the arbitral proceedings. It is about what is contended to be his past association with the respondent. A glance at the CV reveals what the petitioners contend, and what the arbitrator has given a clarification on. That there was an involvement in the project in which the respondent was also a player. The defence given by the arbitrator is that the respondent was not involved in hiring, supervising or paying for the services the arbitrator was engaged for. The inclusion of the respondent as a client was intended to boost his profile and associate himself with a successful establishment. No evidence has been adduced to refute this contention."

On those observations, this court came up with a conclusion on the same page 14-16 that:

"While the act of inflating the arbitrator's credentials is in bad taste and borders on misrepresentation, the effects arising out

of this inaccuracy cannot be said to bring about any sense of feeling that the arbitrator may be biased in his operation. I am hardly convinced that the same can amount to or result in the disqualification, or truncation of his participation in the arbitral proceedings. As I appreciate that this anomaly is stronger than a mere keyboard error, I take the conviction that the same cannot be a justifiable reason for "baying for the arbitrator's blood". It brings nothing to suggest, albeit remotely, that bias would be bred out of this misstatement 15 and form the basis for recusal. Instead, I consider it as a trifling misstatement which should not be hyped beyond what it is.

Thus, in the absence of any other interpretation than that the twisting of facts was intended to have the arbitrator ride on the wave of the respondent's fame, an explanation which I find some plausibility in, the imputation of bias is, to say the least, imaginary, illusory and a hot air. It fails to meet the threshold of bias as illustrated in the definition given above.

I also contend that sense would be made if the arbitrator was a sole adjudicator in the pending arbitral proceedings, which is not

the case. He is one of the three-bench team, with an umpire. The decision in the arbitration is by majority of the arbitrators. A single arbitrator will not, however influential he may be, sway the decision of the panel. It should be emphasized that, an arbitrator, once appointed, serves as a parties' judge and never the parties' proxy. This is why the fees for meeting the cost of arbitration is deposited by both parties and payable to all arbitrators from single pool or basket. I take the conviction that there is nothing to suggest, in the slightest degree, that the arbitrator's "tainted" past or association with the respondent, if any, would hand any advantage to the respondent or prejudice the interests of the parties, more specifically, the petitioners."

On the above observations and what has been found the court dismissing the petitioner's allegations against the partiality of one of the arbitrators Prof. Assad; the issue cannot be re-opened by rephrasing the line of contention manoeuvring the language while the crux of the matter remain the same, that the petitioners are challenging the presence of one of the arbitrators; an issue which was not only determined by the Arbitral Tribunal, but upheld by this same court. That will never happen as the apex court has

already condemned the act in many decision including the case of **Mohamed Enterprises (T) Limited Vd Masoud Mohamed Nasser (Civil Application 33 of 2012) [2012] TZCA 67 (23 August 2012)** whereby the Court of Appeal; when was faced with a situation that a Judge of the High Court set aside a decision of another Judge of the High Court; had this to say:

> *"We would like, however, to note with considerable apprehension, as to what would be the appropriate procedure to be adopted. We do so bearing in mind that there should be no room open to the High Court and courts subordinate thereto whereby one judge would enter judgment and draw up a decree in one case (thus bring such a case to a finality) only to find another judge of the High Court soon thereafter setting aside the said judgment and decree and substituting therefor with a contrary judgment and decree in a subsequent application. To do so in our considered opinion, amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction. Once judgment and decree are issued by a*

given court, judges (or magistrates) of that court become ' 'functus officio' in so far as that matter is concerned.

On the above holding of the Court of Appeal and the same being the case at hand, I will not dwell on determining the three grounds as in doing so, I will fall into the grave mistake of challenging and re-determining what has already been determined by my Brother Judge while sitting in this same court.

Having so made the above findings, I will now determine the first ground of petition, that the Arbitral Tribunal lacked substantive jurisdiction to make the award. The petitioner's submission were in line with what jurisdiction was defined in the case **of Fanuel Mantiri Ngunda vs. Herman Mnatiri Ngunda & 20 Others, Civil Appeal No. 08 of 1995 (Unreported) Court of Appeal of Tanzania at Dar es Salaam** where the question of jurisdiction was elaborated as follows:

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicated upon cases of different nature… the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the

commencement of the trial. It is risky and unsafe for the court to proceed with the trial of the case on the assumption that the court has jurisdiction to adjudicate upon the case".

As for the Arbitral Tribunal's lack of jurisdiction, the submission was that the limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means" (See Halsbury 's Laws of England, 4th Edition, Reissue Vol. 10, para 314). Indisputably, they argued, just as for the courts and other bodies exercising judicial functions, the Arbitral Tribunal likewise ought to ensure that it has jurisdiction in dealing with the parties' dispute before proceeding with the arbitral proceedings and rendering any award.

The petitioner then argued that contrary to this cherished rule of thumb, the Arbitral Tribunal in the circumstances pertaining to this petition had no substantive jurisdiction in rendering the Final Award dated 30th November 2024. The petitioners' substantive arguments were presented in two limbs, the first one was that the Arbitral Tribunal failed to make the award within the time prescribed by law, thereby ceasing to have mandate to make the Final Award sought to be recognized and enforced in the court. According to the petitioners, this was contrary to Regulation 64(a) of the

Regulations and the second limb was that the Arbitral Tribunal was composed of arbitrators who were not accredited.

Starting with the first limb that the Arbitral Tribunal failed to make the award within the time prescribed by law, thereby ceasing to have mandate to make the Final Award sought to be recognized and enforced in the court, contrary to Regulation 64(a) of the Regulations, the petitioner quoted the cited regulation which reads:

> *"(a) The arbitrators shall make their award in writing within three months after entering on the reference, or after having called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, in writing signed by them may, from time to time, extend the time for making the award;"*

The petitioners then submitted that as per the above provision, arbitrators are required to make the award within three (3) months from the date they entered into reference and or after having called on to act by notice in writing from any party to the submission. That looking at Annexures ORYX- 2, 4, 5 and 6 to the Petition, the arbitrators entered into the reference sometime on 15th December 2020 when the then two arbitrators, Hon.

Vincent Lyimo and Hon. Dr. Fauz Twaib appointed Prof. Ameritus Nicholas N. N. Nditi as a third and chairman of the Arbitral Tribunal. The final award was apparently, rendered on 30th November 2023, almost three years down the line. Their argument was that from 15th December 2020, when the Arbitral Tribunal entered into the reference, the prescribed three months lapsed on 15th March, 2021 and that since then, the Arbitral Tribunal ceased to have mandate or jurisdiction to determine the matter.

They went on submitting that according to the provisions of Regulation 64(a) cited above, arbitrators are allowed to extend the time for making the award in writing from time to time. Apparently, they argued, looking at Arbitral Procedural Orders Numbers 1- 10 in Annexure ORYX-3 to the Petition and or any other records, no such time was extended by the Arbitral Tribunal. Citing the decision of this court in **Miscellaneous Commercial Cause No. 07 of 2022, Voltalia Portugal S.A Vs. Nextgen Solawazi Limited**, High Court of Tanzania, Commercial Division at Dar es Salaam (unreported)), their conclusion was that in the absence of an extended time, the Arbitral Tribunal ceased to have mandate or jurisdiction to determine the dispute before it on 15th March, 2021.

The petitioners backed their submissions on the requirement to make the award within three months under Regulation 64(a) of the Regulations with the word "shall" used in Regulation 64(a) which denotes mandatoriness of the requirement, failure of which renders the final award made without jurisdiction, a nullity. The petitioners further invited the court to draw inference from other jurisdictions in determining this point. That Regulation 64(a) of the Regulations is in *pari materia* with Section 29A (4) of the Indian Conciliation and Arbitration Act, 1996 as amended. That the Indian laws provides for twelve months to make an award with an extension of time for making the award for addition of another six months only, making a maximum of 18 months within which a tribunal should make the award. The Indian Act further provides for consequences of not passing the award within the maximum period of 18 (eighteen) months and as per Section 29A (4) of the Indian Act, the mandate of the arbitrator or the arbitral tribunal will come to an end upon expiry of the 18 (eighteen) months, unless the court has, either prior to or after the expiry of the period so specified, extended the period. They hence argued that just like Regulation 64(a) of the Regulations, the mandate of an arbitral tribunal come to end upon expiry of the three (3)

months, unless the tribunal has, either prior to or after the expiry of the period so specified, extended the period.

Reference was made to the decision of the Indian Courts in **Nikhil H. Malkan v. Standard Chartered Bank Arbitration Petition (Lodging) No. 28255 of 2023**, decided on November 30, 2023 by the Bombay High Court. In this case, while holding that after expiry of the prescribed time for making the award the tribunal ceases to have mandate/jurisdiction it also held that *"it is advisable to approach the court seeking extension of the arbitral tribunal's mandate, before the mandate expires, instead of approaching the court after expiry of the statutory period."* This holding is based on the fact that in India the only issue that has not been settled and is now in the Supreme Court, is on whether a party should approach the tribunal or court to seek the extension before or after expiry of the prescribed time.

On the basis of their submission on the mandatory requirement, their conclusion was that the Arbitral Tribunal failed to make the award within the prescribed time and also failed to extend the time. Consequently, as per Regulation 64 (a) of the Regulations, their prayer was that recognition and

enforcement of the final award should be refused because the Arbitral Tribunal had no jurisdiction.

Replying to the respondent's contention on paragraph 19.1 of the answer to the Petition whereby the respondent admits the fact that the award was not made within the prescribed three (3) months and argued that the Regulations do not limit the time for making an award, the petitioner argued that this averment is not correct and is irrelevant. That the requirement to make the award within three (3) months is set by the applicable law and not by the Regulations which are thus irrelevant in that respect. In any event, argued the petitioners, the Regulations did not apply to the arbitration proceedings as they were not agreed by the parties.

On the respondent's arguments under para 19.2 and 19.3 of the answer to the Petition that the Petitioners should have raised this point before the Arbitral Tribunal, the petitioners' reply was that that such a proposition is misplaced as it was the Arbitral Tribunal's duty to observe the law on the prescribed time within which it should make the award and where appropriate to extend the time so as to ensure that it has jurisdiction to entertain the matter. Further that it was not the duty and or obligation of the Petitioner/Claimant to raise the concern before the Arbitral Tribunal as

alleged by the Respondent. In any case, the Arbitral Tribunal had powers to extend time under Regulation 64 (a) of the Regulations at any time before making the award and that none of the parties had expected that the Arbitral Tribunal would have proceeded to determine the matter and or make the award without extending the time. The petitioners emphasized their prayer that the court refuse to recognize and enforce the Final Award dated 30th November 2023 on this ground alone.

The second limb on the ground of jurisdiction was that the Arbitral Tribunal was composed of arbitrators who were not accredited. In this second limb, the Petitioners complain that the Arbitral Tribunal was composed of arbitrators (Hon. Justice Engera Kileo (RTD) and Prof. Mussa Assad) who are not duly accredited arbitrators as required by law. They based their argument on the accreditation requirement of the arbitrators as prescribed under the provisions of the Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021, Government Notice No. 147 of 2021 (the Practitioners Accreditation Regulations) as well as the Act and the Regulations. They submitted that for any arbitrator who handles arbitration disputes in the manner provided under the provisions of the Act is enjoined to go through the recognition and registration of persons

competent to perform the functions and duties as arbitrators in the Mainland Tanzania. That it goes without much saying therefore, that the requirement of accreditation is now legendary and part of our law in terms of the provisions of Regulation 13 (1) and 14(a) of the Regulations which provides as follows:

> *"13. -(1) Except in special circumstances as referred to in sub regulation (5), only those arbitrators who are accredited or provisionally registered in terms of the Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations of 2021, shall act as arbitrators that may be chosen by the parties"*

Further that Regulation 14(a) of the Regulations also provides that:

> *14. An arbitrator to be appointed for the purposes of the Act, shall possess the following requirements-*
>
> *(a) be an arbitrator who is accredited or registered in terms of the Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations;*

They went on submitting that Regulation 23(1) of the Practitioners Accreditation Regulations requires the Registrar of Arbitrators

to keep and maintain a register in which the names of accredited arbitrators shall be entered upon accreditation. Regulation 24(1) of the Practitioners Accreditation Regulations makes it a mandatory requirement that all accredited arbitrators must be published. Under Regulation 25(1) & (2) of the Practitioners Accreditation Regulations, the publication shall be prima facie evidence of registered and accredited of arbitrators, and that non-publication shall be prima facie evidence that the one who is not published is not accredited

It was the petitioners' claim that their inspection of all Government Gazette publications or any other publication recognized by law, covering the period of appointment of the two arbitrators (Hon. Justice Engera Kileo (rtd) and Prof. Mussa Assad) revealed that neither of them is gazetted/published. That the inspection made in the Register revealed that only one of them is in the register. They hence submitted that registration in the Register and publication in the gazette of all arbitrators presiding over an arbitral dispute are both mandatory requirements before one act as an arbitrator.

Pointing to the respondent's response on this issue under para 18 of the answer to the Petition, the petitioners pointed out the Respondent does not dispute that the two are not in the Register and that are not gazetted.

That the Respondent attached to its answer, as Annexure OIL-5, an email from Dr. Zakayo Ndobiro Lukumay along with two certificates of accreditation of the two impugned arbitrators while the same Dr. Lukumay acted as administrative secretary to the Arbitral Tribunal. The Petitioners take issue with this style of providing evidence of accredited arbitrators adopted by the Respondent as on the face of it, it contravenes the provisions of Regulation 25(1) & (2) of the Practitioners Accreditation Regulations. That under this Regulation 25(1), only the publication of the registered arbitrators is prima facie evidence of accredited arbitrators. That an email from Dr. Lukumay purportedly attaching certificates of arbitrators is alien mode of providing prima facie evidence of accredited arbitrators and urge the court to find that this Annexure OIL-5 to the answer to the Petition, is, by no means, prima facie evidence that the two impugned arbitrators are accredited.

The petitioners submitted further that Regulation 25(2) of the Practitioners Accreditation Regulations is even more particular when it comes to proof of accredited arbitrators as under this Regulation only "The Register and all copies thereof or extracts there from which purport to have been certified by the registrar shall be receivable in all courts and tribunals or

other bodies authorized to receive evidence as prima facie evidence of the facts stated therein." Therefore, they argued, Annexure OIL-5, does not meet this mandatory requirement and that it should not be considered as evidence of the fact that the two disputed arbitrators are accredited.

The petitioners further alleged that the Respondent in its answer to the petition has tried to shift the burden of proof to the Petitioners, an attempt which is contrary to the provisions of Regulation 25(1) of the Practitioners Accreditation Regulations where it is clearly stated that absence of any name from the publication, like in this case, shall be prima facie evidence that that person is not accredited. That the Petitioners having stated and the Respondent having not disputed the fact that names of the two arbitrators are not registered and gazetted, the former has discharged its duty to prove that the two are not accredited and it is upon the Respondent to prove otherwise. They supported their submission by citing the requirement of section 112 of the Evidence Act, Cap. 6 R.E 2019 which reads:

"112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it

is provided by law that the proof of that fact shall lie on any other person."

The petitioners hence argued that the burden of proof lies to who still insists that the two are accredited to furnish evidence to the contrary of the prima facie evidence, in place. Indeed, the Respondent having admitted that the two arbitrators are not gazetted and or registered wishes the court to believe that despite them not being registered and gazetted they are accredited while the Respondent's attempts through Annexure OIL-5 fall short of what Regulation 25(2) of the Practitioners Accreditation Regulations requires. The petitioners referred to paragraph 23 of the Reply to the Answer to the Petition which reads:

"23. It is stated that before the commencement of the hearing, the Petitioners shall ask the Court for an order compelling the Registrar of the Arbitrators to submit to the Court the manual and electronic register of the arbitrators, application forms for accreditation submitted by the two arbitrators, proof of payment of the accreditation fee, proceedings of the Accreditation Panel, the resolution of the Accreditation Panel accrediting the two arbitrators and forensic examination of the

similarities and dissimilarities of the font size, signatures and other common features appearing in the two certificates, Annexure OIL-5 to the answer. The Petitioners shall also ask the Court to order Professor Assad and retired Justice Kileo to submit to the Court their original certificates of accreditation for forensic examination."

They reiterated their submission that the absence of the names of the two arbitrators in the government gazette or any other gazette is prima facie evidence that the two arbitrators are not accredited.

Emphasizing on the need to summon the Registrar, the petitioners substantiated that the prayer is in relation to the two certificates supplied by the said Dr. Lukumay in Annexure OIL-5 to the answer to the Petition on the ground that the two certificates in Annexure OIL-5 to the answer bear two different signatures purporting to be the signature of the same Registrar of Arbitrators holding the office in 2022. The Petitioners strongly dispute authenticity of the two signatures and hence insisted that before the composing the decision in this matter the request stated in paragraph 23 of the reply to the answer may be granted.

In their concluding submission, the petitioners pointed that the submissions boil down to safely conclude that in terms of Section 3 of the Act, there was no arbitral tribunal constituted. As such, whatever was done by the Arbitral Tribunal had no legal effect for want of jurisdiction. According to them, this proposition finds support from a decision in the case of **Trans Company Limited vs Road Fund Board & Another, High Court of Tanzania, Commercial Division, at Dar Es Salaam, Misc. Commercial Cause No. 33 of 2022** whereby Hon. Agatho, J., found at page 5 of the typed Ruling that arbitrator who is not accredited at the time of making the award lacked jurisdiction to act as one. In the upshot, they prayed that the recognition and enforcement of the Final award should be refused on this other limb of the first ground in the Petition.

In reply, the respondent started by pointing out that, a challenge against arbitral awards on grounds (i), (ii), (v), (vi), and (vii) must overcome the hurdle imposed by Section 35 (i), (2) and 80 (1) (a) to (d) of the Arbitration Act. That the Section requires on mandatory terms that any grounds of complaints must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the arbitral tribunal's jurisdiction. The

respondent cited the Sections 35(1) and (2) of the Arbitration Act which provide as follows:

"35(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings shall be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the arbitral tribunal's jurisdiction

(2) An objection raised during the course of the arbitral proceedings that the arbitral tribunal exceeds its substantive jurisdiction shall be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised."

They further cited the provisions of Section 80 (1) (a) to (d) of the Arbitration Act, which reads as follows: -

"80(1) where a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the arbitral tribunal or by any provision of this Act or the Law of Limitation Act, any objection that:

(a) the arbitral tribunal lacks substantive jurisdiction;

(b) the proceedings have been improperly conducted;

(c) there has been a failure to comply with the arbitration agreement or with any provision of this Act; or

(d) there has been any other irregularity affecting the arbitral tribunal or the proceedings, he may not raise that objection, before the arbitral tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

They then argued that the cited provisions are crystal clear that the Petitioners are barred by the law from opposing the registration and recognition of the award on the above grounds for not having raised them before and during arbitration. That in both their Petition and written submissions in support of the Petition, the Petitioners, through their team of highly competent Counsels and specialists in arbitrations, have not demonstrated that at the time they took part or continued to take part in the arbitral proceedings, they did not know and could not, with reasonable diligence, have discovered the said grounds of objection. In a nutshell, the

law requires any challenge to the tribunal's jurisdiction be raised at the earliest opportunity, specifically no later than when a party first engages in proceedings.

The respondent submitted further that the demands by the Petitioners to compel the submission of a broad array of documents and records, including the manual and electronic register of arbitrators, application forms, proof of payment for accreditation fees, proceedings and resolutions of the Accreditation Panel, and particularly the call for a forensic examination of certificates, represent an unprecedented intrusion into the administrative and procedural aspects of the accreditation process. Such demands, they argued, are not only disproportionate but also tangential to the core issues at hand in the arbitration.

The respondent went on submitting that first and foremost, the integrity and competence of arbitrators are matters of public record, underpinned by the rigorous processes of accreditation and oversight conducted by the Accreditation Panel. That the accreditation process is designed to ensure that only individuals of the highest professional and ethical standards serve as arbitrators. He argued that the demand for forensic examination of certificates and other administrative documents,

therefore, suggests a fundamental mistrust not only of the arbitrators but also of the entire arbitration system.

The respondent went on submitting that the request for original certificates of accreditation for forensic examination is an unusual measure that diverges significantly from standard legal practice. Such an examination would not only impose an unnecessary burden on the arbitrators but also set a concerning precedent that could affect the willingness of highly qualified professionals to serve as arbitrators, potentially eroding the quality and integrity of the arbitration pool. That the essence of arbitration is resolving disputes based on the merits of the case rather than engaging in protracted procedural disputes that distract from the substantive issues. The focus on minutiae such as font sizes, signatures, and other common features in certificates detracts from this purpose and risks bogging down the process in unnecessary detail.

In conclusion, the respondent submitted that while the Petitioners' demands may be presented under the guise of ensuring transparency and integrity, they are, in fact, disproportionate and misaligned with the spirit of arbitration. Such requests threaten to undermine the efficiency, confidentiality, and finality that define arbitration as an alternative dispute

resolution mechanism. They emphasized that the court should recognize these demands as irrelevant to this Petition and reject them accordingly.

The respondent then questioned, for clarity, that assuming that the Petitioners are entitled to go all the way to the extent of scrutinizing the authenticity of the Registrar's signature appended in the accreditation certificates of Hon. Justice Engera Kileo (Rtd.) and Prof. Mussa Assad, why didn't they raise these allegations and doubts before the arbitral tribunal so that the individual arbitrators could respond to the allegations? Their argument was that the Petitioners' Counsels' submission on the authenticity of signatures appended in the accreditation certificates of the two arbitrators as absurd, scandalous, despicable, and reckless, especially when it proceeds from officers of this Court and who, by virtue of their training, ought to know very well that they cannot condemn anyone unheard. They reiterated their submission that if the arbitral proceedings were being conducted in a manner contrary to the public policy or violation of any law and (b) the Petitioners were denied a hearing, they ought to have raised these objections in the course of arbitration proceedings.

The respondent supported their submissions by citing the decision of the Court of Appeal where this position was recently affirmed the case of

Prestine Properties Limited vs Seyani Brothers & Co. Limited (Civil Application No. 182/16 of 2022) [2023] TZCA 17897 (28 November 2023) (unreported), whereby the Court of Appeal, at page 8 of its ruling, held as follows: -

> *"Having duly considered the contending submissions of the learned counsel in the light of the settled jurisprudence of the Court in the matter, we uphold Mr. Nuwamanya's submission. It is undisputed that the applicant participated in the arbitral proceedings without objecting to the substantive jurisdiction of the tribunal on any aspect. Besides, she did not raise any objection during the said proceedings that the Tribunal had exceeded its jurisdiction. These are matters which should have been raised in accordance with sections 35(1) and (2) of the Act. In terms of section 80(1) of the Act, the Applicant's failure to raise those issues in the course of the arbitral proceedings resulted in her loss of the right to raise any such objection before the Tribunal or the court thereafter, unless it is established that she could not with reasonable diligence have discovered the grounds for the objection."*

The respondent further cited the case of Court in **Prestine Properties Limited vs Seyani Brothers and Co Ltd (Misc Commercial Cause 2 of 2021) 2021 TZHC ComD 3400 (15 November 2021)** where at page 23 of its Ruling, this Court (Dr Nangela, J.) held as follows;

> *"… it has long been established that, as per Mr. Justice Teare in UMS Holding Ltd & Others vs. Great Station Properties SA & Anor [2017] EWHC 2398 (Comm) (05 October 2017), citing Bingham J, in Zermalt Holdings v Nu-Life Upholstery Repairs (1985) 2 Estates Gazette p.14, that, as regards arbitral awards:*
>
> > *'the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."*

Citing the case of **Vodacom Tanzania Ltd vs Fts Services Ltd (Civil Appeal 14 of 2016) 2019 TZCA 514 (27 December 2019)**, the

respondent concluded that this Court, not being an appeal court, is not seized with the powers to step into the shoes of the arbitral tribunal by reviewing, re-hearing, and re-evaluating new evidence presented before it by the Petitioners on the grounds of complaints not raised during arbitration. Their prayer was for the dismissal of the grounds of jurisdiction.

On my part, before I go into determining the substance of the raised points of objection, I will first determine whether I am mandated to do, that is going deep and scrutinize the validity of the documents of arbitration with regard to their accreditation. As pointed out by the respondent to which I am bound by the cited decisions of the Court of Appeal in the case of **Prestine Properties Limited Vs. Seyani Brothers & Co. Limited;** it is undisputed as per the records, having bounced in this court in challenging the impartiality of one of the arbitrators, the petitioners went back to the Arbitral Tribunal and proceeded with hearing of the matter to finality. It has not been revealed in any of the records of the Arbitral Tribunal or by the petitioners in their submissions, that there was ever an attempt to challenge the competence of the arbitrators with regard to their accreditation. Actually, if I may emphasize, since the presence of one of the arbitrators in the panel irked the petitioners, they could have used the opportunity, while challenging

his impartiality, to also challenge his accreditation. Failure to do at that stage can safely be concluded that by raising this ground, the petitioners are playing a trial and error to derail the process of arbitration at this stage of its registration/recognition and enforcement.

Further to the above, looking at the manner in which the ground is crafted and argued by the petitioner, it entails my calling for the records, summoning the Registrar and scrutinizing the evidence as well as analyzing the signatures of the panel members. The question is whether as a court where the award is brought for recognition and enforcement, I do have the mandate to do all that the respondent is moving the court to do? The answer to this is found in the cited case of **Vodacom Tanzania Ltd vs Fts Services Ltd (Civil Appeal 14 of 2016) 2019 TZCA 514 (27 December 2019)** whereby the court held at page 15 of its judgment that:

> *"We hasten to say that **any application to the High Court for review of an arbitral award is not an appeal, therefore, cannot be disposed of in a form of a rehearing.** That position has been taken in numerous cases including a decision by the **Supreme Court of Canada in City of Vancouver v. Brandram-Henderson of B.C. Ltd [1960] S.C.R 539** at page*

555, which we approve, where it was stated, as per Locke, J., that: -

'This is not an appeal from the award and the proceedings ***upon a motion such as this, are not in the nature of a rehearing,*** *as was the case in Cedar Rapid v. Lacoste….*

"This fact is noted in that portion of the judgment of the Judicial Committee in the second appeal in that matter. We cannot in the present proceedings weigh the evidence or interfere with the award on any such ground as that it is against the weight of the evidence."

Guided by the principle set above, I must operate in a manner appreciating the fact that arbitration proceedings are conclusive in their own parameters that they were conducted and determined. The powers of courts in cases where the award is tabled for registration, recognition and enforcement are only limited to the extent of determining whether there was any error on the face of the award in regard to the issue raised. In other words, any issue raised in the petition to challenge the award must be an issue or error manifest on the face of records of the award and not one requiring lengthy submissions and arguments to reach its finding.

The Court of Appeal, while dealing with an issue relating to challenging the Tribunal Award in the case of **Prestine Properties Limited vs Seyani Brothers & Co. Limited (Civil Application No. 182/16 of 2022) [2023] TZCA 17897 (28 November 2023)** had this to say at page 8:

> *"Having duly considered the contending submissions of the learned counsel in the light of the settled jurisprudence of the Court in the matter, we uphold Mr. Nuwamanya's submission. It is undisputed that the applicant participated in the arbitral proceedings without objecting to the substantive jurisdiction of the tribunal on any aspect.* ***Besides, she did not raise any objection during the said proceedings that the Tribunal had exceeded its jurisdiction. These are matters that should have been raised in accordance with section 35 (1) and (2) of the Act. In terms of section 80 (1) of the Act, the applicant's failure to raise those issues in the course of the arbitral proceedings resulted in her loss of right to raise any such objection before the Tribunal or the court thereafte****r, unless it is established that she could not*

with reasonable diligence have discovered the grounds for the objection."

In the objection of jurisdiction raised, the petitioners require this court to call records, examine some people (registrar) examine signatures and invalidate the award. That, with respect to the Senior Counsels who have prepared the submissions on behalf of the petitioners, is going beyond the purview of the provisions of Section 35 and 80 of the Arbitration Act on the issue of time limitation and the cited precedents of this court and the Court of Appeal on the issue of accreditation of the Arbitrators. The first ground of objection is therefore dismissed.

The third ground of objection was that the arbitral award has not yet become final and binding on the parties as it is being challenged under the law of which it was made. The petitioners' submission is that before this court there is a matter pending for determination, challenging the Final Award on account of material irregularities and jurisdiction of the tribunal, Misc. Civil Cause No. 4015 of 2024, Annexure Oryx 22 to reply to the answer to the petition. There is also a pending appeal, Civil Appeal No. 47 of 2024 between the Petitioners and the Respondent see Annexure Oryx 20 to reply to the answer to the petition. That in essence, the outcome of the above

pending proceedings will certainly have an impact to the Final Award. They hence were of the view that, going by the relief(s) sought in the pending two proceedings, it is safe to hold that the arbitral award has not yet become final and binding on the parties as it is being challenged.

That it is a matter of law under section 83(4)(e) of the Arbitration Act that recognition and enforcement of the award may be refused if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. They then argued that the rationale that an award should not be enforced before any challenge is determined is not hard to find, as if the Final Award is set aside, there will be no more award to recognize and enforce and the present proceedings would lose object. It is that arbitration is a creature of the agreement by the parties and where one of the parties is still pursuing its rights under the law, it is always advisable that the court should let the law take its course to its conclusion before recognizing and enforcing the award. In the circumstances, they concluded that the request for recognition and enforcement should be refused until such time when all the pending matters have been determined.

In reply, the respondent submitted that the Petitioners' submissions and prayers are grounded on a wrong and misconceived position of the law. In answering the issue as to whether the High Court has jurisdiction to continue staying a suit after procurement of an arbitral award by the parties over the same dispute, the respondent cited the decision of this court Commercial Division at Dar Es Salaam in **Commercial Case No.94 of 2018 between Jovet Tanzania Limited versus Bavaria N.V** whereby Hon. Mkeha, J, held on page 3 of his Ruling: -

> *"…it is not denied that, the party who filed notice of appeal to register Civil Appeal No.207 of 2018 before the Court of Appeal, submitted herself to an arbitration which proceeded to the extent of issuance of an arbitral award. The dispute which was resolved in the said arbitration proceedings is what is still pending before this court. The learned advocate for the Plaintiff maintains that, the court should continue staying this suit because of the pendency of the notice of appeal. I consider this to be a clear example of how parties and their advocates abuse the court process through forum shopping. It defeats logic how did the Plaintiff participate in the arbitration proceedings and thereafter*

retain her notice of appeal over a related matter before the Court of Appeal. The court has no jurisdiction of ordering a stay of a suit in relation to a dispute which has already been decided by the parties' own chosen arbitrator."

The respondent then fully subscribes to the above court decision and underscored further that both **Civil Appeal No.47 of 2024 and Misc. Civil Cause No. 4015 of 2024** are superfluous following the rendering of the Final Award by the arbitral tribunal on 30th November, 2023. As such, argued the respondent, as this Court has decided in the **Jovet Tanzania Limited Vs. Bavaria N.V** (supra), the said pending matters do not constitute good cause to justify the suspension of registration and recognition of the award being sought before this Court. Their conclusion was that this court has no jurisdiction to do so for reasons articulated herein above and on the strength of the above position of the law, the respondent urge the court to dismiss this ground of complaint for being meritless.

On my part, having considered the submissions of the parties, I need dwell much on this ground either. At the onset, I agree with the respondent and fully subscribe to the holding of my Brother Judge Hon. Mkeha that the petitioners' ground is but an abuse of court process. Why I say so can also

be well captured in the background to the petition at hand. As stated in both their submissions and the judicial notice taken on the decision of this court, the decision and notice which is pending before the court of appeal was issued in October, 2022. Subsequently, a Misc. Application No. 45 of 2023 was filed in this court seeking an order staying arbitration proceedings. Following preliminary of points of objection raised by the respondent herein, the application was dismissed for court's lack of jurisdiction as the matter was already pending before the Court of Appeal. At that point, the petitioner had an avenue to approach the court of appeal and table their prayer for stay of Arbitration proceedings. But it would appear that this was never done, instead, in what I may term as a trial-and-error game of chance, they went back to the Arbitral Tribunal and participated in the whole process. Having lost the battle, they are now re-approaching the court to establish the same issue that was once dismissed by this same Court.

One may raise an argument that at the time the matter was still pending at the Tribunal and now it is finally decided, but the thrust of the matter is not at the point of proceedings that the arbitration has reached, it is about not following the proper procedures by approaching the Apex Court then; and instead come back to establish this issue at this stage after loosing

in arbitration. Is it an afterthought? Is it a deliberate abuse of court process? The answer to the first two questions is rather in the affirmative. All said and done, since there is no order staying the proceedings of this court, and the subject of the appeal being of something that happened prior to Arbitration hearing, the ground lacks merits and it is hereby dismissed.

On the seventh ground, that, the Petitioners were unable to present their case before the Arbitral Tribunal, the Petitioners' grievance is the manner in which the Tribunal conducted the arbitral proceedings and arrived at its Final Award. In particular, it is submitted that the Petitioners were unable to present their case before the Arbitral Tribunal because the tribunal expunged the Petitioners' expert witness' statement, one Juliette Fortin. That the Tribunal also expunged the Petitioners' additional list of documents/exhibits to be relied upon (Annexure Oryx 13 to the Petition). That indeed, this Tribunal's decision deprived and ultimately prejudiced the Petitioners to be able to present their case before the Arbitral Tribunal. They argued that impartiality entails fairness and is an enshrined principle laying a foundation for adjudication of disputes and that such conduct was unfair and inadequate.

The petitioners went on submitting that the said documents and witness statement were very key for the Petitioners' case as they contained Petitioners' detailed quantum arguments to challenge Respondent's claims and prove Petitioners' quantum of damages for the counterclaim. That such evidence put forward the substantial flaws in the calculation of the extremely high amount claimed by the Respondent (Juliette Fortin's statement contained arguments showing that Respondent's damages should have been zero or that, even following Respondents position, they would have been far less (between USD 10.8 million and USD 13.4 million rather than USD 173 million as claimed) (see pages 23 to 33 of Juliette Fortin's statement – Annexure Oryx 13 to the Petition).

They then argued that the reason of such exclusion was without any basis in fact and in law: (i) the legal basis for such exclusion (TIArb Rules) should not have been applied (see above); (ii) there was and there is no rule or law limiting one party's right to call a witness of its choice; (iii) the Arbitral Tribunal stated that "*the Tribunal's sanction is needed because the Tribunal is entitled to satisfy itself of the credentials of the experts. Conversely speaking, how would the Tribunal know of Ms. Fortin qualifies as an expert under our laws which govern the proceedings in this matter?*". That the

Arbitral Tribunal's decision was based on a hypothetical issue and the fact that Juliette Fortin could have not been in possession of alleged credentials required from an expert in Tanzania was without merits as this could have been fairly debated at the hearing during the cross-examination, without need to expunge its statement.

The petitioners went on submitting that never had they again, during the proceedings, the opportunity to present their case on quantum as the above documents and statement were expunged just before the start of the final hearing and the Arbitral Tribunal rejected Petitioners' request to call at least a local expert. Further that the result of such decision caused enormous harm to Petitioners' essential right to be heard and to put its case and that without the opportunity for the Petitioners to present fully their quantum arguments, the Respondent was successful in almost all of its claims and won substantial damages as a result (as it was awarded USD 152 million), while Petitioners' arguments on quantum would likely have, at least, greatly reduced the amount awarded.

The petitioners further added that they could not fully present their arguments on damages for the counterclaims either, also discussed in Juliette Fortin's statement. That by unjustly expunging them, the Tribunal

undermined the principles of fair hearing by not affording the Petitioners a right to address the Tribunal on matters such as quantum and assessment of the Respondent's exaggerated claims. By parity of reasoning, the petitioners implored the Court to consider an erudite holding in the words of Viscount Haldane in the case of **Local Government Board versus Arlidge (1915) AC 120 (page 132)** to the effect that;

> *"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give each of the parties the opportunity of adequately presenting the case made."*

They then argued that the above ground has not led to a bizarre conclusion since impartiality is of the same species to natural justice. That there is good faith by the forum in deciding the matter and right for one to be aware of the element that can be used to his detriment, as well as presenting his point of view on matters which may be prejudicial to him or her, the petitioners argued that the scales were not held evenly between the Petitioners and the Respondent in the arbitral proceedings resulting into the Final Award and prayed that the Court allow this ground as there was a

blatant breach of right to be heard Final Award should not be recognized and enforced as it is a nullity in legal sense. They supported their prayer by citing **Civil Revision No. 1 of 2009, in the Matter of Independent Power Tanzania Limited and In the Matter of Companies Act, 2002** (Unreported) where the Court held:

> *"…No decision must be made by any court of justice, body or authority, entrusted with the power to determine rights and duties, so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be the breach of natural justice"*

They further cited the case of **Nazira Kamru Vs. MIC Tanzania Limited, Civil Appeal No. 111 of 2015, Court of Appeal of Tanzania at Mwanza (Unreported)** where under page 21 the Court held:

"we think parties must be heard before trial courts impose any drastic legal consequences which are likely to affect the substantive rights of parties".

The petitioners also relied on an English Courts decision which established the same principles in that respect, in **UK No. 97, Cukurova Holding A.S. v. Sonera Holding B.V., Privy Council, Appeal No. 0096 of 2013, 13 May 2014** whereby an arbitral tribunal's award was challenged on the same ground that Under the 1996 Act Sect. 103(2)(c); a court can refuse to enforce an award where those against whom the award is invoked prove that they were unable to present their case, was also referred.

Their conclusion was that all the above is evidence that Petitioners were unfairly and unjustly deprived of their essential right to present their case which is sufficient ground to refuse recognition and enforcement of the Final Award.

In reply, the respondent cited the decision of this Court in the case of **D.P. Shapriya and Co. Ltd vs. Bish International B.V [2003] 2 EA 404**, in which Msumi, J (as he then was) considered and endorsed the position taken in the English case of **Tersons Ltd v. Stevenage**

Development Corporation [1963] 3 All ER 863 where the Court of Appeal, speaking through Upjohn, L.J, held as follows; that

> *"the courts will not interfere with the conduct of proceedings by the arbitrator except in circumstances which are now well defined. If the arbitrator is guilty of misconduct, his award may be set aside or remitted. If the award contains an error of law on its face, it may be sent back or remitted. If a special case is stated on a question of law, the court will determine that question of law within the framework of the particular case. But if there is no misconduct, if there is no error of law on face of the award, or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. It is not misconduct to go wrong in law so long as any mistake of law does not appear on the face of the award."*

The respondent further cited the decision of the **Vodacom Tanzania Limited versus FTS Services Limited** case (Supra) where at page 20 of its judgment, the court held as follows that :-

> *"it is therefore, inferable from the above decisions that the court is not entitled to intervene where there is an error in law on the*

part of the arbitrator which can only become apparent after an examination of the evidence. As a general rule, the court is not entitled to examine the record of proceedings before the arbitrators except the award and document incorporated therein."

The respondent then submitted that whether the arbitral tribunal was right or wrong in expunging the Petitioners' expert witness report, one Juliette Fortin does not constitute a ground to oppose the registration and recognition of the award as this Court cannot step into the shoes of the arbitral Tribunal nor is it an appeal Court. They reiterated the decisions of the High Court of Tanzania (Commercial Division) At Dar es Salaam, **Misc. Commercial Cause No.52 of 2021, between Cereals and Other Produce Board of Tanzania Versus Monaban Trading & Farming Co. Ltd**, whereby this Court, at page 36 of his Ruling, Hon. Dr. D. Nangela J, quoted with approval the case of **Marine Services Co. Ltd VS M/S Gas Entec Company Ltd, Consolidated Comm. Cause No.25 & 11 of 2021,** citing the English case of **Lesotho Highlands Development Authority vs Impregilo SpA and Others [2006] 1 AC 221**, and

observed that the law does not permit a challenge on the ground that the Tribunal arrived at a wrong conclusion as a matter of law or fact.

The respondent then argued that the petitioners' dissatisfaction with the way the Tribunal expunged the Petitioners' Expert witness report and reliance on the TIArb Rules do not constitute legally acceptable grounds for challenging the award, let alone objection registration of the award. The respondent urged the Court to also dismiss this ground for being without merit.

They went on submitting that in terms of Section 80 (1) of the Arbitration Act, the Petitioners failed to raise the objection during arbitration proceedings. In the premises, they argued, the Petitioners are precluded or estopped from raising these grounds of complaint after the Award was rendered basing their argument on the stand or position taken by Hon. Nangela, J. in **Prestine's Decision** to the effect that a party's failure to timely exercise its right to raise objection amounts to waiver or estopped or forfeiture of that right and find that there is no merit whatsoever in all the grounds of complaint.

As for this ground, I will reiterate what I held before while subscribing to the cited cases of **Vodacom Tanzania Ltd vs Fts Services Ltd.** I must

emphasize that the petition to challenge the registration and enforcement of the award is not in itself an appeal. It follows therefore, whatever is put forward by the petitioner to challenge the award must be that what is manifested on the face of records. In the cited case of **Prestine Properties Limited vs Seyani Brothers and Co Ltd** ("Supra") the Court cited with the approval the holding in the case of **UMS Holding Ltd & Others vs. Great Station Properties SA & Anor [2017] EWHC 2398 (Comm) (05 October 2017),** citing **Bingham J, in Zermalt Holdings v Nu-Life Upholstery Repairs (1985) 2 Estates Gazette p.14,** that, as regards arbitral awards:

> '***The courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration.*** *Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."*

The matter before me is of no exception to the holding above. Since parties, in their own volition agreed to settle the matter through arbitration and when a dispute arose, that is the route they took in execution of the terms of their contract, hence as a court, our duty is to strive to uphold the award and make the ends of justice meet. It must be borne in mind that striving to uphold the award does not mean overlooking any violations of basic principles of natural justice or any error manifest on records, what it is that the duty automatically minimizes the extent upon which we may interfere with the award of the tribunal. Therefore, as held in the Vodacom case, unless; the error is manifest on the face of records of the tribunal or in any case the conduct was in violation of principles of natural justice or an issue of fraud is pleaded and proved, the interference is to the extent explained above.

It is apparent that in this ground, the petitioners are challenging what they termed as tribunal's decision that expunged the Petitioners' expert witness' statement, one Juliette Fortin and the Petitioners' additional list of documents/exhibits to be relied upon (**Annexure Oryx 13** to the Petition). Their argument was that the move denied Petitioners right to fully present their quantum arguments making the Respondent successful in almost all of

its claims and won substantial damages as a result (as it was awarded USD 152 million), while Petitioners' arguments on quantum would likely have, at least, greatly reduced the amount awarded. In a nutshell, the petitioners are challenging the quantum of damages awarded through the window of the expunged records of Juliette Fortin. As said above the powers of this court to what has been analyzed by the Tribunal in length and which is not manifested on the face of records is limited. Since this is not appeal, I cannot dive deep to challenge the reasoning of the Tribunal in the quantum of damage that is to be awarded or why a certain action which was reasoned and reached was taken. By doing so, I will be acting as the first appellate court by wearing the shoes of the Tribunal, re-hear the case and ascertain the evidence to the decision reached and the quantum of damages that was awarded. That power, as per the cited authorities above, I do not have. That being the case, the ground is also dismissed for lacking merits.

The fifth ground is discussed the last because in this ground, the petitioners argue that the enforcement of the arbitral award would be contrary to the law, norms and the public policy. The petitioners briefly submitted that the Final Award cannot be recognized and enforced in Tanzania as the proceedings violated Tanzanian principles of natural justice,

such as the inability for one party to present its case, as proved by the Petitioners below.

As it was submitted by the petitioners, I will also be brief. Since the grounds challenging the petition which would have established the violated Tanzanian principles of natural justice and all the grounds having been dismissed, this ground also crumbles.

In conclusion therefore, having made the above analysis and finding, I found all the grounds raised as lacking in merits. The petition is therefore founded on un-meritious grounds. As for the respondent's prayers for declaration that the Award dated 30th November, 2023 is final and binding on the Petitioners and the Respondent and that the Award be and is registered as a decree of the Honorable Court; the prayers will be dealt with in the Misc. Application No. 27821/2023 pending before this court. My conclusive verdict is the dismissal of this petition. Consequently, this petition is dismissed with costs awarded to the respondent.

Dated at Dar-es-salaam this 12th day of April, 2024.

S.M. MAGHIMBI

JUDGE