

TANZANIA / JUDGMENT

RULING VODACOM AND PLANETEL MISCELLANEOUS COMMERCIAL CAUSE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISCELLANEOUS COMMERCIAL CAUSE NO. 15940 OF 2024 VODACOM
TANZANIA PUBLIC LIMITED COMPANY (formerly known as Vodacom Tanzania Limited)
..... PETITIONER VERSUS PLANETEL COMMUNICATION
LIMITED..... RESPONDENT

RULING

Date of Last Order: 01/11/2024 Date of Ruling: 21/02/2025 HON. GONZI, J. The Petitioner filed this Petition against the Respondent under section 75 (1), 2(b),(g) and 78 (1), (3) of the Arbitration Act ,CAP 15 of the Laws of Tanzania read together with Regulation 63 (1)(a),(b),(c),(d) and (e) of the Arbitration (Rules of Procedure) Regulations, GN.No.146/2021. The Petitioner prayed for the following orders:

- (a) The Honourable Court declare the following parts of the Reconsidered Award to be of no effect or alternatively set them aside: 1
 - i. paragraph A.) (on page 23) entitling the Respondent to specific damages up to the date of the breach on 7th October, 2016; ii. paragraph A.) (on page 23) Awarding the Respondent TZS. 1,926,439,108.88 (including VAT) as special damages in the form of unpaid commissions for the period from March 2014 to September 2016; iii. paragraph A.) (on page 23) Awarding the Respondent interest at the rate of 18% on TZS 1,926,439,108.88 from September 2016 to 15 November 2022; iv. paragraph A. 4) (on page 23) awarding the Respondent TZS. 5,810,000,000.00 being the value of the Respondent's interest in the subscriber base;
 - v. paragraph A. 5) (on page 24) awarding the Respondent interest at the rate of 18% per annum from May 2012 to the date of filing the Amended Statement of Claim on TZS. 5,810,000,000.00; vi. paragraph A. 6) at page 23 and a reference to paragraph 104 and 180 of the Final Award (on pages 21 and 22) which awarded the Respondent TZS. 9,500,000,000.00 as 2 general damages for Petitioner's act of introducing the TD Model; vii. paragraph A. 7) (on page 24) awarding the Respondent interest of 7% on the amounts awarded in paragraphs A.

2) and 3) (on page

- 23) from the date of the Amended Statement of Claim to the date of the Final Award; viii. paragraph A. 8) (on page 24) awarding the Respondent interest of 7% on the amounts awarded in paragraphs A. 2), 3), 4) and 5) (on page 23) from the date of the Final Award until full and Final payment; and ix. (ix), paragraph 25 (on page 22) where the Tribunal modified para 183 of the Final Award by stating that the general damages were awarded due to breach of the agreement for failure to follow the procedures for termination by the parties and for introducing the TD Model.
- (b) Costs of the Petition.
- (c) Any other reliefs this Honourable Court may deem fit to grant. A brief background is that the Petitioner and the Respondent had a Super Dealer Agreement (SDA) dated 23rd November 2004 which 3 contained an arbitration Agreement under Clause 18 thereof providing for arbitration as the agreed mode of settling disputes between the parties arising out of and in connection with the said Agreement. A dispute arose in connection with the Super Dealer Agreement. On 1st December 2016, the Respondent herein initiated arbitration by Notice of Arbitration. The arbitration proceedings were conducted by Prof. Zakayo Lukumay and Dr. Wilbert Kapinga as the party-appointed Arbitrators with the two Arbitrators having powers to appoint the Third Arbitrator as an Umpire who could break a deadlock in decision making, whenever necessary. Hon. Makaramba, J. (Rtd) was appointed as an Umpire, however, throughout the Arbitration proceedings leading to the issuance of the Final Award and subsequently the Reconsidered Award, he played no role as there was no deadlock between the Co-Arbitrators (The Arbitral Tribunal). Before the arbitral tribunal, each party alleged that the other party had breached provisions of the Super Dealer Agreement. The Respondent, who was the Claimant before the Arbitral Tribunal, alleged violations of her contractual rights which emanated from the SDA. Under the SDA, the Petitioner had appointed the Respondent to be a Super Dealer to sell and distribute pre-paid airtime, post-paid airtime, starter 4 packs and other products and services of the Petitioner. Specifically, the Respondent alleged that, the Petitioner had breached the SDA by: failing to issue a 30 days' notice to her (the Respondent) when she made amendments, adjustments or variations under the SDA contrary to Clause 5.1.2, 5.1.4 and 20.5 of the SDA; Constructively ignoring the Respondent's repeated requests/calls to solve the issues that arose during their trading relation contrary to Clause 6.1.3 of the SDA; Unilaterally valuating the value of the Subscriber base while under the SDA the same was the transferrable asset of the Respondent and, Misappropriation of the interest of the subscriber base from the Respondent to which the Petitioner had continued to benefit from the same up to when notice of initiation of arbitral proceedings was issued. The Petitioner, in addition to opposing the Claim by the Respondent, raised a Counter-Claim. In the Petitioner's Counter Claim, it was contended that the Respondent had purchased products on credit between 30th December 2013 and 11th March 2014 in respect of which she did not pay despite being bound to do so. The Petitioner contended further that, she had established that the Respondent was liable for

payment of the sums 5 due under the SDA (as per the repayment conditions of the Credit Facility and Clause 7.1.7 of the SDA) and as a matter of Tanzanian law. After conducting the Arbitration proceedings, the Arbitral Tribunal issued its Final Award on 15th September 2023. The Award was in respect of both the Petition by the Respondent herein and the Cross Petition by the Petitioner herein. Several Orders were made against each party in favour of the other. The Petitioner was aggrieved by the Final Award and filed a petition before this Honourable Court that was registered as Misc. Commercial Cause No.64 of 2023, challenging the Final Award on the grounds of serious irregularities. The same is available at TANZLII as Vodacom (T) Public Ltd Company vs Planetel Communication Ltd (Misc. Commercial Cause No. 64 of 2023) [2024] TZHCComD 39 (27 March 2024). On 27th March 2024, this Honourable Court, as per Hon. Mkeha, J., delivered its Ruling in Misc. Commercial Cause No.64 of 2023 and made a finding that the Final Award contained serious irregularities and proceeded to remit the Final Award to the Arbitral Tribunal for its reconsideration in accordance with section 75 (3) (a) of the Arbitration Act. The specific 6 findings of the Court were stated at pages 47, 48, 49 and 50 of the Ruling and I quote them verbatim that: “(a) It was complained by the Petitioner that, at page 80 of the award the Tribunal determined not to award the Respondent specific damages in the form of unpaid commissions as there was no basis in law to award that limb of damages. However, later on, the Tribunal awarded specific damages in the form of unpaid commissions from March 2014 to September 2016; (b) That, at page 70 of the award, the Tribunal held that the Petitioner was contractually entitled to 18% interest rate on the amount of TZS 5,092,272,254.09/= from the date of filing the Arbitration Claims. However, without reasons, at page 84 of the award, the Tribunal awarded interest on the said amount at the rate of 7%;

- (c) That, at pages 35 and 37 of the award the Tribunal held that, the Petitioner's purported termination of the SDA on 07/10/2016 was a breach of contract, yet, at page 83 of the award the Tribunal awarded the Respondent damages up to the date of breach the result 7 being that, the Respondent was held to be entitled to damages prior to the occurrence of the purported breach and;
- (d) That, at paragraphs 104 and 180 of the award the Tribunal held that the Petitioner was entitled under the SDA to introduce TD Model and that it did not constructively terminate the SDA by introducing the TD Model. However, at page 81 of the award, the Tribunal awarded the Respondent general damages of TZS 9,500,000,000/= partly because of the Petitioner's act of introducing the TD Model. Without beating around the bush, all the Petitioner's allegations in respect of this ground/issue are vivid in the Final Award. That is perhaps why the Respondent's counsel recommended that the Petitioner would have sought clarification from the Tribunal rather than challenging the award in the way she did. One of the remedies of rectifying uncertain awards is for the courts to remit them to the tribunals for re-consideration. However, where the uncertainties in an award are irreconcilable, they may be a reason for setting aside of the award. 8 For the foregoing reasoning the third issue is answered in the affirmative. That is, the Final Award is uncertain or ambiguous as to its effect, to the extent indicated hereinabove. For the foregoing reasoning, having held the

award to have been procured in a manner that is contrary to public policy and that, the same is uncertain or ambiguous as to its effect; I proceed to hold that, these are serious irregularities affecting the award. Pursuant to section 75 (3) (a) of the Arbitration Act Cap. 15 R.E. 2020, I remit the award to the arbitral tribunal in whole, for reconsideration.” The Final Arbitral Award was therefore remitted to the Arbitral Tribunal for reconsideration pursuant to the Order of this Court as reproduced above. The Arbitral Tribunal reconsidered its Final Award and on 3rd June 2024, the Arbitral Tribunal issued the Reconsidered Award whose contents will soon become apparent in the course of this Ruling. The Petitioner herein, upon issuance of the reconsidered Award, felt aggrieved by the Reconsidered Award on the grounds that it contains serious irregularities which have caused and or will cause substantial 9 injustice to the Petitioner due to the following alleged serious irregularities as listed in the Petition.

- (a) The Tribunal exceeded its powers, other than jurisdiction, when it adjudicated and/or challenged the Court’s findings in the Ruling;
- (b) The Reconsidered Award is procured in the manner that is contrary to the public policy because it violates the laws; and
- (c) The correction and or modification of the Final Award made by the Tribunal is contrary to the provision of Sections 64 (2) (a) and (4) (b) of the Arbitration Act. The Respondent filed an Answer to the Petition. The Respondent stated that the Arbitral Tribunal complied with the Court’s decision by reconsidering the areas complained of by the Petitioner but that the Petitioner is, once again, challenging the Reconsidered Award almost based on the same grounds and complaints as in Misc. Commercial Cause No. 64/2023. The Respondent stated that by doing that the Petitioner is not only engaging in forum shopping but also abusing the due process by attempting to achieve different results on one and the same ground in the same court. The Respondent stated that this court in Miscellaneous 10 Commercial Cause No. 64 of 2023 did not issue any specific directives to the Arbitral Tribunal, rather, the court at paragraph 50 of the ruling concluded that the Final Award had been procured in a manner that was contrary to public policy and that, the same was uncertain or ambiguous as to its effect and thus remitted the award to the arbitral tribunal in whole, for reconsideration. It was stated in the Answer to Petition that the reconsidered award was not procured in a manner contrary to public policy or in violation of the law. This is because:
 - (i) The powers of the tribunal in reconsideration of award were not limited in any way so far as the award was returned in whole. The court findings did not result into specific directives to the tribunal. (ii) The tribunal did not refuse or ignore to comply with the court findings and directions. The only directive issued by the court was to reconsider the award in whole which the tribunal correctly complied with and cleared ambiguities plus making some rectification on few errors. (iii) In reconsideration of the final award the tribunal rightly applied interest rate and kind and was satisfied that the agreed interest kind 11 was a simple interest. The compound interest was not pleaded by the petitioner. Having further awarded 18% on the defaulted period, the tribunal complied with court’s directives. It was stated

further that by the court having declared that the effect of the final award was ambiguous and that the whole award was remitted back for reconsideration, the 28 days limitation under Section 64 of the Act was inapplicable. Further, it was stated that the reconsideration of the award did not warrant petitioner's audience and that the reconsidered award and the final award met justice for both parties as all damages awarded to both parties were scrutinized by the tribunal. The Respondent prayed for the Court to dismiss this petition in its entirety, with costs. The hearing of this petition proceeded by way of Written Submissions. Mr. Gasper Nyika, Ms. Samah Salah and Mr. Madina Chenge, Learned Advocates, represented the Petitioner. Mr. Michael J.T. Ngalo, Learned Advocate, represented the Respondent. I thank the Learned Counsel for their useful submissions. The Learned Counsel for the Petitioner submitted that Section 75 (1) of the Arbitration Act empowers a party to arbitration proceedings to challenge an arbitral award when there is a serious irregularity which affects the arbitral tribunal, the proceedings or the award. They argued that serious irregularity is defined under Section 75 (2) of the Arbitration Act to mean an irregularity of one or more of the kinds listed under subsections (a) to (i) of Section 75 (2), which the court considers has caused or is likely to cause substantial injustice to the applicant. The Petitioner's Learned Counsel argued that the Petitioner is challenging the Reconsidered Award in accordance with the provisions of Sections 75 (1),

- (2) (b), (g) and Sections 78 (1), (3) of the Arbitration Act. The arguments by the Learned Counsel for the Petitioner were clustered into three main areas:
 1. Whether the Tribunal exceeded its powers, otherwise than exceeding its substantive jurisdiction, in reconsidering the Final Award;
 2. Whether the Reconsidered Award was procured in a manner that is contrary to the public policy; and
 3. Whether the correction and or modification of the Final Award was made in accordance with the law. 13 The Learned Counsel for the Petitioner submitted with regard to the first issue they raised as to whether the Tribunal exceeded its powers, otherwise than by exceeding its substantive jurisdiction, in reconsidering the Final Award. It was submitted that section 78 (3) of the Arbitration Act provides the power which an arbitral tribunal has when an award is remitted back for reconsideration. This power is otherwise referred to as the arbitral tribunal's jurisdiction on remission. They reproduced the provision for ease of reference: "(3) Where the award is remitted to the arbitral tribunal, in whole or in part for reconsideration, the arbitral tribunal is required to make a fresh award in respect of the matters remitted within three months from the date of the order for remission or such longer or shorter period as the court may direct" The Learned Counsel for the Petitioner submitted that in the persuasive case of *Mark Blake Builders Pty Limited v John Frederick Davis and Anor* (Unreported, Supreme Court of New South Wales, 14 November 1994), the Supreme Court of New South Wales made a finding that when an award is remitted to the arbitrator for the second time, the arbitrator is obligated to take up the original award as remitted to him and with the benefit and guidance obtained from the judgment, reconsider

the matter remitted to him and make awards in conformity with them. The Learned Counsel for the Petitioner submitted that in reconsidering an award, the tribunal's jurisdiction is only confined to making a fresh award in respect of matters remitted for reconsideration by being guided by the Court's decision remitting the award for reconsideration. They submitted that the tribunal's original award renders it functus officio, save to the extent the remission order gives it revived powers and, even then, the tribunal's jurisdiction is only revived to the extent of the remission ordered. The Learned Counsel for the Petitioner submitted that remission is an alternative to setting aside the award. It is intended to provide the arbitral tribunal an opportunity to correct defects in the original award identified by the Court that would otherwise constitute grounds for setting it aside. They argued that the arbitral tribunal has no power to adjudicate and/or challenge the findings, directive/guidance issued by the Court remitting the award for reconsideration. They submitted that this Honourable Court, in determining the present petition, is required to confine itself to the review of the findings and 15 directives made in the Ruling and compare them with the Reconsidered Award so as to confirm whether the Reconsidered Award was issued in compliance with the findings and directives made in the Ruling. Mr. Nyika and his Learned Colleagues argued that since this Honourable Court made various findings on the serious irregularities found in the Final Award before remitting the Final Award for reconsideration, the Arbitral Tribunal was required to reconsider those parts found to contain serious irregularities, in line with the Court's findings on the particular irregularities then make a fresh award in respect of those matters. It was argued that the findings of this Court in its Ruling were the basis for which the remission to the Tribunal was ordered, they are an integral part of the Ruling and could not be re-opened, revisited or scorned by the Tribunal on remission. It was argued that if the Respondent intended to contest the Ruling of the Court, it was open for him to challenge the decision on appeal. It was argued that since the Ruling was never challenged by the Respondent, it remains binding. Mr. Nyika, Learned Advocate and his team, argued that in excess of the Tribunal's scope of jurisdiction in remission, the Arbitral Tribunal not only ignored the Court's findings but also failed to comply with this Court's 16 directives on reconsidering those parts of the Final Award found to contain serious irregularities. It was argued that the Arbitral Tribunal exceeded the scope of its jurisdiction on remission by re-awarding the following reliefs, despite findings by this Court on various irregularities identified in the reliefs:

- (i) Re-awarding TZS 5,810,000,000.00 as the value of the Respondent's interest in the subscriber base while this Court had made a finding that such amount was never pleaded or proven by the Respondent; (ii) Re-awarding TZS 5,810,000, 000.00 as special damages while this Court had made a finding that such an award was contrary to the provisions of Sections 73 (1) and 73 (2) of the Law of Contract Act; (iii) Re-awarding TZS 1,926,439,108.88 as specific damages while this Court had made a finding that such an award was contrary to the law on award of special damages. (iv) Re-awarding TZS 1,926,439,108.88 as special damages for the period between March 2014 and September 2016 while the Court had made a finding that such an award was in contravention of the law because 17 it was awarded to the Respondent for the

period before the SDA had been breached;

- (v) re-awarding TZS 1,926,439,108.88 as special damages for unpaid commission without any determination that the Respondent had proved such special damages despite the Court having made a finding that such an award was in contravention of Section 73 of the Law of Contract Act; (vi) Re-awarding TZS 1,926,439,108.88 as special damages, which resulted in double compensation to the Respondent, which the Court had found at page 50 of the Ruling to be one of the vivid uncertainties in the Final Award for being awarded after the Tribunal had already determined in paragraph 179 of the Final Award, as amended by the Reconsidered Award, that commissions for June 2012 to September 2016 were already paid to the Respondent; (vii) re-awarding of TZS 9,500,000,000 as general damages while the Court had made a finding that such an award was contrary to the provision of Sections 73 (1) and (2) of the Law of Contract Act and against the established legal principle in *Anthony Ngoo & Another v 18 Kitinda Kimaro* which established that the discretion to award such kind of damages has to be accompanied with reasons. The re-awarding was also made despite the Court's finding at page 50 of the Ruling that it constituted one of the vivid uncertainties for being awarded as a general damages partly for the Petitioner's act of introducing the TD Model after the Tribunal had held at paragraphs 104 and 180 of the Final Award that the Petitioner was entitled under the SDA to introduce TD Model and that it did not constructively terminate the SDA by introducing the TD Model; (viii) Re-awarding simple interest at 18% per annum to the Petitioner on the amount of TZS 5,092,272,254.09 during the period starting from 30th December 2013 to 21st December 2022, while the Court had made a finding that the Tribunal had no discretion under Sections 56
- (1) and 56 (2) of the Arbitration Act to vary compound interest which parties had contractually agreed, to simple interest; and (ix) Re-awarding, to the Petitioner, a reduced 7% per annum simple interest from 21st December 2022 until full and final payment instead of 18% per annum compound interest while the Court had made a finding that the Tribunal had no discretion under Sections 56 (1) and 19 56 (2) of the Arbitration Act to reduce the compound interest of 18% per annum which parties had contractually agreed to 7% per annum simple interest. This was also despite this Court's finding that such award constituted one of the vivid uncertainties because it contradicted with the Tribunal's finding at paragraphs 163 and 164 (on page 70 of the Final Award) which held that the Petitioner was contractually entitled to 18% per annum interest. Mr. Nyika, Learned Advocate, submitted that from the list above the Tribunal failed, on remission, to make a fresh award which conformed to this Court's findings in the Ruling. He argued that instead of addressing and remedying the serious irregularities in the Final Award identified by this Court in its Ruling, what the Tribunal did in the Reconsidered Award was to simply reproduce excerpts of different parts of the Final Award to justify its decision, which parts this Court had already considered and determined that they contain serious irregularities as they contravened public policy. Mr. Nyika, reasoned that by reproducing the excerpts of the Final Award in the Reconsidered Award, to support its position to re-award the same reliefs which this Court had already determined that the same had been awarded in contravention of the law, the Tribunal in essence 20 took

a contrary view against the findings and directives of this Court contained in the Ruling and purported to uphold the Final Award under the guise of reconsidered award. Mr. Nyika argued further that, consequently, the Arbitral Tribunal exceeded its powers on remission because it made the same findings and awarded the same reliefs which had already been declared by the Court to contain serious irregularities. It was argued that this renders the Reconsidered Award a nullity. The second issue raised by Mr. Nyika, Learned Advocate, was whether the Reconsidered Award was procured in a manner that is contrary to Public Policy. He cited section 75 (2) (g) of the Arbitration Act that allows an arbitral award to be challenged on grounds of serious irregularity where the award was procured in a manner that is contrary to public policy. He submitted that the Arbitration Act does not distinguish between a reconsidered award and original award or initial award. On what is public policy, Mr. Nyika referred the Court to the case of CATIC International Engineering (T) Ltd v University of Dar es Salaam, Misc. Commercial Case No. 1 of 2020 page 24 (unreported) (the “CATIC Case”), where this Court (Hon. Nangela, J., as he then was) relied on the case of State Trading Corporation v Betamax Ltd, 2019 SCJ 154 21 which held that in challenging an arbitral award on ground of public policy there must be “clear violations of mandatory legal rules which are fundamental to the legal order of the state”. Mr. Nyika argued that an award that is in breach or would result in the express violation of a law in Tanzania, can be challenged for being contrary to public policy. He argued that the decision was upheld by the Court of Appeal in CATIC International Engineering (T) Ltd v University of Dar es Salaam, Civil Appeal No. 162 of 2020 (unreported) which at pages 15 and 16 confirmed that courts can interfere with an award if there are errors of law manifest on its face. Mr. Nyika, Learned Advocate, submitted that in this Honourable Court’s Ruling at page 42, Hon. Mkeha, J, upon confirming that the Final Award was against public policy, held that an award which on the face of it is patently in violation of statutory provisions, cannot be said to be in the public interest. He submitted that where the seat of arbitration is Tanzania and the parties have chosen Tanzanian law as the law applicable to the substance of the dispute, Section 53(1) (a) of the Arbitration Act requires the tribunal to decide the dispute in accordance with the substantive law in force in Tanzania and, therefore, violation of 22 substantive laws is contrary to the Arbitration Act and cannot be condoned by Courts of law. The Learned Counsel for the Petitioner argued that it is the position of the law that an award cannot legalize that which is prohibited by law; and that courts of law cannot uphold an illegality. He referred the court to Chama cha Walimu Tanzania v. Attorney General, Civil Application No.151 of 2008, CAT at Dar es Salaam (Unreported). It was submitted for the petitioner that in the Reconsidered Award, the Tribunal re-awarded reliefs declared by this Court to be contrary to public policy for being in violation of the law. This is contrary to public policy which requires Courts orders and/or decisions to be respected by all to preserve public order, uphold justice and avoid chaos. No exception is afforded to arbitral tribunals. He cited the case of Karori Chogoro v. Waitihache Merengo, Civil Appeal No. 164 of 2018, CAT at Mwanza (Unreported). The last issue raised by Mr. Nyika and his fellow Learned Advocates for the Petitioner, was whether the correction and/or modification of the Final Award was made in accordance with the law. 23 It was submitted that the arbitral tribunal’s power to

correct or modify an award is provided under section 64 (2) (a) of the Arbitration Act. Under this section, an arbitral tribunal is empowered to correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or to clarify or remove any ambiguity in the award provided that the arbitral tribunal shall firstly afford parties a reasonable opportunity to make representations before the correction. It was submitted further that in terms of Section 64 (4) (b) of the Arbitration Act, any correction of an award made by the arbitral tribunal on its own initiatives, is required to be made within twenty-eight days from the date of the award. It was submitted that in this case, during reconsideration of the Final Award on remission, the Tribunal purported to correct the Final Award and awarded the Respondent TZS 1,926,439,108.88 as special damages for unpaid commission for the period between March 2014 and September 2016 on the basis that the notice of termination delivered by the Petitioner on 7th October 2016, did not follow the termination procedure set out in clauses 16.1.1 and 19.1 of the SDA and on ground that such damages had 24 been pleaded. The Tribunal made a correction that what it had intended to award to the Respondent was specific damages for unpaid commission and not for breach of SDA. The Learned Counsel for the Petitioner submitted that the purported correction by the Tribunal was made without inviting parties to address the Tribunal on the intended correction. It was also argued that the correction was made approximately nine months after the Final Award was issued, therefore, contrary to the requirement of Section 64 (4) (b) and Section 64 (2) (a) of the Arbitration Act. It was the further submission for the Petitioner that since the purported correction was in violation of Sections 64 (2) and (4) (b) of the Arbitration Act, it was procured in a manner that is contrary to public policy and therefore subject to challenge on serious irregularities. Further, it was argued that the Tribunal had no jurisdiction to modify or correct the Final Award in the manner purported as this was outside the scope of the remission order and by doing so, it acted contrary to the principle of *functus officio*. It was argued that the Tribunal could not alter the Final Award on any matter which was not remitted back to it. Based on the submissions, the Petitioner invited the Court to find that there are serious irregularities which affect the Reconsidered Award 25 which have caused or are likely to cause substantial injustice to the Petitioner. The Petitioner prayed for this Court to declare that certain parts of the Reconsidered Award to have no effect or alternatively set them aside as per the prayers in the petition. Mr. Ngalo, Learned Advocate for the Respondent, duly filed the written submissions in reply. He submitted that the Court's decision (Hon. Mkeha, J.) in Misc. Commercial Cause No.64/2023 found merit in two grounds which are that the Final Award was (a) procured contrary to public policy and, (b) uncertain and ambiguous. Accordingly, Mr. Ngalo argued, the court remitted the Final Award to the Tribunal for reconsideration on those grounds. He refreshed the court on the issues before the arbitral tribunal and its findings thereon that:

- (a) Regarding the Respondent's breach of the SDA by stopping business, circumstances caused by the Petitioner (then Respondent) contributed to the inability of the Respondent (then Claimant) to continue with business (as per para 161 at page 69 of the Award);

- (b) The Respondent (then Claimant) failed its payment obligations in respect of Credit Facility Instrument read together with the terms of 26 Clauses 9 and 16.1.1 of the SDA hence a material breach (as per para 161 at page 69 of the Award); and
- (c) The Petitioner (then Respondent) has not provided any contractual basis or otherwise as to why the interest should be compounded. The interest rate should be simple 18% (as per para 164 at page 70 of the Award).
- (d) The Tribunal's findings and/or determinations on legal issues include among others that:
- (e) On the basis of statutory and case law, where there is a breach of contract by one party there is a remedy for the innocent party. (As per para 118 at page 50 of the Award);
- (f) The Respondent (then Claimant) should not be disentitled to any rights and remedies provided by law for whatever proven damages and losses the Claimant might have suffered as a result of termination of the SDA (as per para 176 page 79);
- (g) As the Tribunal has held that the Petitioner (then Respondent) was in breach of the SDA, compensation for loss or damage caused by such 27 breach is a remedy available under the Law of Contract Act (S. 73) (See Para 176 at page 79); and
- (h) Having agreed with the High Court's legal position in Finca's case, the Tribunal held that the Respondent (then Claimant) is entitled to its statutory right for certain specific and general damages" (as per Para 178 at page 80). Mr. Ngalo, Learned Advocate, submitted that it is worth noting that the Petitioner has not and does not challenge or fault all or any of the factual and legal findings and determination by the Tribunal above stated. He argued, therefore, that it goes without saying that the Petitioner is content with the Tribunal's findings that: (a) the Petitioner breached the SDA in the manner and to the extent found proven /established, (b) the Petitioner's breaches caused damages and financial losses to the Respondent, (c) the termination of the SDA in October 2016 is wrongful, ineffectual hence ongoing and subsisting until lawfully terminated and (d) as a result of the breaches the Respondent was, and is, entitled to legal redress in terms of the reliefs prayed for. 28 Mr. Ngalo, Learned Advocate, submitted in respect of matters the Respondent believes are untrue, misleading and made in bad faith to discredit the Hon. Arbitral Tribunal. He emphasized that the Hon. Tribunal complied with the Court's order by reconsidering the parts remitted in the manner they did and not in the manner the Petitioner wished or expected. Mr. Ngalo, Learned Advocate, submitted that much as the Respondent did not, and has not, challenged the Court's said decision in the petition challenging the Final Award that resulted into the remission order, still chances of the Respondent challenging the same are neither forfeited nor closed since the Court's decision did not finally and conclusively determine the rights and/or liabilities of the parties. He argued that the decision was preliminary or interlocutory and once a final decision is made on the legality, validity and correctness or otherwise of the Final Award, the Respondent will then challenge the same, if aggrieved. Mr. Ngalo submitted that in essence the Ruling of this Court leading to remission of the Award has two main aspects and findings namely that the Award was Procured in

Contravention of Public Policy and that the Final Award was Uncertain and Ambiguous. 29 Mr. Ngalo, Learned Advocate, submitted that the Court's Final Order regarding the findings/conclusions, were that: "For the foregoing reasoning, having held the award to have been procured in a manner that is contrary to public policy and that, the same is uncertain or ambiguous as to its effect; I proceed to hold that, these are serious irregularities affecting the award. Pursuant to section 75 (3) (a) of the Arbitration Act Cap. 15 R.E. 2020, I remit the award to the arbitral tribunal in whole, for reconsideration". Mr. Ngalo, Learned Advocate, submitted that remittance of the Final Award was made pursuant to Section 73 (3) of the Arbitration Act, which reads: "Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within three months from the date of the order for remission or such longer or shorter period as the court may direct". 30 Mr. Ngalo, Learned Advocate, submitted that complaints that the Tribunal has refused or ignored or failed to comply with the Court's directives have no merits whatsoever and that the Reconsidered Award has addressed the areas the Court held to be contrary to public policy and/or those which it found to be uncertain or ambiguous, even if the Reconsidered Award may not be in the language or manner expected or wished by the Petitioner. After making the above generalized arguments, Mr. Ngalo, Learned Advocate, submitted in respect of the three issues submitted upon by Mr. Gasper Nyika, Ms. Samah Salah and Mr. Madina Chenge, Learned Advocates for the Petitioner. On the 1st issue that that the Tribunal exceeded its Powers/Jurisdiction, Mr. Ngalo submitted that the Petitioner's complaints on this ground are wholly unfounded both in law and in fact and unjustified. He submitted that the Petitioner has not demonstrated or substantiated such allegations regarding how and to what extent has the Tribunal adjudicated and/or challenged the Court's decision or findings. He argued that the term "adjudication" simply means resolution of two or more competing views, arguments or facts. He submitted that the Petitioner has not identified or demonstrated the matters that the Tribunal 31 adjudicated in the Reconsidered Award. In the same vein, he argued that the Petitioner has not demonstrated which parts of the Court's decision has the Tribunal challenged, how and to who! He argued that to say that the Tribunal repeated the same findings and re-awarded the same reliefs without more is not enough, unfair and disrespectful to the Arbitral Tribunal. In any event, Mr. Ngalo argued, there is nothing in the Court's decision which directed or prohibited or restricted the Tribunal not to repeat or award the same reliefs to the parties after reconsidering the Final Award. Mr. Ngalo, Learned Advocate for the Respondent, submitted that the Court's final decision/order on the previous Petition is that whole of the Final Award is remitted to the Tribunal. He added that the Court's decision did not set aside and could not have set aside parts of the Final Award and at the same time order reconsideration! He emphasized that having found merit in the two grounds complained of under the previous Petition, the Court declined the Petitioner's prayers to have those parts firstly declared as of no effect and, secondly, setting aside those parts. Instead, the Court ordered reconsideration with no specific directives on what the Tribunal should reconsider, how and to what extent. Mr. Ngalo submitted 32 that the Tribunal did not exceed and has not, in the circumstances, exceeded, its jurisdiction or

powers in so far as the Reconsidered Award is concerned. Mr. Ngalo, Learned Advocate, concluded that the Tribunal was aware of what the Court meant and wanted it to reconsider. This is demonstrated by the Tribunal's resort to finding out the meaning of the term "reconsideration" so as to guide the Co-Arbitrators as per paragraph 13 of the Reconsidered Award. Mr. Ngalo, Learned Advocate, reasoned that in absence of any specific directives and or format, the reconsideration could take any form and it is an exercise in futility to strenuously dare and sad to accuse and argue against the Tribunal in the manner and the extent done by the Petitioner. Mr. Ngalo distinguished the Catic's case from the present matter in that in Catic's case, there was breach of express provision of law prohibiting public expenditure of public funds without following the Procedures under the law. In this matter, on the other hand, Mr. Ngalo argued, the violations alleged are directed to the provisions of the LCA, the Arbitration Act and case law, all of which have no provision prohibiting or restricting arbitral tribunals from awarding special and general damages for breach of contract to innocent parties. 33 Mr. Ngalo, Learned Advocate, addressed the court with respect to the second issue raised by the Petitioner. It was the allegation that the Reconsidered Award was Procured Contrary to Public Policy. Mr. Ngalo, Learned Advocate, submitted that the basis and/or gravamen of the Petitioner's complaints are that this Court has, in its decision, made findings that (a) the award of unpaid commissions (i) was contrary to the law governing of special damages; (ii) was made for the period before the SDA had been breached, (iii) was made before any determination that the Respondent had proved such special damages and (iv) was made when at para 179 of the Final Award as amended by the Reconsidered Award the Tribunal found that commissions for the June 2012 to September 2016 had already been paid to the Respondent; (b) the award of TZS 9.5 billion was (i) contrary to Section 73 (1) and (2) of the LCA and (ii) against the legal principle of awarding costs without assigning reasons; (c) the award of simple interest on the Petitioner's principal claim for the pre- Award period was contrary to Sections 56 (1) and 56 (2) of the Arbitration Act, which do not give discretion to arbitral tribunals to vary compound to simple interest as agreed by the parties; 34 and (d) awarding the Petitioner simple interest at 7% for the post-Award period instead of the alleged interest of 18% compounded. Mr. Ngalo, submitted that the Petitioner's complaints on this ground are a replica of the same ones fronted under the previous Petition and are not borne out by the record of the arbitral proceedings which has not been made part of the present petition for this Court's review and ascertain of what is alleged by the Petitioner. He submitted that the Petitioner's complaints on the re-awarded reliefs are unfounded both in law and in fact and further that submissions and/or arguments by the Petitioner's Counsel in support thereof are legally erroneous and unsubstantiated by the pleadings filed under the arbitral proceedings. In respect of unpaid Commissions, Mr. Ngalo submitted that the reasons advanced by the Petitioner's Counsel are factually unfounded and legally erroneous. He argued that the unpaid commissions were pleaded under the Respondent's Amended Statement of Claim and proved by the Petitioner's own document entitled "unclaimed commissions" attached to Annexures "CDL – 19" to the Respondent's Amended Statement of Claim. Therefore, he argued, it beats common sense and logic to comprehend how on earth can the Petitioner

and her Counsel deny or dispute such 35 facts as the basis of challenging the Final Award, and now the Reconsidered Award! He argued that the Reconsidered Award has neither been made nor procured in any manner contrary to public policy or in violation of any law or legal principle as alleged by the Petitioner and/or at all. He prayed for this Court not to disturb or set aside the re-award of TZS 1,926,439,108.88 as unpaid commissions for the period between March 2014 to September 2016 because the same was pleaded and still is a lawful entitlement of the Respondent. On the Award of 18% simple interest instead of compound interest, it was the submission of the Learned Counsel for the Respondent that actually in all the facility letters the parties agreed as follows:- “3. The credit facility will bear no interest except where repayments are overdue in which case an interest of 18% per annum will be chargeable”. Mr. Ngalo referred the court to the Credit Facility Letters annexed to the Amended Statement of Claim as “CLD- 08”, which do not use the words “compound or simple” but rather, talks of 18% per annum. He wondered on what basis then does the Petitioner claim to be awarded compound interest at 18% per annum on her principal sum of TZS 5,092,246,000/= 36 He went on to submit that the court did not issue specific directives to the tribunal to award compound interest in favour of the petitioner. Rather, the court cemented on explanation to tribunal’s decision to award simple interest. He referred this Court to page 39 of the court’s ruling where the court stated that: “...While there was contractual interest agreed by the parties, reduction of the same from 18% to 7% and its variation from compound to simple interest as mercantile practice would require, went unexplained...” Mr. Ngalo submitted that in reconsideration of the award, the Arbitral tribunal correctly re-awarded simple interest and advanced explanation under paragraph 19 and 20 being that firstly, the petitioner did not plead compound interest and secondly, that the Credit Facility Instrument (Annexure Planetel- 3 of the Answer to the petition), agreed and signed by both parties, invited simple interest. He insisted that in making reconsideration, the arbitral tribunal did not defeat the agreement of parties. The tribunal awarded the interest at the rate of 18% per annum as agreed by the parties for the whole duration of defaulted payments, 37 i.e. from 30th December 2013 to 21st December 2022 (as per paragraph 20 of the reconsidered award). Mr. Ngalo, Learned Advocate, submitted that the authorities cited and relied upon did not, and cannot be interpreted as imposing a mandatory or absolute obligation on the arbitral tribunals and courts to grant compound interest on each and every business/commercial debt even where there is no such term in the parties’ contracts. In the premises, he argued, the award and re-award of simple interest on the Petitioner’s claim of TZS. 5,092,246,000/= is perfectly in order as was done in exercise of the Tribunal’s discretion and in accordance with the law and judicial precedent on interest claims for the said periods. He called upon the court to confirm the Tribunal’s re-awarding of simple interest as done under the Reconsidered Award because doing otherwise would be interfering with the Tribunal’s judicial exercise of its discretion under the law. With respect to the last issue that the Correction/Modification of the Final Award Violates Sections 64 (2) (a) and (4) (b) of The Arbitration Act, Mr. Ngalo, Learned Advocate for the Respondent, submitted that the Petitioner’s complaints are addressed and covered by the Respondent’s submissions on the second ground and notably the Court’s final order 38

which remitted “the whole of the Final Award for reconsideration”. He added that, in any event, the tribunal has the right and power to do what it did when entertaining reconsideration of the whole Final Award not on its own motion but on the basis of the Court’s remittance order. Mr. Ngalo argued that the correction or modification made has neither violated any principle of public policy or law nor has it occasioned any prejudice or cause injustice to either party. He stressed that even the Petitioner has not demonstrated how and to what extent the modification or correction made have prejudiced her interests or rights or the injustice suffered as a result. Mr. Ngalo, Learned Advocate, concluded his submissions by praying to the Court not to disturb or set aside the Reconsidered Award on the basis of the Petitioner’s complaints regarding the corrections/modification made. He prayed for dismissal of the Petition, confirmation of the reconsidered award and costs of pursuing the arbitration and opposing the Petitions. 39 By way of rejoinder, the Learned Counsel for the Petitioner submitted in respect of the three issues raised. It was submitted that the Petitioner has the right, in accordance with the Arbitration Act, to challenge any order and or decision of the Arbitral Tribunal in accordance with the laws. It was submitted that the Respondent appears to suggest that the Tribunal’s powers on reconsideration of an award are unlimited, and the Petitioner’s challenge is disrespectful and or discourteous to the Tribunal. The Learned Counsel for the Petitioner retorted that the Learned Counsel for the Respondent has failed to provide any authority in support of this argument. On the other hand, it was argued, the Petitioner relied on Section 78(3) of the Arbitration Act and case law to clearly show that the Tribunal was required to reconsider the Final Award only on those matters remitted to it by the Court and in conformity with the guidance obtained from the Ruling. He argued that if the argument by the Respondent’s Counsel were true, it would undoubtedly lead to a miscarriage of justice and render the Court’s supervisory power over arbitral tribunals, redundant. It was the Petitioner’s submission that the Court need not issue a ‘word-for-word’ order to the Tribunal telling it that “do not proceed to award damages that were neither pleaded nor proved”. He reasoned that 40 the finding made by the Court was clear enough for the Tribunal to understand this position. He argued that any word-for-word direction would amount to a re-write of the award by the Court and defeat the purpose of remission. On the issue of Arbitral Tribunal’s power on correction/modification of the Final Award, it was submitted in rejoinder that the purported correction was made contrary to the principles on natural justice. It was argued further that the Petitioner is prejudiced. Mr. Nyika wondered that if a monetary award made against the Petitioner is not prejudicial, what possibly would constitute prejudice in the eyes of the Respondent. He reiterated the prayers made in the petition and submissions in chief. That marked the end of the submissions by the Learned Counsel in this matter. I will now proceed to determine the petition before me. Before getting into the gist of the petition there are some settled legal principles the court stands guided by as it approaches the matter at hand and these should be known in advance. First is the principle of *functus officio*. In the case of *Tanzania Portland Cement PLC versus Lukas Mwakabanga* [2024] TZHCLD 158 (Tanzlii), High Court, at page 4, Mlyambina, J., had this to say on *functus officio*: 41 “...It is crystal clear that the doctrine of “*functus officio*” restricts a judge or a magistrate or the arbitrator to perform a

function which has been performed already. It means that when a matter is finally determined, it cannot be re-determined.” Under the doctrine of *functus officio*, it follows that the Arbitral Tribunal who issued the final Award between the parties herein on 15 September 2023, thereby became *functus officio* in respect of that Award save to the extent their powers were subsequently restored or revived by the Order of the Court in Misc. Commercial Cause No.64 of 2023, when it remitted the Award back to the Co-Arbitrators for their reconsideration, but only to the extent directed by the Court. Equally, under the doctrine of *functus officio*, this Court having issued its decision on 27th March 2024 through Hon.Mkeha,J., in Misc. Commercial Cause No.64 of 2023, which decision made a finding that the Final Award dated 15 September 2023 contained serious irregularities and proceeded to remit the same to the Arbitral Tribunal for its reconsideration, is now *functus officio* to reconsider the final Award between the parties herein dated 15 September 2023. I have started with the doctrine of *functus officio* because upon reading the submissions by the Learned Counsel for the Petitioner and the 42 Respondent alike, great efforts were made by both sides in an attempt to vindicate the correctness or disclose the deficiencies on its merits. Equally, there have been arguments trying to vouch or discredit the Ruling of this Court dated 27th March 2024 through Hon. Mkeha,J., in Misc. Commercial Cause No.64 of 2023. Under the doctrine of *functus officio*, the judicial position taken in that case is settled so far as the High Court is concerned. Any aggrieved person ought to have taken the matter to the Court of Appeal of Tanzania. To set the matters in their correct perspective, I also wish to point out the fact that before me it is only the reconsidered Award dated 3rd June 2024, delivered by the Arbitral Tribunal pursuant to the order of this Court, that is being challenged now. This is an Award distinct from the Final Award dated 15 September 2023, hence capable of being challenged independently. Therefore, the focus of this Ruling is only in respect of the reconsidered award and not the Final Award which was dealt with by this Court in Misc. Commercial Cause No.64 of 2023. In order to set the legal context clear, again, I will approach the matter at hand while being guided by another principle on the scope of judicial intervention of arbitral Awards. The rule as restated in the case of 43 Fidelity Management SA and Others Vs. Myriad International Holdings BV and another [2005] EWHC 1193; [2005] 2 ALL (Comm), in 312 at [2][5], where Morison J, observed that: “When considering arbitral award, as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults in awards and with 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 usually the case, that there will be no substantial fault that can be found with it.” A similar attitude was restated by the Court of Appeal of Tanzania in the case of Vodacom Tanzania Ltd vs Fts Services Ltd (Civil Appeal No 14 of 2016) [2019] TZCA 514 (27 December 2019) whereby at page 15 the Court of Appeal held 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 rehearing”. 44 With the above in mind, I will not consider or consider the Counsel’s arguments on the merits of the reconsidered Award because this is not an appeal or a rehearing of the arbitral proceedings. The court's

intervention is limited to errors of law, which are apparent on the face of the award especially in the aspects of lack of substantive jurisdiction and serious irregularities. In the case of D.B Shapriya and Co Ltd Vs Bish International BV (2) 2003 E.A 2002 the court held that: “Courts cannot interfere with the findings of the fact by the arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the ground of misconduct. The court's intervention is limited to errors of law, which are apparent on the face of the award. It is only when an erroneous proposition of law is stated in an award and forms the basis of that award that a court can set aside the award or remit it”. With the legal perspective clear, I will now proceed to determine the merits of the petition challenging the Reconsidered Award. As seen in the submissions by the Learned Counsel for the Petitioner, the reconsidered 45 Award was assailed from three different fronts. These are: arbitrators exceeding their jurisdiction; the Award violating public policy and the reconsidered Award being issued contrary to section 64 of the Arbitration Act. I will start with the third issue to be argued, namely that the correction and or modification of the Final Award made by the Tribunal was contrary to the provision of Sections 64 (2) (a) and (4) (b) of the Arbitration Act. I reproduce section 64 of the Arbitration Act: 64.-(1) The parties may agree on the powers of the arbitral tribunal to correct an award or make an additional award.

- (2) Where parties fail to agree in terms of subsection (1), the arbitral tribunal may, on its own initiative or on the application of a party-
 - (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award; or
 - (b) make an additional award in respect of any claim, including a claim for interest or costs, 46 which was presented to the arbitral tribunal but was not dealt with in the award: Provided that, the arbitral tribunal shall first afford the other parties a reasonable opportunity to make representations to it.
- (3) An application for the exercise of powers under this section shall be made within twenty eight days from the date of the award or such longer period as the parties may agree.
- (4) Any correction of an award shall be made –
 - (a) in the case of an application of a party, within twenty-eight days from the date the application was received by the arbitral tribunal;
 - (b) where the correction is made by the arbitral tribunal on its own initiative, within twenty-eight days from the date of the award; or
 - (c) in either case, such longer period as the parties may agree.
- (5) Any additional award shall be made within fifty-six days from the date of the original award or such longer period as the parties may agree. 47

- (6) Any correction of an award shall form part of the award. It is obvious that the above provision does not deal with remission of an Award by order of the court for its reconsideration by the Arbitral Tribunal. Remission of an arbitral award by Order of the court for reconsideration by the Arbitral Tribunal is not anyhow governed by section 64 of the Arbitration Act. It is governed by section 78 of the Act. The power of the Arbitral Tribunal to correct an award under section 64 of the Act or make an additional Award is contractual and consensual conferred by an agreement of the parties to the arbitration. Under section 64 of the Arbitration Act, the Arbitral Tribunal may correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, on its own initiative or on the application of a party. Also, the arbitral tribunal, on its own initiative or on the application of a party, may make an additional award in respect of any claim, including a claim for interest or costs, which was presented to the arbitral tribunal but was not dealt with in the award. The present petition deals with a reconsidered Award made by the Arbitral Tribunal pursuant to an order of the Court, not a corrected Award or additional 48 Award under section 64 of the Act made by the Tribunal suo mottu or referred to the Arbitral Tribunal by an application of a party. In this petition, Mr. Nyika, Learned Advocate, complained that the reconsidered Award was made approximately nine months after the Final Award was issued and, therefore, contrary to the requirements of Section 64 (4) (b) and Section 64 (2) (a) of the Arbitration Act. He therefore argued that since the purported correction was in violation of Sections 64 (2) and (4)
- (b) of the Arbitration Act, it was procured in a manner that is contrary to public policy and, therefore, subject to challenge on serious irregularities . I find it as a matter of law that section 64 of the Arbitration Act does not apply to reconsideration of an arbitral award remitted by order of the court to the Arbitral Tribunal. It follows, therefore, that all the complaints by the Learned Counsel for the Petitioner, on non-conformity to section 64 of the Arbitration Act, are unfounded and a misconception of the law. A remission of an Award by the Court for reconsideration by the Arbitral Tribunal is governed by section 78 of the Arbitration Act not section 64. In reconsidering the Arbitral Award remitted by order of the Court, therefore, the Arbitrators were not bound by nor justified to apply, any of 49 the provisions of section 64 of the Arbitration Act. The reconsidered Award, therefore, cannot be faulted as such on that aspect. The second issue in contention in this petition was with respect to the reconsidered Award being procured in a manner that is contrary to the public policy because it violates the laws of Tanzania, both statutory and case laws. The Learned Counsel for the Petitioner relied on section 75(1) and (2) (g) of the Arbitration Act to argue this ground. I reproduce section 75 (1) and (2) (g) of the Arbitration Act, CAP 15 R.E 2020: 75.- (1) A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the arbitral tribunal, the proceedings or the award.

- (2) For the purpose of this section, “serious irregularity” means an irregularity of one or more of the following kinds which the court considers has caused or is likely to cause substantial injustice to the applicant:
- (g) the award being obtained by fraud or procured in a manner that is contrary to public policy;
- 50 This Court had an opportunity to consider the meaning and implications of section 75(2) (g) of the Arbitration Act, 2020 in the case of Ministry of Education and Vocational Training Zanzibar vs Mindset Techies (T) Ltd (Misc. Commercial Cause No. 02247 of 2024)

[2024] TZHCComD 283 (8 November 2024) where a petition to challenge an arbitral Award was brought under section 75(2) (g) of the Arbitration Act. The Court inter, alia, observed in extenso as follows: “In my considered and settled view, the above provision is not applicable to the circumstances of this case since there is no allegation that the Award or additional award was procured by fraud or in a manner that is contrary to public policy. The complaint is therefore misplaced. That provision does not refer to the effect of the Award rather in the way or manner that the Award was procured. Procuring the Award in a manner that is contrary to public policy should be given a similar meaning akin to obtaining the Award by fraud. It embraces variety forms of malpractices other than fraud but having more or less the same imputations like fraud and which are therefore contrary to public policy. Whereas section 75(2)(g) of the Arbitration Act deals with the manner of procuring the Award 51 being contrary to Public Policy, the submissions by Mr. Othman on this point focused on the effect of the Award given that it contravenes public policy. Those are two different things. An Award may be procured in a manner that does not contravene public policy but its effect and enforcement may become contrary to public policy. Likewise, an Award may be procured in a manner that contravenes public policy but its enforcement may not have the effect of contravening public policy. Section 75(2) (g) of the Arbitration Act, refers to the manner of procuring the Award as being contrary to public policy where an award is procured in circumstances which are similar to fraud and other illegal practices or practices that are against the public policy. Therefore, the complaint by the Petitioner is misconceived as the ground of challenge under section 75(2) (g) of the Arbitration Act, does not have anything to do with the substance and effect of the award itself, rather, it has bearing to the conduct, practice, manner or process by which the award itself was obtained or procured by the parties or given by the arbitrator. In the case at hand, there is no complaint from the Petitioner in that regard. 52 In the same above referred case, the Court further observed that: “Where the effect of an Arbitral Award is violative of the public policy, an objection may be raised in court under section 83(2)(a)(vi)(b)(ii) of the Arbitration Act, 2020 when resisting the recognition and enforcement of that award. In CBS and others v. WAK Orient Power & Light Ltd, (Decision of 12 April 2001, No. 99-2996; published in YCA, Vol. 26 (2001), p. 1120.), the implications of the public policy ground for refusing recognition or enforcement of an award was described thus: [T]he public policy exception is very narrow.... The courts have held that the exception is only applicable when enforcement would violate the forum state’s most basic notions of morality and justice.” In interpreting the implications and applicability of

section 75(2)(g) of the Arbitration Act, I stand by the above quoted except from an earlier decision of this court. In the petition at hand, the Learned Counsel for the Petitioner argued that the reconsidered Award is in clear violation of mandatory legal rules which are fundamental to the legal order of the 53 state. He argued that an award that is in breach or would result in the express violation of the laws and disrespect to the court orders in Tanzania can be challenged for being contrary to public policy. With due respect, Mr. Nyika, Learned Counsel, in his submissions on this ground was talking about the effect of the reconsidered award as being violative of public policy, rather than that the manner in which the award was procured being violative of public Policy. The argument by Mr. Nyika, Learned Advocate, would have been relevant had the Respondent herein been resisting a petition for recognition an Arbitral Award for its enforcement as a decree of the court. I find that the complaint by the Petitioner that the Reconsidered Arbitral Award was procured against the public policy, was raised and argued out of its legal context and therefore it has not been substantiated. The same fails. The third argument raised by the Learned Counsel for the Petitioner to challenge the reconsidered award was that the Tribunal exceeded its powers, other than jurisdiction, when it adjudicated and/or challenged the Court's findings in the Ruling. The Petitioner's Learned Counsel challenged the reconsidered award on this ground relying on the provisions of Section 54 75 (1) and (2) (b) and Section 78 (1) and (3) of the Arbitration Act. I reproduce section 75(1) and (2) (b) of the Act: 75.-(1) A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the arbitral tribunal, the proceedings or the award.

- (2) For the purpose of this section, "serious irregularity" means an irregularity of one or more of the following kinds which the court considers has caused or is likely to cause substantial injustice to the applicant:
 - b) The arbitral tribunal has exceeded its powers otherwise than by exceeding its substantive jurisdiction; As to section 78 of the Arbitration Act, the same provides that: 78.-(1) The following provisions shall have effect where the court makes an order under section 74, 75 or 76 with respect to an award. 55
- (2) Where the award is varied, the variation shall have effect as part of the arbitral tribunal's award.
- (3) Where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within three months from the date of the order for remission or such longer or shorter period as the court may direct. The Ruling of this Court in Misc. Commercial Cause No.64 of 2023 (Hon.Mkeha,J.) delivered on 27th March 2024, ordered that: "For the foregoing reasoning the third issue is answered in the affirmative. That is, the Final Award is uncertain or ambiguous as to its effect, to the extent indicated hereinabove. For the foregoing reasoning, having held the award to have been procured in a manner that is contrary to public policy and that, the same is uncertain or ambiguous as to its effect; I proceed to hold that, these are

serious irregularities affecting the 56 award. Pursuant to section 75 (3) (a) of the Arbitration Act Cap. 15 R.E. 2020, I remit the award to the arbitral tribunal in whole, for reconsideration.” The specific findings of the Court were stated at pages 47, 48, 49 and 50 of the Ruling and I can reproduce the same that: “(a) At page 80 of the award the Tribunal determined not to award the Respondent specific damages in the form of unpaid commissions as there was no basis in law to award that limb of damages. However, later on, the Tribunal awarded specific damages in the form of unpaid commissions from March 2014 to September 2016;

- (b) At page 70 of the award, the Tribunal held that the Petitioner was contractually entitled to 18% interest rate on the amount of TZS 5,092,272,254.09/= from the date of filing the Arbitration Claims. However, without reasons, at page 84 of the award, the Tribunal awarded interest on the said amount at the rate of 7%;
- (c) At pages 35 and 37 of the award the Tribunal held that, the Petitioner's purported 57 termination of the SDA on 07/10/2016 was a breach of contract, yet, at page 83 of the award the Tribunal awarded the Respondent damages up to the date of breach the result being that, the Respondent was held to be entitled to damages prior to the occurrence of the purported breach;
- (d) At paragraphs 104 and 180 of the award the Tribunal held that the Petitioner was entitled under the SDA to introduce TD Model and that it did not constructively terminate the SDA by introducing the TD Model. However, at page 81 of the award, the Tribunal awarded the Respondent general damages of TZS 9,500,000,000/= partly because of the Petitioner's act of introducing the TD Model. Now, when the Award was remitted to the Co-Arbitrators for their reconsideration of the same, they did the reconsideration in the following manner as it can be seen from the Reconsidered Award dated 3rd June 2024:
 - (a) The Co-Arbitrators deliberated and resolved on what they were expected to do in conformity with the order of the Court regarding 58 the remitted Award. This is seen at page 8 of the reconsidered Award where they reasoned that: “13. At the outset the Tribunal observes that reconsideration is neither a term of art nor defined in law. The Tribunal will therefore subscribe to the plain dictionary meaning of the term. The Online Cambridge Dictionary of the English language defines reconsideration as: “The act of thinking again about a decision or opinion and deciding if you want to change it”. Collins Cobuild Advanced Learner's English Dictionary explains reconsideration in the following terms: “if you reconsider a decision or opinion, you think about it and try to decide whether it should be changed.” 14. Upon close and careful reading of the Court decision, the Tribunal turns to the reconsideration and modification, where appropriate, of the final Award in compliance with the Court order as set out below.” (underlining added) 59 The Co-Arbitrators proceeded to reconsider the Final Award under different aspects as directed by the Court. In particular the following are worthy being noted at pages 9 to 12 thereof: “At page 42 of the Court decision, the Court held the Final Award was procured in contravention of section 73 (1) and 73(2) of the LCA and sections 17(1) and 56(1) and 56(2) of the Arbitration Act, resulting in the

Final Award being contrary to public policy...the reconsidered view of the Tribunal is that the award of TZS 9,500,000,000 to the Claimant as general damages is touted in the Tribunal's reasoning contained in paragraphs 104, 115 to 118, 180 to 183 of the Final Award. (underlining supplied) At page 13 of the reconsidered Award, the Co- Arbitrators proceeded to reconsider "losses suffered by the Claimant" and revisited its reasoning in the Final Award and held that: "In the case at hand, the Respondent has provided sufficient Evidence to support the claim that there is debt of TZS. 5,092, 272,254. 09 being unpaid amount claimed against the Claimant under the credit facility as outstanding balance of the 60 executed works. This amount has remained outstanding since 30th December 2013 being unpaid amount claimed against the Claimant under the credit facility. The Tribunal finds that this is payable as a matter of course. Accordingly, and on the same basis, the Tribunal will not Award the Claimant a declaration that the introduction and implementation of TD Model in 2012 constructively terminated the Super Dealer Agreement hence unlawful and invalid... "With reference to the Claimant's prayer for general damages for breach of contract arising from the Respondent's not complying with the contractual procedure for the purported termination and for introducing a new Model which resulted in the Claimant's being frustrated and grounding to a halt, the Tribunal is minded exercising its discretion to award the Claimant general damages in the amount of TZS.9,500,000,000.00." (underlining supplied) At page 18 of the reconsidered Award, the Tribunal reconsidered the "Compound interest". It reasoned that: "20. To the extent that the Tribunal found that Parties had not specifically provided for 61 compound interest to apply. The Parties' implied understanding was that the interest to be paid would be simple. There is no controversy that the Tribunal awarded the contractually agreed interest rate of 18% per annum with respect to the period of default of payment, i.e. from 30th December 2013 to 21 December 2022. "21. The 7% was awarded with respect to the period from the date of filing the Amended and Restated Statement of Defence and Counterclaim by the Respondent to the date of final award." (underlining supplied) At page 20 of the reconsidered Award the Arbitral Tribunal reconsidered "Ambiguity/uncertainty to the effects of the final Award", then it concluded that: "21. At p. 47 of the Court decision, the Court observed as follows: at page 70 of the award, the Tribunal held that the Petitioner was contractually entitled to 18% interest rate on the amount of TZS 5,092, 272,254.09/= from the date of filing the Arbitration Claims. However, without reasons, at page 84 of the 62 award, the Tribunal awarded interest on the said amount at the rate of 7%. At pages 47-48 of the decision, the Court held that there is uncertainty or ambiguity with regard to damages award. The Court also observed that the tribunal had held at page 80 of the Final Award, that it would not award specific damages for unpaid commissions. 23.The Tribunal wishes to clarify that what it meant to say at pages 33 and 37 of the Final Award is that the 7th October 2016 notice of termination was not what was contemplated under Clause 16.1.1 of the SDA. What the Tribunal meant to say under paragraph 87 at page 37 of the Final Award was that the October notice did not follow the procedure contemplated under clauses 16.1.1 and 19. 1 of the SDA. The Claimant had prayed for specific damages being underpaid commission due to constructive termination. This prayer was denied by the Tribunal at page 189 of the Award. What the Tribunal intended

award to the Claimant under A (2) of the Depositif was specific damages for unpaid commission and not for breach of the SDA. The Tribunal now 63 accordingly modifies A (2) to reads as follows: “Payment of the sum of TZS 1,926,439,108. 08 (VAT inclusive) as specific damages in form of unpaid commissions for the period between March 2014 and September 2016. “

24. To further clarify, at page 80, paragraph 179 of the Final Award, the Tribunal misquoted the prayer for underpaid commission to include unpaid commissions. The Tribunal, therefore, substitutes the phrase “Respondent’s breach” for the phrase “unpaid commissions” to align with the reconsidered reasoning; above.
25. At p. 48 the decision the Court held that the Tribunal should have not awarded general damages because of what it said in paragraph 104 and 180... The Tribunal did not grant this prayer in view of what it observed in paragraphs 104 and 180 of the Final Award. What the Tribunal said in those paragraphs is consistent with the Tribunal’s denial to the Claimant’s prayer for specific damages set out above. At para 183 of the Final Award it is clear that general damages were awarded due to the Respondent’s procedural breach of the agreement. To be more specific, the general 64 damages were not awarded due to constructive termination but rather they were awarded due to breach of the agreement for failure to follow the procedures for termination as agreed by the parties. After the above reproduced responses to the decision of the Court, the Arbitral Tribunal issued its reconsidered Award with dispositive orders in it which essentially maintained the position of the Arbitral Tribunal it was in the Final Award that had been remitted to them by the Court for their reconsideration. Now, Mr. Nyika, Learned Advocate for the Petitioner, has taken issues with what the Co-Arbitrators did under the banner of “reconsideration” of the Final Award remitted to them by order of the court. The main argument by the Petitioner’s Counsel is that the Arbitral Tribunal exceeded its powers, other than jurisdiction, when it adjudicated and/or challenged the Court’s findings in the Ruling. He argued that the conduct by the Arbitral Tribunal violated section 75(1) and (2) (b) of the Arbitration Act, hence a serious irregularity. Mr. Ngalo, Learned Advocate for the Respondent, has defended the Arbitral Tribunal’s approach to reconsideration of the award by arguing that the Court ordered 65 reconsideration with no specific directives on what the Tribunal should reconsider, how and to what extent. Mr. Ngalo, Learned Advocate, submitted that the Tribunal was aware of what the Court had meant and wanted it to reconsider and that is why the Tribunal resorted to finding out the meaning of “reconsideration” to guide them as per paragraph 13 of the Reconsidered Award. He reiterated that in absence of any specific directives and or format, the reconsideration could take any form. The rival arguments by the Learned Counsel for the parties brings the court to the legal issue as to what an arbitral tribunal is required to do when reconsidering an Award remitted by the Court for its reconsideration. Section 78 of the Arbitration Act provides that: 78.- (1) The following provisions shall have effect where the court makes an order under section 74, 75 or 76 with respect to an award.

- (2) Where the award is varied, the variation shall have effect as part of the arbitral tribunal's award.
- (3) Where the award is remitted to the arbitral tribunal, in whole or in part, for 66 reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within three months from the date of the order for remission or such longer or shorter period as the court may direct.
- (4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may order that any provision, that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards to the subject matter of the award or, as the case may be, the relevant part of the award. Section 78(3) shows what the Arbitral Tribunal is required to do when an Arbitral Award is remitted by order of the Court for reconsideration. That is where the award is remitted to the arbitral tribunal, in whole or in part, for reconsideration, "the arbitral tribunal shall make a fresh award in respect of the matters remitted "within three months from the date of the order for remission or such longer or shorter period as the court may direct. 67 The question remains as to whether in making the fresh Award, the powers of the Arbitral Tribunal are anyhow circumscribed by the Order of the Court while remitting the Award for reconsideration? Section 78(1) of the Act is instructive that the provisions of section 78 on remission of an Awards by order of the court for its reconsideration by the Arbitral Tribunal, shall occur only where the Court makes an order under section 74 which is on lack of substantive jurisdiction on the part of the Arbitral Tribunal; section 75 which is on serious irregularity or section 76 which is on appeal against an Arbitral Award to Court by way of Case Stated. The case stated procedure is deemed to be an "appeal" against an arbitral award on its merits which can only be pursued where both parties agree in writing to that procedure and state the facts surrounding the award delivered for the court to determine the "special case" and enter Judgment. The optional, consensual, special case stated that results into a Judgment of the Court on the merits of the dispute, in the place of an Award, is what is termed as an "appeal" under section 76 of the Act because the court's inquiry extends to the merits of the Award unlike the normal challenges on substantive jurisdiction or serious irregularity. Whenever the grounds of challenge under sections 74, 75 or 76 of the 68 Arbitration Act exist, and a challenge under those provisions succeeds, the Court has a variety of reliefs to grant in respect of the successfully challenged Award, including variation of the Award where the challenge is based on section 74 or remission of the Award for its reconsideration by the Arbitral Tribunal where the challenge is based on sections 75 and 76 of the Act. Remission is the most preferred, alternative relief that maintains sanctity of the arbitration agreement, even where there are grounds justifying the court setting aside the Award. In order for remission of arbitral Award to be ordered by the Court, the grounds of challenge under sections 75 or 76 should be proved to exist such that the court would have been justified to annul or set aside the Award on the basis thereof, but instead of setting aside the Award, the Court orders remission of the Award for reconsideration by the Arbitrator. No remission of an Award for reconsideration by the Arbitral Tribunal can be

ordered by the Court unless the circumstances are such that, on the basis of the same grounds, the court would have been perfectly entitled to annul or set aside the Award. That is, there must be some misconduct which amounts serious irregularity under section 75 or improper application of the law on the merits of the Award (where parties agree to this remedy) which 69 attracts appeal by way of case stated under section 76. This means that by the time the Court decides to order remission of the Award for reconsideration, it will have inevitably already pointed out the anomalies in the Final Award which constitute serious irregularity or improper application of the law, in case section 76 is applicable. This means that it is not possible for the Court to order remission of an Award for reconsideration by the Arbitral Tribunal with no specific directives on what the Tribunal should reconsider, how and to what extent. Remission order by the Court inevitably will contain within it the matters remitted for reconsideration and the legal basis of remitting those matters for their reconsideration by the arbitral Tribunal. When an Award is remitted by the Court for its reconsideration by the Arbitral Tribunal, there is no question of uncertainty as to whether or not the matters remitted for reconsideration were wrongly dealt with as to constitute serious irregularity. When an Award is remitted by the Court for its reconsideration by the Arbitral Tribunal, the court will have already conclusively found with certainty that the matters remitted for reconsideration were wrongly dealt with by the Arbitral Tribunal as to constitute serious irregularity for which the same Award could have been 70 set aside by the Court if it had not opted for a more convenient relief of remission. In the case at hand, when remitting the Final Award for reconsideration, this Court in Misc. Commercial Cause No.64/2023 held that: "For the foregoing reasoning, having held the award to have been procured in a manner that is contrary to public policy and that, the same is uncertain or ambiguous as to its effect; I proceed to hold that, these are serious irregularities affecting the award." It is my settled view that the court while remitting the Award for reconsideration had already conclusively found with certainty that the matters being remitted for reconsideration by the Arbitrators had been inappropriately dealt with by the Arbitral Tribunal and that the errors constituted serious irregularities affecting the award. That is to say the Court was thereby giving its Ruling that unless the matters remitted for reconsideration by the Arbitrators could be patched by the Arbitrators themselves, their effect was sufficient enough to make the Award set aside by the Court under sections 75 or 76 of the Arbitration Act. 71 The question argued by the Learned Counsel was whether the powers of the Arbitral Tribunal during remission by order of the court for reconsideration, are limited? Without flinching the answer is in the affirmative. The scope of powers of the Arbitral Tribunal during reconsideration of an arbitral Award following a remission of the same by the court are circumscribed by the Court's Ruling and order remitting the Award for reconsideration. It is this Ruling that revives the powers of the Arbitrators to reconsider their own final award in respect of which they would have otherwise become *functus officio*. It is the same Ruling and Order of the Court which dictate what the Arbitrators must do to salvage their otherwise defective Award in some respects but which defects are curable if the Arbitrators themselves, guided by the Court's order, reconsider their Award in respect of the matters thereby remitted for reconsideration. The Arbitrators have no option in

incorporating into their reconsidered Award, the findings and directives of the Court contained in the remitting order. The Court has a supervisory jurisdiction over the Arbitrators, not the other way around. In the Ruling and the order leading to remission of the arbitral Award, the Court will have already considered the same matters being remitted for reconsideration by the Arbitrators and 72 will have already been satisfied that if not changed accordingly by the Arbitrators, the same would have constituted good grounds to justify setting aside the arbitral Award. if the Arbitral Tribunal does not heed to the order of the Court in respect of the matters remitted, the Court's verdict in respect of the Award is already known as it was held in Misc. Commercial Cause No.64/2023 that:" they are serious irregularities affecting the award" . Therefore, all the matters remitted by the Court Order must be reconsidered by the Arbitral Tribunal in line with the Court's reasoning and not according to the Arbitrators' reasoning anymore. An order by the Court for remission of an Award to the Arbitrator for reconsideration is a polite way by the Court of telling the Arbitrator that the Court is satisfied to the required standards that there are defects in the Arbitral Award, serious enough for the Award in question to be set aside, but that the Court finds it prudent that the Arbitrator himself reconsiders his Award in respect of the matters remitted and as guided by the Court in order to make changes in respect of the identified area in the Award. The Court's order in remission of an Award for reconsideration, is not an opinion or viewpoint. It is a reasoned and binding court order to be obeyed. Any aggrieved party can always challenge the court order for 73 remission of an Award for reconsideration. It is true, as it was argued by the Learned Counsel for Respondent, that section 78 of the Act does not prescribe what the Arbitrator should exactly do in reconsideration of the remitted Award. This is because unlike clarifications of Award under section 64, remission of an award for reconsideration will always come through an order of the Court and the order shall always be based on some known legal grounds of challenging the Award for serious irregularity under section 75 or improper application of the law on the merits of the Award (where parties agree to this remedy) under section 76 of the Arbitration Act. The order of the Court will therefore show the roadmap during reconsideration of the Award. The aim is to give effect to the court' order given while remitting the Award for reconsideration. In the persuasive case of Mark Blake Builders Pty Limited v Davis & Anor (unreported, Supreme Court of New South Wales, 14 November 1994), as per Hon. Giles J., the court examined the position of an arbitrator after the publication of the award. It held that the principles are as follows: "After the publication of an award, an arbitrator is functus officio. There is no power to alter the award except for the power to correct it in 74 conformity with the slip rule... Where an award is set aside in part the jurisdiction of the arbitrator will depend upon the terms of the court's order. To work out the extent to which the arbitrator's power has been revived, it may be necessary to look to the terms of the judgment. It is permissible for the arbitrator to look at the judgment as a whole to see whether there is an implied or express limitation of jurisdiction on remission...An arbitrator has no jurisdiction to go beyond what is necessary to give effect to the order of the court. Upon remission by the court of the Final award in this case for reconsideration by the Arbitral Tribunal, the jurisdiction of the Co-arbitrators depended upon the terms of the court's order and they had no jurisdiction to go

beyond what was necessary to give effect to the order of the court. The Arbitrators were entitled to reconsider matters in respect of which the award would otherwise have been set aside and in respect of which the Award had been remitted. What was the scope of reconsideration required by the Ruling of this Court in Misc. Commercial Cause No.64/2023 when remitting the Award for 75 reconsideration? The specific findings of the Court were stated at pages 47, 48, 49 and 50 of the Ruling and I reproduce them verbatim that: “(a) It was complained by the Petitioner that, at page 80 of the award the Tribunal determined not to award the Respondent specific damages in the form of unpaid commissions as there was no basis in law to award that limb of damages. However, later on, the Tribunal awarded specific damages in the form of unpaid commissions from March 2014 to September 2016;

- (b) That, at page 70 of the award, the Tribunal held that the Petitioner was contractually entitled to 18% interest rate on the amount of TZS. 5,092,272,254.09/= from the date of filing the Arbitration Claims. However, without reasons, at page 84 of the award, the Tribunal awarded interest on the said amount at the rate of 7%;
- (c) That, at pages 35 and 37 of the award the Tribunal held that, the Petitioner's purported termination of the SDA on 07/10/2016 was a breach of contract, yet, at page 83 of the award the Tribunal awarded the Respondent 76 damages up to the date of breach the result being that, the Respondent was held to be entitled to damages prior to the occurrence of the purported breach and;
- (d) That, at paragraphs 104 and 180 of the award the Tribunal held that the Petitioner was entitled under the SDA to introduce TD Model and that it did not constructively terminate the SDA by introducing the TD Model. However, at page 81 of the award, the Tribunal awarded the Respondent general damages of TZS. 9,500,000,000/= partly because of the Petitioner's act of introducing the TD Model. Without beating around the bush, all the Petitioner's allegations in respect of this ground/issue are vivid in the Final Award. That is perhaps why the Respondent's counsel recommended that the Petitioner would have sought clarification from the Tribunal rather than challenging the award in the way she did. One of the remedies of rectifying uncertain awards is for the courts to remit them to the tribunals for re-consideration. However, where the 77 uncertainties in an award are irreconcilable, they may be a reason for setting aside of the award. For the foregoing reasoning, having held the award to have been procured in a manner that is contrary to public policy and that, the same is uncertain or ambiguous as to its effect; I proceed to hold that, these are serious irregularities affecting the award. Pursuant to section 75 (3) (a) of the Arbitration Act Cap. 15 R.E. 2020, I remit the award to the arbitral tribunal in whole, for reconsideration”. In the view of the Arbitral Tribunal, whose Award was thereby being remitted, the Court in making the above Ruling might as well have erred. They may hold the view that the court was thereby interfering into the merits of their decision. However, it being a Court Order and one that had revived and prescribed the scope of their jurisdiction in reconsidering the remitted Award, the Arbitrators had no choice but to incorporate changes in their reconsidered Award in line with the Court's reasoned decision. If either party felt aggrieved

by the effects the Ruling dictating some modifications for inclusion in the Award, he had an avenue to challenge that Ruling before a superior Court. Otherwise, the Ruling remitting the 78 Award, coming from the supervisory Court over the arbitration in question, the Arbitral Tribunal had no option other than to give effect to the order of the court. Non-incorporation of the findings of the Court in the Reconsidered Award would suggest that the court had no legal basis to order the remission for reconsideration of the award in the first place while in law remission could only be done if the Court was satisfied that there exist grounds for setting aside the Award. It would also imply that the remission order was unjustified and, in that regard,, it would imply that the Arbitral Tribunal had no mandate to do the reconsideration, in absence of a valid remission order. Further, as the unaltered award would stand in sharp contrast against the Court order, it would render the Award a nullity. That would not augur well with the orderly administration of justice. Lastly, did the reconsidered Award give effect to the order of the court in Misc. Commercial Cause No.64/2023 that had remitted the Award for reconsideration by the Arbitral Tribunal? Without flinching, that was not the case. From the very beginning the Arbitral Tribunal started on the wrong footing when it deliberated on what to do in “reconsideration” of the remitted Award “in conformity with the order of the Court.” It held: 79 “Upon close and careful reading of the Court decision, the Tribunal turns to the reconsideration and modification, where appropriate, of the final Award in compliance with the Court order.” It seems that the Tribunal was from the very beginning minded to do the reconsideration and modification of the Award where appropriate because they misunderstood the true nature of reconsideration and treated it as the act of thinking again about a decision or opinion and deciding whether one wants to change it. Whereas semantically that could be right, it was legally and contextually wrong. In my view, the Arbitral Tribunal misconceived reconsideration of a remitted Award for “correction” and” clarification” of Awards. Remission for reconsideration is found under section 78 of the Arbitration Act and is initiated by Court order while correction or clarification of an award is initiated by the Arbitral Tribunal suo mottu or by a party without the involvement of the Court. Correction or clarification of award or issuance of an additional award under section 64 of the Act is not the same thing as reconsideration of a remitted award. It is my view that due to this mistaken but erroneous belief of what they were supposed to do, the Co- Arbitrators ended up exercising their powers under section 64 of the 80 Arbitration Act rather than section 78 thereof as it can be seen in the excerpts of the reconsidered award wherein the Arbitral Tribunal in most cases ended up clarifying, explaining, justifying and slightly modifying their Final Award that had been remitted for reconsideration after the Court had found serious irregularities therein which could have justified the setting aside of the Award. I find that in doing so, the Arbitral Tribunal was going in excess of their jurisdiction, other than substantive jurisdiction, which scope of powers was only confined to giving effect to the order of the Court in respect of the matters remitted for their reconsideration. Perhaps, the Arbitral Tribunal was feeling that their Award would be substantially modified in its merits if they complied with the Court order, but then they should have remembered that their earlier Final Award entirely written by themselves had already been judicially tested vide

Misc. Commercial Cause No.64/2023 and that the Court had found some areas needed to be patched so as to make the otherwise defective Award, valid. What they were being ordered to incorporate could have been incorporated by the Court itself as well since the court has powers to vary the award. However, in upholding the party autonomy principle, the Court set the parameters within which the Arbitrators were directed and expected to reconsider their 81 Final Award to bring it in line with the Court's observations, reasoning and conclusions (whether correct or wrong in their view). That was not done. What was done was not anticipated by the court order. The Arbitral Tribunal exceeded the powers conferred by the Court Order that had remitted the Award to them for reconsideration. In essence, the present Petition succeeds in respect of the ground of the Arbitral Tribunal exceeding their powers in violation of section 75(1) and (2) (b) of the Arbitration Act. The pertinent question is as to the appropriate reliefs in the circumstances. In the above referred case of Mark Blake Builders Pty Limited v Davis & Anor (unreported, Supreme Court of New South Wales, 14 November 1994), as per Hon. Giles J., the arbitrator's second award was treated as a nullity. The arbitrator was obliged, for the second time, to take up the original awards as remitted to him and with the benefit and guidance obtained from the judgment, reconsider the matters remitted to him and make awards in conformity with them. Having allowed the petition, I find that the appropriate remedy in the present case is to declare the reconsidered Award as a nullity and set it aside in whole and to order that the Ruling of this Court in Misc. 82 Commercial Cause No.64 of 2023 (as per Hon.Mkeha,J.,) dated 27th March 2024 be implemented by the Arbitral Tribunal and the Parties herein. Therefore, I do hereby allow the Petition and set aside in whole the reconsidered Arbitral Award of Prof. Zakayo Lukumay and Dr.Wilbert Kapinga, Co-Arbitrators, dated 3rd June 2024 between Planetel Communication Limited and Vodacom Tanzania Public Limited Company (formerly known as Vodacom Tanzania Limited. I also direct that the Order of this Court in Misc. Commercial Cause No.64 of 2023 (as per Hon.Mkeha,J.,) dated 27th March 2024 be implemented in terms of section 78 of the Arbitration Act, as soon as possible from the date of this Ruling. I make no order as to costs since the omission is attributable to the Arbitral Tribunal itself. It is so ordered. A. H. GONZI JUDGE 21/02/2025 Ruling is delivered in Court this 21st February 2025 in the presence of Mr. Idrissa Juma, Advocate accompanied by Mr. Andrew Mrosso, Principal 83 Officer, for the Petitioner and Mr. Safari Malata Advocate accompanied by Mr. Peter Noni, Director of the Respondent, for the Respondent. A. H. GONZI JUDGE 21/02/2025

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