

TANZANIA / JUDGMENT

bharya enginnering and contracting company ltd becco vs the arab contractors osman ahmed osman coltd another 2023 tzhccomd 109 31 march 2023

COURT
TZHCCOMDDECIDED
31 March 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 3 OF 2023

IN THE MATTER OF ARBITRATION

AND

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

AND

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ADDITIONAL
ARBITRAL AWARD ISSUED THROUGH THE TANZANIA INSTITUTE OF
ARBITRATORS DATED 9th JANUARY, 2023, IN FAVOUR OF THE

RESPONDENTS:

BETWEEN

BHARYA ENGINEERING AND

CONTRACTING COMPANY LTD (BECCO) PETITIONER

VERSUS

THE ARAB CONTRACTORS (OSMAN AHMED

OSMAN & CO.) LIMITED 1ST RESPONDENT

ELSEWEDY ELECTRIC COMPANY 2ND RESPONDENT

RULING

Date of last order: 07/02/2023 Date of ruling: 31/03/2023 AGATHO, J.: The petitioner by way of petition applied to this Court challenging additional award issued by the Arbitral Tribunal. The petition was supported by the affidavit of Sarbjit Singh Bharya, the principal officer of the Petitioner. The Respondents protested by filing a joint reply to the petition. Both parties employed the services of learned counsel. Whereas the petitioner was represented by learned advocate Norbert Mlwale of Victory Attorneys & Consultants, the respondents enjoyed the services of learned counsel Frank Kifunda of KKB Attorneys. The hearing of the petition was done by way of written submissions. But before we delve into the grounds of the petition it is worthwhile to sketch the background of the petition albeit briefly. The petition stems from the arbitration proceedings on the subcontract agreement between the parties executed on the 22/02/2020. The agreement was for purpose of upgrading and rehabilitation of the road from Kibiti to Julius Nyerere Hydropower Project site in the Coast Region. The dispute arose from the petitioner's allegation that the 1st and the 2nd respondents breached the agreement through unilateral termination by not only leaving the petitioner's equipment idle at the site for over six months but also, they left an expensive gravel stockpile purchased by the petitioner at the said site. Moreover, the respondents failed to pay the petitioner for works already done under the interim certificate No. 2 of May 2021. The parties decided to settle their dispute by arbitration. The Tanzania Institute of Arbitrators appointed one Eng. Dr Kumbwaeli W. Salewi as a sole arbitrator to preside over the matter. The arbitration proceedings ensued and eventually the arbitrator issued a final award on 11/10/2022. Later, on 09/01/2023 he issued an additional award in favour of the respondents. That irked the petitioner, who preferred to challenge the additional award. In challenging the additional award, the petitioner advanced four grounds namely:

- 1) That the Arbitrator lacked jurisdiction to issue the additional arbitral award. That, the arbitrator after issuing the first award was functus officio.
 - 2) That the application for additional award and the award itself were both time-barred.
 - 3) That the arbitrator committed serious procedural irregularity in issuing the additional award. That is the arbitrator issued the additional award despite the respondents' failure to prosecute the counterclaim.
 - 4) Lastly, that the arbitrator was biased.
- 3 To determine the application four issues matching the grounds of the petition were raised. In answering the issues, the petition was disposed.
- (1) Whether the arbitrator had no jurisdiction to issue an the additional award dated 09/01/2023? Was the arbitrator opening his original award.
 - (2) Despite the issue of lapse of time and irregularity that whether the arbitrator committed serious procedural irregularity in awarding additional award?

- (3) Whether the arbitration was biased in issuing the additional award. Regarding the issue (1) that the arbitrator had no jurisdiction in issuing the additional award while on his side the arbitrator was of the view that he had jurisdiction as per Tanzania Institute of Arbitration Rules 2018. But then again, while the first award was issued on 11/10/2022, the additional award was issued on 09/01/2023. That is 90 days from the date the first award was issued. A question is whether the Arbitration Tribunal was functus officio after issuing the first award? Legally speaking, the additional award ought to have been issued within fifty six (56) days from the date of issuing the first arbitral award. See Section 64(5) of the Arbitration Act [Cap. 15 R.E. 2020]. It states that: 4 “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.” The time limit for a party applying for correction of an award or applying for additional award is twenty-eight days. Section 64 (3) of the Arbitration Act [Cap. 15 R.E. 2020] provides that: “An application for 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.” The application referred here is that of additional award or correcting the award. It should be noted that the first award was issued on 11/10/2022. And the Respondents’ application for additional award is dated 09/11/2022. According to Section 64 (3) of the Arbitration Act [Cap. 15 R.E. 2020], the application was a day late. The application ought to have been filed on 08/11/2022. The said application was sent to the Arbitral Tribunal on 14/11/2022, that is 34 days from the date the first award was issued. Moreover, the application was served upon the Petitioner on 21/11/2022. That is 41 days from the date of issuing of the first award. Of importance to note, is the fact that there was no agreement between the parties to 5 prolong the time. They neither agreed that the application for additional award be done beyond the 28 days as stated in section 64 (3) of the Arbitration Act [Cap 15 R.E. 2020] nor did they agree to prolong the time for the arbitrator to issue the additional award beyond 56 days as per Section 64(5) of the Arbitration Act [Cap 15 R.E. 2020]. For that reason, the respondents’ application, and the whole exercise of the arbitrator’s power to issue additional award was time barred as there was no agreement by the parties for the same to be done for a longer period than 28 days stated in Section 64 (3) of the Arbitration Act [Cap 15 R.E. 2020], and 56 days as stated in Section 64(5) of the same Act. Referring to the petitioner’s annexure BECCO – 11 to the petition, it was a document forwarded to the arbitral tribunal seeking clarification and informing the said tribunal that the application by the respondents was out of time. Unfortunately, the Arbitrator ignored it. Further, the additional award was issued on 09/01/2023 that is 90 days from 11/10/2022 when the first award was issued. The petitioner claimed that in absence of the parties’ agreement to allow longer time than 28 days to issue the additional award was contravention of section 64 (3) of the Arbitration Act. In my view, this is a confusion. I am saying so because under Section 63 (5) of 6 the Arbitration Act, the arbitrator has 56 days to issue the additional award. That section requires additional award to be made within 56 days from the date of the first award. Thus, the issuing of the award 90 days later from the date of the original award implies that the Arbitral tribunal was indeed time barred. As for the issue of the arbitrator lacking jurisdiction and being functus officio in issuing the additional award, the petitioner cautioned the arbitrator [See BECCO – 12] but

he failed to consider the Petitioner's concern. Since the arbitrator was time barred, he lacked jurisdiction to entertain the counterclaim. On the issue of lapse of time the respondents cited Section 19 of the Law of Limitation Act [Cap 89 R.E. 2019] that it has excluded days for obtaining copies of award/judgments/orders or proceedings in computing time. But what is interesting is that section 64 of Arbitration Act [Cap 15 R.E. 2020] is loud that the 28 days are counted from the date of the original award. We have to consider what is reasonable time for supplying copies of the award. In my view, the delay was not due to delay in getting copy of the first award. This excuse is unfounded because the Respondents said they were supplied with the copies of the award on 13/10/2022. That 7 was quite a good time. The Respondents are themselves to blame as they applied for additional award on 09/11/2022 while as per Section 64(3) of the Arbitration Act [Cap 15 R.E. 2020] the deadline was 08/11/2022. Moreover, the Respondents admitted in their submission that they were unaware of the need for additional award until when the parties made their payment. This cannot anyhow be a justification for the delay. The law of limitation is a merciless sword as visible, in *John Cornel v A. Grevo (T) Limited*, Civil Case No 70 of 1998 HCT, Dar es salaam Registry where it was held that: "However unfortunate it may be for the Plaintiff; the law of limitation is on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught by its web." Furthermore, if the statutory period of limitation is not respected then there is no point of having such rules prescribing when certain legal action is to be taken. In *Elius Mwakalinga v Domina Kagaruki and 5 Others*, Civil Application No. 120/17 of 2018 (unreported), the CAT stated that delays must be accounted for otherwise there would no point of 8 having rules prescribing periods within which certain steps have to be taken. Besides that, the Respondents' claim that section 64 (3) (b) of the Arbitration Act [Cap 15 R.E. 2020] is on correction of award is not true as there is not such subsection. The subsection dealing with correction of the award is section 64 (4) (b). It is true though that the time prescribed for the Arbitrator to issue additional award is provided for under section 64 (5) of Arbitration Act [Cap 15 R.E. 2020]. It is also correct that the Petitioner did not seek correction of the award. But it should be noted that an application for exercise of powers under section 64 of Arbitration Act [Cap 15 R.E. 2020] shall be made within 28 days from the date of original award or such longer period as the parties may agree. The Respondents delayed for 6 days in applying for the additional award. Also, the parties never agreed for longer period. Hence 28 days' time limit applied in the circumstance of this case. The additional award was issued 90 days from the date of original award. Since the law is clear that the additional award has to be issued within 56 days from the date of original award unless the parties agree to give longer period then issuing of additional award after 90 days from the date original award is contrary to the law section 64 (5) of 9 the Arbitration Act [Cap 15 R.E. 2020]. The Respondents claim that the petitioner contributed to the delay due to back and forth communications and exchange of pleadings. In my view time spent in communication cannot stop time to ran. Therefore, that cannot extend period of limitation. The parties ought to have agreed to extend the time. That is essentially the doctrine of parties' autonomy. But since that was not done, the application, and issuing of additional award were vitiated as they were time barred. The point that the

Arbitrator delayed issuing the award due to ill- health is unsubstantiated. With due respect to respondents' counsel that point has miserably failed to convince the court. Turning to the issue of counterclaim, that main issues are that of procedural irregularity and bias. The petitioner claims that the Arbitrator granted the additional award based on a counterclaim that was not prosecuted by the Respondents. The respondents argue that the awarded damages emanated from the petitioner's breach of the agreement. What should be clarified at this juncture is whether the counterclaim was prosecuted or not? The respondents simply argued that the counterclaim arose from the petitioner's breach of agreed clauses 4.4.2 and 4.4.3 of the 10 subcontract. They submitted that the damages awarded in the additional award are drawn from the said clauses of the subcontract. The petitioner breached the subcontract. The Arbitrator found her to be liable. The Respondents went on citing the case of Sluis Brothers (EA) Ltd v. Mathias & Tawari [1980] TLR in which it was held that once a person signs a document or contract without reading it, he cannot afterwards disclaim that it is not his document. This case irrelevant as it does not match the facts of the case at hand because the petitioner is not denying signing the subcontract rather the issue is whether the respondents prosecuted the counterclaim? Or the Arbitrator simply issued the additional award without the respondents proving the counterclaim? The respondents have not addressed the question of prosecution of the counterclaim. Section 64 (2) (b) of the Arbitration Act [Cap 15 R.E. 2020] provides that the arbitral tribunal may, on its own initiate or on the application of a party make an additional award in respect of any claim, 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. The above proviso is crucial. It means that when the application for award is made the other party shall be heard. 11 Now, with regards to the counterclaim the Respondent made their application for additional award via counterclaim. As rightly pointed out by the petitioner's counsel, the respondents as I gather from the record, they merely mentioned the clauses in the subcontract to support their counterclaim. Section 110 of Law of Evidence [Cap. 6 R.E. 2019] requires that he who alleges must prove. It is glaring that the respondents did not prosecute their counterclaim. They did not provide any evidence to support their counterclaim, yet and surprisingly the arbitrator was generous enough to grant them with the additional award. In my considered view, the Arbitrator committed fatal irregularity in awarding damages under the counterclaim without the same being prosecuted or any evidence being given. This anomaly is serious and may invariably be regarded as a mockery of justice. Along that the Arbitrator did not give reasons for the decision he reached in respect of the counterclaim. The law under section 59 of the Arbitration Act [Cap 15 R.E. 2020] requires that the arbitral award to be supported with reason. However, and mindful of parties' autonomy the law is to the effect that the parties may agree on the form of an award [Section 59 (1) of the Arbitration Act [Cap 15 R.E. 2020]]. While section 59 12

- (2) of the same Act states that where there is no such agreement the award shall:

- (a) be is writing signed by all arbitrators or all those assenting the award;
- (b) Contain the reasons for the award unless it is an agreed or the parties have agreed to dispense with reasons;
- (c) State the seat of the arbitration and the date when the award is made. The Arbitrator's additional award bore no reasons and the parties did not agree on the form of the award or to dispense with the requirement of reasons as per section 59 (2) (b) of the Arbitration Act [Cap 15 R.E. 2020]. Respectfully, the Arbitrator erred in crafting the award without backing it up with reasons. As for the petitioner's claim that the Arbitrator was biased, I have failed to find concrete facts to support such allegation. The fact that the Arbitrator copied the words, phrases or sentences found in the respondents' submission is insufficient to establish bias. Moreso is the claim that the Arbitrator ignored the petitioner's arguments. Therefore, the allegation of bias is in my view clumsy and devoid of substance. 13 Save for the unfounded allegation of bias, the Petition is meritorious as the application for additional award was time barred, the additional award itself was given out of time, and hence the Arbitrator acted without jurisdiction. Consequently, the additional award and its proceedings are set aside for being time barred and unprocedural. Since the irregularities observed were partly contributed by the arbitral tribunal, each party shall bear its costs. It is so ordered. DATED at DAR ES SALAAM this 31st day of March, 2023. U. J. AGATHO JUDGE 31/03/2023 Date: 31/03/2023 Coram: Hon. U.J. Agatho J. For Petitioner: Edith Michael Mtwewe, Advocate For Respondent: David Peter Kasana, Advocate. C/Clerk: Beatrice 14 Court: Ruling delivered today, this 31st March 2023 in the presence of Edith Michael Mtwewe, learned counsel for the Petitioner, and David Peter Kasana, advocate for Respondent. U. J. AGATHO JUDGE 31/03/2022 15

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