

TANZANIA / JUDGMENT

ms rans company ltd vs road fund board another 2023 tzhccomd 124 28 april 2023

COURT
TZHCCOMDDECIDED
28 April 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 33 OF 2022 BETWEEN M/S RANS COMPANY
LIMITED.....PETITIONER AND ROADS FUND BOARD1ST
RESPONDENT ATTORNEY GENERAL2ND RESPONDENT

RULING

Date of last order: 14/04/2023 Date of Ruling: 28/04/2023 AGATHO, J.: This ruling was prompted by the petitioner's petition challenging the registration of the arbitral award granted in favour of 1st respondent. The petitioner's petition was contested by the respondents who filed their reply to the petition. The petitioner raised four grounds against the arbitral award and the proceedings, namely:

- (i) That the Arbitrator's award has not been procured in conformity with the Arbitration Act, 2020 and the Civil Procedure Code [Cap 33 R.E. 2019] as the award was procured by unregistered and unaccredited Arbitrator the fact which was not disclosed by the Sole Arbitrator during the 1 conduct of the arbitration proceedings and issuing of the award contrary to the applicable laws. (ii) That the Arbitrator committed serious misconduct for failure to follow procedure rules applicable in the National Construction Council (NCC) Arbitration Rules and as agreed by the parties in not appearing on the dates 17/03/2020 and 18/03/2020 without notifying the parties and the NCC. (iii) That the Arbitrator committed serious misconduct on her failure to first rule on her jurisdiction before proceedings to entertain the matter on merit and further committed a serious irregularity in delivering the final award out of the prescribed time and contrary to the applicable laws. (iv) That the Arbitrator committed serious misconduct on her failure to communicate to the parties' fair and appropriate arbitration procedures which was not to be used in the arbitration proceedings. It was further averred that the arbitrator conducted the arbitration schedules that suited herself than the parties as expounded in ground No.(i). For consistency, I will begin with ground (ii), that the arbitrator committed serious misconduct for failure to follow procedure rules under the NCC Arbitration Rules and as agreed by the parties for failure to appear on 17/03/2020 and 18/03/2020. Indeed, the rules required the arbitrator to notify the parties, which she did not do. The respondent submitted that the arbitrator reported to have

an emergency and hence it was impracticable for her to issue the notice to the parties. In my reading of the petitioner's grounds for challenging the arbitral award especially ground (ii), and even the submission thereto, I am inclined to agree with the respondent that the petitioner seems to be re-opening the arbitration. The petition to challenge the arbitration award and proceedings is not an appeal in disguise as rightly ruled by the Court of Appeal in *Vodacom Tanzania Ltd v FTS Services Ltd*, Civil Appeal No. 14 of 2016, CAT at page 15. In my view, much as the second ground could have substance, the fact that the arbitrator had the emergency is sufficient to counter the requirement of notice. But then again to dig deep into that would require rehearing, which the Vodacom's case (supra) clearly disallows. Therefore ground (ii) is dismissed for lacking merit. As for the grounds (iii) and (iv), these were jointly argued for by the petitioner as they are interrelated. The gist of these grounds is that the arbitrator committed serious misconduct for failure to comply with the time. There was delay in the proceedings and issuing of the arbitral award. The final award was issued out of time contrary to the time prescribed by the law. According to Regulation 43(1) and (2) of the Arbitration (Rules 3 of Procedure) Regulations, G.N. No. 146 of 2021, it is conspicuous that

- (1) unless otherwise agreed by the parties, the arbitral tribunal, shall issue its final award within thirty days of the conclusion of the hearing, except in such case in which the arbitral tribunal or the sole arbitrator considers that the period may be extended adequately. (2) Where the arbitral tribunal intends to extend the time of issuing the award, it shall notify the parties using form No. 5 as prescribed in the fourth schedule to these Regulations. This was not done. Moreover, rule 12.2 of the NCC Arbitration Rules, 2001 edition, reprint of 2017 provides that: "the Arbitrator will send his award to the NCC within 14 days after conclusion of the final hearing, the NCC thereafter will notify the parties that the award is ready to be taken up." The arbitrator delayed issuing the award without extension of time. The arbitration commenced on ... The preliminary hearing was conducted on 08/10/2020 and the award was issued on 06/09/2021. As per the records of the arbitration proceedings especially the letter Annexure OSG-2 the reply to the petition dated 19/04/2020, the arbitrator stated the hearing date to begin on 22/04/2020 through 23/04/2020. As per the provisions of the law herein above stated the award ought to have been 4 issued on 30/05/2020. That is 30 days from the date the hearing was concluded. The respondent contended that given the circumstances of the arbitration proceedings, that it was conducted amidst COVID-19 the delay in the proceedings and issuing of the award is justifiable. In my view, be it as it may, what is wanting is the issue of notification to the parties on the delay or lack of evidence to show that the parties agreed to extend time. That said, there was delay in issuing the award contrary to the applicable laws. If find this ground to have merit. Lastly and more significantly ground (i) that the arbitrator conducted arbitration proceedings without being accredited or registered as required by the law. In my view, the arbitrator who is not accredited at the time of delivering the arbitral award has exercised powers which she does not possess. It means she lacked jurisdiction. The issue of the arbitrator's lack of jurisdiction is loud because when she entertained the arbitral proceedings and issued the award she had not been accredited as required by the then newly enacted Arbitration Act [Cap 15 of 2020].

That is confirmed by the respondent's submission on page 4, third paragraph of her submission that by the time the sole arbitrator was issuing the final award, she had already lodged her application for accreditation and 5 registration in compliance with the new Arbitration Act which came into force while the matter was pending issuing of the award. Along that that I distance myself from the respondent's view that it will be inappropriate to hold the award rendered during transition period to be of no effect since the practicability of the application of the law was still not effectual. I am holding so because the award rendered by the arbitrator who has not been accredited is nullity because it is the decision rendered by a legally unauthorised person. Section 96(4) of Cap 15 of 2020 provides: "Any proceedings pending shall be proceeded in the light of this Act." It means the Arbitrator ought to abide with the new Arbitration Act. Strangely, the respondent picked Section 96(3) of Cap 15 of 2020 which provides: "Any arbitration arrangement concluded before the coming into force of this Act which has not yet materialized shall be renegotiated and brought in line with this Act." She blamed the petitioner that despite participating in the whole of the arbitration proceedings she never raised the concern. In the respondent's view the petitioner had obligation to negotiate or renegotiate with the respondent on how to move about with the matter which was yet to be materialized as they were waiting for the award. In my view, what comes out clearly is that the arbitration proceedings were pending when the new Arbitration Act was coming into force. Even if we assume that the arbitration was complete, the award was yet to be issued. Therefore, there was an obligation to ensure that the arbitration proceedings comply with the new Act. If the proceedings were complete only the award was yet to be issued the parties had an option to renegotiate to make sure they are in line with Cap 15 of 2020. Neither was done. Therefore, the arbitrator was not accredited, and there was an apparent non-compliance with Section 96(2) and (3) of the Arbitration Act [Cap 15 of 2020]. Consequently, the proceedings and the award are in my view are nullity for contravening the law. This flaw alone disposes the petition at hand. For the foregoing reasons, the arbitration proceedings and the award are therefore set aside for contravening the law. Considering that the fact that the flaw observed was contributed by the arbitrator, each party shall bear its costs. It is so ordered. 7 DATED at DAR ES SALAAM this 28th Day of April 2023. U. J. AGATHO JUDGE 28/04/2023 Date: 28/04/2023 Coram: Hon. U.J. Agatho J For Applicants: Rehema Mtulya State Attorney For Respondent: Litete Haji Advocate. C/Clerk: Beatrice Court: Ruling delivered today this 28th April 2023 in the presence of Rehema Mtulya State Attorney for the Applicants, and Litete Haji learned counsel for the Respondent. U. J. AGATHO JUDGE 28/04/2023 8

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