

TANZANIA / JUDGMENT

SALU AND CO LTD VS COOL CARE SERVICES LTD MISC

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 56 OF 2017 AND MISC. COMMERCIAL CAUSE NO 322 OF 2016 (Arising from Misc. Commercial Case No. 322 of 2016 before Hon. Sehel, J) IN THE MATTER OF ARBITRATION ACT CAP. 15 R.E, 2002 AND . IN THE MAHER OF ARBITRATION OF PROPOSED REMODELLING OF TANZANIA POSTAL BANK UBUNGO FLAT -DSM AND IN THE MAHER OF ARBITRATION IN CONNECTION WITH SUB-CONTRACT FOR ELECTRICAL INSTALLATION BETWEEN SALU & COMPANY LIMITED PETITIONER AND COOL CARE SERVICES LIMITED RESPONDENT

RULING

Date of the Last Order: 23/05/2018 Date of the Ruling 10/07/2018 SEHEL J. i Sctlu and Company Limited a petitioner, filed a petition under Section 16 of the Arbitration Act, Cap 15 (hereinafter referred to as "the Act") challenging the Award filed in Court by Shaibu S. Likumbo, a sole arbitrator on a dispute which the petitioner was involved. In the said dispute, the petitioner entered into subcontract agreements with cool care services limited, the respondent herein, to execute air conditioning works at Tanzania Postal Bank llbungo and to execute electrical works at the same site. After completion of works, the respondents submitted its claim for payment to the petitioner but petitioner failed to honour the same. Thus prompted the respondent to initiate arbitral proceedings at National construction Council (NCC) as required by the contract agreement. The sole arbitrator Shaibu S. Likumbo was appointed and heard the dispute and made his final award which was in favour of the respondent. The award is pending in court for enforcement through Misc, Commercial Cause No. 322 of 2016 which has been consolidated for ease of determination of the matter. 2 In a bid to vitiate the Arbitral Award the petitioner has filed the present petition praying for setting aside the award with costs. At the hearing of the petition, the petitioner was duly represented by the learned advocate Gwamaka Mwaikugile while the respondent was represented by the learned advocate Chisamo Elias. Counsel Gwamaka begun his submission by adopting the contents of the petition and reply to the answer to the petition. He further elaborated that Section 16 of the Act allows this Court to set aside arbitral award if it is improperly procured or there was a misconduct on part of the arbitrator. He argued the present award was improperly procured because there was a non-disclosure of the status of the counsel

for the respondent who appeared in the preliminary hearing held on 6th April, 2016 that he is also an employee of the National Construction Council (NCC) as a quantity surveyor. He also argued the said meeting was also an employee of NCC but appeared arbitration coordinator. Counsel Mwaikugile feared that the counsel for the respondent might have influenced the arbitrator in reaching to this decision. He pointed out that Rule 3 1(1) of the NCC Rules provides that the object of arbitration is to obtain the fair resolution of disputed by an impartial tribunal and that Rule 3.1 of the NCC Rules requires parties to do all things necessary for proper and expeditious conduct of the proceedings. It was the view of the counsel Mwaikugile that failure of the advocate of the respondent to act in an honest manner as a legal professional amounts to improper motive which does not consonant well with the provisions of the NCC Rules and the general principle of equity and good conscious. The counsel therefore prayed from this court to do justice, equity and fairness to the parties by setting aside the arbitral award. It was responded by the learned advocate Kisamo that it is true he is a quantity surveyor working with NCC but also a practising advocate with roll number 4257 working at A.K.K. Attorneys. He said the proceedings held on 6th April, 2016 shows that he introduced himself as an advocate of the respondent so the facts were revealed to the parties. He submitted that the arbitral tribunal was constituted by the parties themselves and it is was the parties 4 themselves who appointed the arbitrator Shaibu S. Likumbo as such NCC was not the arbitrator and the counsel had no influence over the arbitral proceedings. He also argued that the petitioner has no cogent evidence of his allegation and that in order to establish the arbitral award was improperly procured the petitioner must establish such allegation with facts. He argued that the fact that the advocate misconducted, if it is true, is not a ground under section 16 of the Act for setting aside arbitral award. It was his submission that for the arbitral/award to be set aside under Section 16 of the Act the award itself must be improperly procured or there must be misconduct on part of the arbitrator. To cement his argument, he cited the case of Permanent Secretary, Ministry of Water and Irrigation Vs. Mega Builders Ltd, Misc. Commercial Application No. 84 of 2015 (unreported-High Court) where this court through Songoro, J stated:- 11 In the petition and the Petitioner submission the court did not find any credible complaint or allegation, that the arbitrator was corrupt or bias or there was under influence on his part 5 of the Award was procured by fraud or in dishonest manner or through misconduct. So generally, there is no ground under which the court may exercise its powers and set aside the Award. Even if it is found that, the Arbitrator made a wrong decision, that is not misconduct or wrongs envisaged by Section 16 of the Arbitration Act, Cap 15 as ground for setting aside an Award". The counsel for the respondent, therefore, prayed for the petition to be dismissed with costs. It was rejoined that on 6th April, 2016 the counsel for the respondent did not disclose the fact that he is a quantity surveyor of NCC thus the counsel for the petitioner insisted that the Award be set aside. It is gathered from the submissions made by the learned advocates that there is no dispute that the counsel for the respondent works with NCC as quantity surveyor and that he 6 represented the respondent in the Arbitral proceedings. It is on record that on 6th April, 2016 during the preliminary meeting the counsel for the respondent introduced himself that he is an advocate for the claimant (now the respondent). The bone of contention is a non-disclosure of the fact that he is also a quantity surveyor of NCC. It is argued by the counsel for the petitioner that this non-disclosure amounts to improper motive of which the petitioner

equates it as interference to the final award hence it is improperly procured. Section 16 of the Act which the petitioner has invoked to move this court to set aside the arbitral award provides:- “Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award”. From the above provision of the law, the court may set aside an arbitral award where it is established that there is a misconduct on part of the arbitrator/umpire and/or an arbitration or award has been improperly procured. In *Mega Builders (Supra)* this court stated that fraud, dishonesty and/or misconduct on the proceedings makes an award or arbitration improperly procured. The counsel for the petitioner is completing that there is a dishonesty on part of the counsel of the respondent during the hearing of the arbitration thus makes the award improperly procured. The immediate question that follows is whether this type of dishonesty on part of the counsel was envisaged by the legislators. In the book titled “Law of Arbitration and Conciliation” 9th Ed. by Avtar Singh at Page 369 when discussing an award that may be set aside due to it be improperly procured stated- “Where an award has been obtained fraud or by corrupt Inducements it is improper” The author went further and gave an example of an English case of *Elektrim SA Vs. Vivendi Universal SA* 2007 Bus LR D 69 (QBD) as follows:- “In another English Case the ground for seeking setting aside of a partial award was that it was obtained by fraud, or alternatively, the way in which it was procured was contrary to public policy. The allegation was that one of the lawyers deliberately concealed or recklessly failed to disclose a memorandum written by an employee of the party to the arbitration. This happened at a crucial stage of negotiations for an investment agreement. This was in breach of the order for disclosure made by the arbitral tribunal. It was held that the fact of deliberate concealment was not proved nor it was apparent that any emotive meaning was put upon the order of the tribunal and also that even if the memorandum had become available, it would have made no difference to the tribunals partial award ” The same party of reasoning applies to the matter at hand. The fact of deliberate concealment was not proved not it was proved that the advocate for the respondent had interfered with the decision of the arbitrator to make the award improper. Even if the fact was to be disclosed that the advocate for the respondent is a quantity surveyor of the NCC, it would have made no difference to the tribunal’s award because NCC was not party to the proceedings. In the end I see no merit on the petition. I thus proceed to dismiss it with costs. Further in terms of Section 17 of the Act I do hereby proceed to register the award as presented through Miscellaneous Commercial Case No. 322 of 2016 and decree is hereby entered as follows:-

1. The petitioner Salu and Company Limited shall pay the respondent, Cool care Services Limited the total sum of Tanzania Shillings Twenty Five Million Five Hundred and Twenty Two Thousand, Thirty Six (Tshs. 25,522,036.00) being amount awarded by Sole arbitrator to the Respondent.
2. The petitioner shall pay the costs in Miscellaneous Commercial Case No. 56 of 2017 to the respondent which shall be taxed. It is so ordered. Dated at Dar es Salaam this 10th day of July, 2018. 10th day of July, 2018 ii

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