

TANZANIA / JUDGMENT

kilimanjaro oil company limited vs tanzania petroleum development 2022 tzhccomd 18 17 february 2022

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TZHCCOMDDECIDED
17 February 2022

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT PAR ES SALAAM
MISCELLANEOUS COMMERCIAL CAUSE NO. 25 OF 2020 (ARISING FROM MISC. COMMERCIAL
CAUSE NO. 385 OF 2017) IN THE MATTER OF PETITION FOR SETTING ASIDE AN ARBITRAL
AWARD DATED 5th SEPTEMBER 2017 BETWEEN KILIMANJARO OIL COMPANY
LIMITED..... PETITIONER VERSUS TANZANIA PETROLEUM DEVELOPMENT
CORPORATION..... RESPONDENT Date of Last Order: 11/09/2020
Date of Ruling: 17/02/2022

RULING

C.P. MKEHA, J Ruling in respect of the present Petition had been fixed to be delivered on 4th November, 2020. However, through a letter referenced as Kilioil- TPDC/12/20/2020 dated 12th October, 2020 the parties indicated their intention to resolve their dispute out of court. They asked the Predecessor Judge to halt delivery of the said ruling. The request was granted. Despite 1 the parties' long time negotiations in view of resolving their dispute out of court; they timely filed their respective written submissions for and against the Petition. After almost a year since when negotiations commenced the parties appeared before the court with information that the negotiations had failed. They therefore pressed for a ruling date. By then, the Honourable Judge before whom a schedule for filing written submissions was made, who afterwards adjourned the matter to give way for the negotiations out of court, was no longer serving at this station. Since hearing of the Petition proceeded by way of written submissions, to avoid further delay of the matter, re-assignment order was issued for the Successor Judge to compose the delayed decision. Those are the reasons why the present ruling delayed being delivered. Essentially, the Petitioner is moving the court for an order setting aside and remitting for consideration the Arbitral Award dated 5th September 2017. She is also asking the court to quash and nullify the arbitral proceedings (if any). The petition traces its background from a contract entered into by the parties on 08/12/2015. The contract was for disposal of condensates from the Songosongo gas plant in Mtwara region. Under the contract between the parties, the task had to be performed by the petitioner who emerged the winner in a tender advertised by the respondent. It would appear that, the initial consignments of condensates were smoothly disposed. However, on 8th March,

2016 the petitioner wrote a 2 letter to the respondent requesting negotiations for reduction of price of the condensates. In the said letter, the petitioner cited the continued drastic collapse in the international prices of petroleum products by then. Even after numerous correspondences and meetings, the parties failed to agree on price adjustment. Pursuant to Clause 9.2 of the contract, on 20/09/2016, the petitioner initiated adjudication proceedings claiming damages to the tune of USD 5,000,073. The respondent resisted the claim. She further raised a counterclaim. Whereas the petitioner's claim was dismissed, the respondent's counter claim succeeded. The petitioner expressed his dissatisfaction to the Adjudicator's ruling by filing a Statement of Reference with the Tanzania Institute of Arbitrators. The Arbitrator pronounced the Final Award on 05/09/2017. It was in favour of the respondent. The operative portion of the Final Award condemned the petitioner as hereunder:

1. Pay for four (4) cargoes of condensates they uplifted priced at USD 600,642.02 (United States Dollars Six Hundred and Forty Two and Two Cents);
2. Pay for the penalty of USD 1000 per day (United States Dollars One Thousand) up to seven days for consignments which had not been paid for within fourteen days as provided for in the contract;
3. Furnish TPDC with USD 100,000 (United States Dollars One Hundred Thousand) Performance Bond as provided in the contract. In future, TPDC are advised to ensure that furnishing of an acceptable Performance Bond is a condition precedent for the coming into force of similar arrangement; 3
4. Compensate TPDC for the expenses they have incurred in contracting Pan African Energy Tanzania (PAET), uplifting fees and transporting condensates to the storage facility amounting to USD 614,245 (United States Dollars Six Hundred and Fourteen Thousand Two Hundred and Forty Five) following failure to uplift condensates as per contract and
5. Compensate TPDC for USD 177,271.83 (United States Dollars One Hundred and Seventy Seven Thousand Two Hundred and Seventy One and Eighty Three Cents) for storage of condensates which could not be sold because of this dispute. However, in order to mitigate their loss TPDC are advised to dispose of the condensates stored at TIPPER as soon as market conditions allow. The present petition seeks to challenge the arbitrator's award as indicated hereinabove. Whereas Mr. Twaha Yusuph learned advocate represented the petitioner, Mr. George Mandepo learned Principal State Attorney represented the respondent. The petition was argued by the parties through filing written submissions in court. The case of the Petitioner challenging the arbitrator's award was premised on eight grounds, to wit:
 - i. The Arbitrator acted injudiciously for her failure to compose the actual award. ii. The Arbitrator acted in excess of Jurisdiction , injudiciously and contrary to the common principles of the law by proceeding to adjudicate the matter without considering / ignored potentially relevant evidence adduced by the parties. 4 Hi. The Arbitrator committed iegai misconduct by making an Award which is perverse in iaw on the grounds of failure to agree

on the disposal of the appeal lodged before her. iv. The Arbitrator denied fair chance and right of hearing on the part of the petitioner and totally ignored, in a manner suggestive of lack of impartiality and, in violation of the principles of natural Justice.

- v. The impugned award was illegallly procured and enforced even before being registered as a decree of the court. vi. The Arbitrator failed to perform her essential duty of ensuring the notice of filing an award is given to the parties before forwarding the same for registration. vii. The Arbitrator committed misconduct by relying on her self-imposed orders, directions and consequential impugned award the act which creates prejudice and denial of fair hearing to the Petitioner. viii. The Award is bad in law for its failure to direct its mind to the raised grounds of appeal in challenging the ruling of the adjudicator. At the time of filing written submissions, the Petitioner chose to abandon ground No. 5. The Petitioner's dissatisfaction with the Arbitration award in summary can be stated as the alleged misconduct on the part of the Arbitrator in handling the matter involving the Petitioner and Respondent. It was the Petitioner's submission that the Final award handed down by the Arbitrator was at variance with what was referred to the Arbitrator for consideration. The Petitioner submitted that according to the order for directions, three issues were placed before the Arbitrator for consideration and these were: 5
- (1) Whether the Respondent had breached the contract, (2) Whether KILIOIL was entitled to damages, and (3) Whether the tendered data sheet which was largely relied upon by the Adjudicator and Respondent, were part of the contract. The Petitioner attacked the Final Award for having been reached at, without agreement of the parties on issues for determination. Again, the Final Award was challenged by the Petitioner for not deciding who between the Petitioner and Respondent breached the contract. The Petitioner further challenged the Final Award on a ground of not finding that the Adjudicator had exceeded jurisdiction when he pronounced his decision outside the 14 days prescribed in the Contract. Finally the Final Arbitration Award was challenged on a ground that, the Arbitrator failed to perform an essential duty of ensuring the notice of filing an award is given to parties before forwarding the same for registration. On part of the Respondent, it was submitted that the Petitioner was discussing issues of facts and law which were raised by the parties during hearing and which were determined in presence of both parties. The Respondent cited the case of Tanzania Electric Supply Company Limited Vs, Dowans Holdings Sa (Costa Rica) & Another, Wise. Civil Application No, 8 of 20211, High Court of Tanzania (at Dar es Salaam) to show that it was not open for the Petitioner to bring such issues in this matter. In respect of the Final Award, the Respondent submitted that the Arbitrator did not act with misconduct as alleged by the Petitioner. The Respondent further submitted that the Petitioner could not challenge the mode of reasoning of the Arbitrator and that this court was not an appellate court to correct the errors of the Tribunal. In respect of the issues, the Respondent submitted that, the issues tackled were the ones reflected in the proceedings and the Arbitral Award and that the Arbitrator considered all the issues of law and fact before her as agreed and presented by the parties. In respect of who breached the contract, the Respondent submitted that KILIOIL was found to have breached the

contract. On the issue of failure by the Adjudicator to deliver decision within 14 days, the Respondent submitted that, it was the Respondent who submitted the reference to Arbitration and if that was something to complain of, she should have made it an issue before the Arbitral Tribunal and not before the High Court. On the alleged excess of jurisdiction by the Arbitrator, the Respondent submitted that, the Arbitrator acted within her jurisdiction. Regarding failure to ensure Notice of Filing an Award is given to the parties, the Respondent submitted that, the Petitioner was aware of the Final Award and that is why she appeared in court. I have gone through the submissions of both learned counsel for the Petitioner and Respondent in respect of the matter before the court and I wish to start by stating that the power of this court in entertaining a matter like this is very limited. It is derived from sections 69 (1) (a) to (b), (3) (a) to (c) and 70 (1), (2) (a) to (i) and (3) (a) to (c) of the Arbitration Act,

2020. These provisions constitute the court's power to review and set aside an arbitral award for arbitration proceedings conducted under the Act. 7 Section 70 (1), (2) (e) and (3) of the Act is specific, when an award is challenged on a serious irregularity of acting in excess of powers vested to the arbitrator by the parties, which is the petitioner's complaint in the second ground of petition. Although counsel for the Petitioner and Respondent have submitted a lot on what transpired in the arbitral proceedings, the main issue before the court is whether the record before the court has any evidence of the alleged misconduct of exceeding the powers vested on the part of the Arbitrator who delivered the Final Award subject of the present petition. I have carefully read, amongst other documents, the Contract for Disposal of Condensates between the Petitioner and Respondent dated 8th December 2015, Special Conditions of the Contract, the Adjudicator's Ruling dated 4th May, 2017, Statement of Reference by the Petitioner dated 26th May, 2017, Final Award dated 5th September 2017 and the Petitioner's Petition. Of all the grounds argued by the parties, I choose to start with the one relating to excess of jurisdiction. It is apparent that the Contract for Disposal of Condensates dated 8th
- December, 2015 has in place General Conditions of Contract which in clause 9 (Settlement of Disputes) provides: 9.1 If any dispute or difference of any kind whatsoever shall arise between the Seller and the Buyer in connection with or arising out of contract, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation. 9.2. If after seven days, the parties have failed to resolve their dispute or difference by such mutual consultation, then either the Seller or Buyer may give notice for adjudication. 9.3. If either party believes that a decision taken by other was wrongly taken the decision shall be referred to the Adjudicator within 7 days of the notification of the decision. 9.4. The Adjudicator stated in the SCC shall give decision in writing within fourteen (14) days of receipt of a notification of a dispute. 9.5. ...Either party may refer a decision of the Adjudicator to an Arbitrator within fourteen (14) days of the Adjudicator's written decision.... I have quoted at length this paragraph because it is the basis of the Arbitration proceedings, which were carried out between the parties. It is elementary in the law of Arbitration that, Arbitration is an alternative dispute settlement mechanism through

which parties to a dispute submits a dispute, by mutual agreement, to one or more arbitrators, who arbitrates and makes a binding decision. In this matter, the submission to arbitration stems from the paragraph quoted above. I have already observed on the limited nature of the powers of the High Court under sections 69 and 70 of the Arbitration Act, to set aside an arbitration award. Back to the main issue, was there any misconduct? This brings me to what constitutes misconduct on part of the Arbitrator. 9 In the case of D.B. Shapriya and Co. Ltd Vs. Bish International B.V

[2003] 2 EA 404, The High Court of Tanzania (Msumi, J,K) having acknowledged the absence of a statutory definition of the term "Misconduct" relied upon various English and Indian cases that had discussed the term and noted thus: "Under the influence of this common legal heritage, courts in this country have been, as a matter of practice, regarding both English and Indian court decisions in the interpretation of these common statutes to be highly persuasive except where such decisions are not in harmony with the relevant local statutory provisions or court decisions. There is no reason why this long established court practice should be ignored in the present case," Having made that note, his Lordship Msumi (IK), as he then was, proceeded to hold as follows: "The courts will not interfere with the conduct of proceedings by the arbitrator except in circumstances which are now well defined. If the Arbitrator is guilty of misconduct, his award may be set aside or remitted. If the award contains an error of law on its face, it may be sent back or remitted..." It was also held in Kelantan Government Vs. Duff Development Co.

[1923] AC 395 at 589 that: 10 "If it appears by the award that the Arbitrator has proceeded illegally- for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be a ground for setting aside the award." In respect of this petition, clause 9 (Settlement of Disputes) of the General Conditions of the Contract states the jurisdiction of the Adjudicator and Arbitrator. Clause 9.4 provides that ' The Adjudicator stated in the SCC shall give decision in writing within fourteen (14) days of receipt of a notification of a dispute/"The Petitioner has submitted that there were manifest mistakes made by the Adjudicator and that the Arbitrator failed to notice and act on the fact that the Adjudicator grossly exceeded his jurisdiction by not determining the adjudication within the time prescribed. It is not in dispute that notice of adjudication was issued on 22nd September 2015 and the Adjudicator's Ruling was delivered on 4th May

2016. The Respondent did not deny these facts but instead, it was submitted on her behalf that, if the Petitioner had concerns he should have included them in his reference to arbitration. I am not at one with the position taken by the learned Principal State Attorney for the Respondent in this aspect. The Adjudicator was bound to act within the mandates of the power given to him under clause 9.4 of the Arbitration Agreement and further, the Arbitrator was bound to establish that the Ruling of the Adjudicator referred to him was composed within the jurisdiction provided by the Agreement between the parties. My 11 disagreement with the learned Principal State Attorney for the Respondent is not without

reasons. An arbitrator is a creature of the arbitration agreement. If there is a specific prohibition in the agreement against entertainment of claims, but in disregard of such prohibition the arbitrator hears the matter and makes an award, the arbitrator is guilty of legal misconduct. Unlike what the learned Principal State Attorney submitted, the arbitrator has no power apart from what the parties have given him under the arbitration agreement. If he has acted outside the bounds of the agreement, he has acted without jurisdiction. But if he has remained inside the parameters of the agreement and has construed the provisions of the agreement, his award cannot be interfered with on ground of want of jurisdiction unless he has given reasons for the award disclosing an error apparent on the face of it. Unlike the powers of the court which are not subject to any limitation about there being any agreement to the contrary, the powers of the arbitral tribunal are subject to provisions contained in the arbitration agreement. Therefore, where with the consent of the parties it is agreed that the arbitrator shall make his award within a fixed time, the arbitrator's mandate stands terminated when the last day arrives but the arbitral proceedings do not thereby become terminated. That is the reason, under section 52 (1) to (4) of the Arbitration Act, 2020 a scheme is given, on how the arbitral tribunal and the parties to arbitration agreements, should procure extension of time for making awards, where the time for making an award is limited by arbitration agreements. See also: Section 84 (1) 12 and (2) (a) and (b) of the Act, that allows the arbitral tribunal or the parties to make applications to the court for extension of any time limit agreed by the parties in relation to any matter relating to the arbitral proceedings. See also: Law of Arbitration and Conciliation by S. K. Chawla, Third Edition at pages 485 to 661. I am mindful that these arbitration proceedings were commenced under the repealed Arbitration Act. However, in terms of section 91 (2) of the Arbitration Act, 2020, anything done or concluded under the repealed Act, is deemed to have been done or concluded under the Arbitration Act, 2020. Therefore, failure by the Adjudicator to act within the mandates of Clause 9.4 of the General Conditions of the Contract rendered his ruling a nullity and the consequent Arbitration which was highly dependent on the Ruling of the Adjudicator also becomes a nullity for being based on a nullity. I am holding so because in arbitration proceedings, unlike court proceedings, procedures such as, the place of sitting, time frame within which to conclude the arbitration, number of arbitrators, language of the arbitration, to say but a few, are regulated by the parties through the arbitration agreement providing for such arbitration. For the foregoing reasons, I find that the failure by the Adjudicator and later on failure of the Arbitrator to act within jurisdiction regarding time for concluding the arbitration, constituted a misconduct under section 70 (2)

- (e) of the Arbitration Act. That said, I hereby set aside the Final Arbitration Award dated the 5th day of September 2017 for being pegged on Adjudication Proceedings which were made ultra vires the powers 13 contained in clause 9.4 of the General Conditions of the Contract between the Petitioner and Respondent. Since this ground is sufficient to dispose of the petition, I find no reason to decide the other grounds. The petition is granted. No order is given as to costs. Dated at Dar es Salaam this 17th day of February 2022. JUDGE 17/02/2022

Court: Ruling is delivered this 17th day of February 2022 in the presence of Ms. Shao learned State Attorney for the Respondent and Mr. Chundo learned advocate for the Petitioner.
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