IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 71 OF 2018

AND

IN THE MATTER OF THE ARBITRATION ACT, CAP. 15 R. E. 2002

AND

IN THE MATTER OF THE ARBITRATION

BETWEEN

TREASURY REGISTRAR.....PETITIONER

AND

A.C.GOMEZ (1997) LIMITED.....RESPONDENT

Last Order: 14th Aug, 2019

Date of Ruling: 26th Sept, 2019

RULING

FIKIRINI, J.

This ruling emanates from a challenge lodged by the petitioner by way of petition challenging an Award, which was awarded on 31st July, 2017 to the respondent by the Arbitrators, and on 05th February, 2018 filed before this Court by an arbitrator for the initiation of the execution process.

Challenging the Award the petitioner cited the following grounds:

1. The Award was improperly procured as the Arbitrators grossly misconducted themselves in determination of the dispute involving the Government of the United Republic of Tanzania without the Attorney General being made a party thereto.

2. The Award was improperly procured by determining defamatory issues which were not supposed to be determined by Arbitrators.

3. The Arbitrators have misconducted themselves as they have contravened the First Schedule to the Arbitration Act, Cap. 15 R. E. 2002, Item 1 on the mode of reference, that it shall be to a single arbitrator since the SSA does not expressly provide how many Arbitrators should entertain the dispute between parties.

4. The Award was improperly procured because firstly the awarded damages were based on defamatory issues and Arbitrators erred on the face of the record by awarding huge amount of money as general damages to the respondent which was not justifiable and not proved.

5. The Arbitrators misconducted themselves by acting with great biasness for acting as advocates for the opponent to the respondent (now petitioner) when they seriously joined hands with the advocate

for the claimant (now respondent) to put cross-examination questions to the respondent's (now petitioner's) witness aimed at discrediting his testimonies to serve the interest of the claimant (now respondent) as can be depicted in the defence case proceedings on pages 6, 7, 9, 11, 12, 21 and 22.

6. Whether the general damages awarded was awarded wrongly and unfounded and not part of the contractual terms. And that the award stated categorically that the words published were not defamatory *per se* hence the general damages awarded were unfounded.

The genesis of this ruling can be traced to way back on 25th April, 1997, when the Government of the United Republic of Tanzania through the defunct Presidential Parastatal Sector Commission (PSRC) entered into Agreement by way of Memorandum of Understanding (MoU) with the respondent, the A.C. Gomez (1997) Ltd. The MoU was in relation to interim execution of Share Sale Agreement (SSA), which was executed on 1st August, 1997, for the purpose of sale of all issued and outstanding ordinary shares of the capital of the Kunduchi Beach Hotel at the purchase price of USD 800,000.00. The respondent was also required to pay USD 300,000.00 for meeting various liabilities, and thus a total amount payable was USD

1,100,000.00. The respondent initially paid USD 550,000.00, and as per the Agreement the balance was to be paid within 12 (twelve) months from signing of the Agreement. After that any outstanding amount would attract interest at the commercial rate prevailing on the due date.

There was then a problem in handling the Share Certificates to the respondent and in remedying the situation parties agreed to execute the Memorandum of Settlement (MoS) on 19th October, 1999, whereby USD 450,000.00 was set off.

After the execution of the above, the respondent is stated to have declined paying the remaining balance of USD 100,000.00.Also failed, to conduct and submit a Valuation report of the staff quarters or to reply to the letter with reference PSRC/1/13/239 dated 16th June, 2003 which made reference to the meeting held between the respondent and the defunct PSRC held on 07th April, 2003.

In addition, under the SSA the respondent committed herself that she will invest on the hotel an amount equal to USD 5,000,000.00 (Five Million USD) out of which USD 1,400.000.00 was to be utilized to protect the beach erosion, develop appropriate training programs, enhancement of technology and management skills transfer to the company, and would

submit half yearly written progress. The respondent failed to furnish the report in that regard and was reluctant to submit half yearly written progress and also restricted access of the petitioner's (then respondent) office to conduct monitoring and evaluation as agreed upon in MoU and SSA.

On 31st December, 2015, the petitioner floated a notice in the Daily News paper. The intention was to inform the purchasers of the relevant privatized entities on the subsisting breaches and urging them to submit the Implementation Reports to the petitioner as per the agreement as stipulated in SSA. The respondent aggrieved by the notice published in the Daily News filed a claim before the Arbitral tribunal for defamation contending that she has suffered reputation damage in the creditworthiness of the respondent and the Wellworth Group including that of its Chairman in the eyes of its current lenders and Financial Partners.

On 02nd September, 2016 the respondent lodged a Statement of Claim with the Arbitrator, whereas the petitioner filed their Statement of Defence on 19th September, 2016. On 10th January, 2017, arbitral proceedings were conducted and on 31st July, 2017, 3 (three) Arbitrators delivered the final Award in favour of the respondent. The Award was later filed in Court on

the 05th February, 2018, by 1 (one) of the Arbitrator on behalf other Arbitrators. The petitioner aggrieved by the Award filed challenged it by way of this Petition.

On 24th June, 2019 parties entered appearance and Mr. Benson Hoseah - State Attorney prayed for the petition to be disposed by way of written submissions, the prayer which was not objected to by the respondent and ultimately granted by the Court. Ruling was scheduled for 14th August, 2019 but was rescheduled to 26th September, 2019.

Parties filed their written submissions for and against the petition. Challenging the 1st ground raised, it was Mr. Themistocles Rwegasira counsel for the respondent's submission that the requirement that the Attorney General (AG) must have been joined was an afterthought. His assertion was premised on the fact that: *one*, under section 3 (2) of the Treasury Registrar (Powers & Functions) Act. No. 16 of 1999, Cap. 370 (the Treasury Registrar Act), the Treasury Registrar had all the power to sue or be sued in its own name. *Two*, that by the time amendment of the Treasury Registrar Act through Written Laws (Miscellaneous Amendments) (No. 3) Act, 2016 came into force on 18th November, 2016, the arbitration proceedings by then had already been initiated 2 (two) months ago to wit

on 02nd September, 2016. In the amendment, involvement of the AG was made mandatory in any claim or suit against the Treasury Registrar. This was however, not to act retrospectively. Fortifying his position Mr. Rwegasira, made reference to Black's Law Dictionary, which defined the term as:

> *"a legislative act that looks backward or contemplates the past, affecting Acts or Facts that existed before the Act came into effect"*

Three, since the petitioner had not raised that objection during the pendency of the arbitration before the Tribunal, this Court was called upon to invoke the doctrine of estoppel, stopping the petitioner to deny the fact the resort to arbitration was voluntary. And also knowing that they had all the powers and capacity to sue and be sued in their own names.

Four, even if the Written Law (Miscellaneous Amendment) (Act. No) Act, 2016 was to be considered effective, still under section 40 (5) the Treasury Registrar was the one tasked with the duty to inform the AG and not the respondent. This was however, quickly remedied by submitting that since the Treasury Registrar had capacity to sue and be sued, no blame should as well be placed on the petitioner. Furthering this point, it was the

respondent's submission that even under section 3 (6) (b) of the Executive Agencies Act, Cap. 245 as amended by the Finance Act No. 18 of 2001, the Treasury Registrar must have checked and concluded that there was no need of informing the AG. Supporting his assertion he cited the cases **African Banking Corporation Tanzania Ltd v Tanzania National Road Agency (Tanroads), Miscellaneous Commercial Application No. 235 of 2016, (unreported) p. 10,** where the Court stated that for the institution of a suit, revision or application in the name of the agency in order to fit in the purview of section 3 (6) of the Executive Agencies Act, such action must be based on the contract signed by the Agency. The situation which was not different from those in the present circumstances, Mr. Rwegasira averred.

Other cases cited were from other Commonwealth jurisdictions such as **AG v KBC Ltd, High Court Civil Case No. 329 of 2001 or East African Law Reports (ELR**) in which the Court held that the AG cannot act where the state corporation has a power to sue and be sued in its own name and institute a suit in his name on behalf of a state corporation. The last case of **The Commissioner General Uganda Revenue Authority v Meera Investment Ltd, Supreme Court of Uganda at Mengo [2009] 2 EA**

408, the Court stressed that what the law provides was what was giving URA its powers to sue and be sued in its corporate name. The decisions coming from East African countries, was in the respondent's submission a good influence to the present case.

Countering the submission, it was the petitioner's contention that though the Treasury Registrar had power or sue or be sued in its own name, but it did not bar the AG as guardian of public property to intervene in any suit or matter instituted by or against the Treasury Registrar notwithstanding the provisions of section 3 of the Treasury Registrar Act. Since the requirement was not optional to involve or not to involve the AG, the proceedings without involvement of the AG was fatal and against the law and public policy. This was regardless as to the fact that the arbitration proceedings had already been instituted.

It was the petitioner's further submission that pursuant to section 4 of the Public Corporations Act, Cap. 257 R.E. 2002, all investments and other property vested in the Treasury Registrar, including investment comprised in the paid up capital of a public corporation or a statutory corporation shall be held by the Treasury Registrar in trust for the President and for the purposes of the Government of the United Republic as provided under

section 7 (1) of the Treasury Registrar Act. All these are public property and the AG as its guardian. Therefore by failing to notify the AG, who is the guardian of the public property has resulted into depriving the AG, opportunity to defend public interest. As of 18th November, 2016, all proceedings pending or intended against Treasury Registrar was to be brought to the attention of the AG for his intervention, which was not done in the arbitral proceedings between the petitioner and the respondent. So long as the notification of the AG was mandatory requirement, to proceed without notification, rendered the proceedings nullity, submitted Mr. Hoseah. Buttressing the position, the case of **M/S E & A Construction and Permanent Secretary, Ministry of Planning, Economy & Planning and Attorney General. Commercial Case No. 13 of 2007 (unreported),** was cited.

Countering the submission that the respondent was not to be blamed for not giving notification, as the petitioner had capacity to sue and be sued, it was Mr. Hoseah's submission that since it was a statutory requirement both parties including the arbitrators shared the blame. As for the submission that the law cannot operate retrospectively, he argued that the respondent has failed to interpret the law properly as section 40 of the Written Law

(Miscellaneous Amendment) (Act. No. 3) Act, 2016, the AG has been given right to intervene on any pending suit against the Treasury Registrar. For this to take effect the petitioner was legally obligated to notify the AG.

In determining whether this petition has merits or not, let me commence by pointing out undisputed facts. Parties in this petition are in agreement that the petitioner pursuant to section 3 (2) of the Treasury Registrar Act, had a capacity to sue and be sued at the time of instituting of the arbitration proceedings. They are also in agreement that the Attorney General is the custodian of public property on behalf of the Government. Their point of departure is, however on whether the section 40 of the Written Law (Miscellaneous Amendment) Act No. 3 of 2016 which came into effect on 18th November, 2016 amending section 3 of the Treasury Registrar Act, could operate retrospectively. Whilst, the respondent contends it does not, the petitioner considered the respondent as to have misinterpreted the provision. For ease of reference the provision of section 3 (3), (4) and (5) are provided herein below:

(3) "*Notwithstanding the provisions of this section, the*

Attorney General ***shall have the right to***

intervene in any suit *or matter instituted by, or* ***against the Treasury Registrar:***

(4) *Where the Attorney General* ***intervenes*** *in any matter in pursuance to Sub-section (2) of the provisions of the Government Proceedings Act, shall apply in relation to the proceedings of that suit or matter as it had been instituted by, or against the Government:*

(5) *For the purposes of subsections (3) and (4),* ***the Treasury Registrar shall have a duty to notify the Attorney General of any impending suit*** *or intention to institute a suit or matter by, or* ***against the Treasury Registrar"*** [Emphasis mine]

Whereas I agree to Mr. Rweyemamu's assertion that the amendments could not operate retrospectively, but I am equally in agreement to his

contrary position, which was as well agreed to by Mr. Hoseah that the AG's involvement was a legal requirement.

Going by the amendments, the AG has been given a leeway to be part of the proceedings including in any impending suit against the Treasury Registrar. The directive or rather requirement was not optional but mandatory. And since the arbitration proceedings were already pending, the AG's involvement which is mandatory could thus only be by way of intervention. For purposes of clarity, it is necessary to define the term "intervention" According to **Black's Law Dictionary Online,** the term has been defined to mean:

> *"The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject matter in dispute, in order the better to protect such interest"*

From the definition, it is evident that the AG who was not a party to the impending suit against the petitioner was afforded a right to be joined as a party. The law did not only illustrate what should be done for the AG's involvement to occur, but under section 3 (5) of the Treasury Registrar Act, as amended has imposed that duty of notifying the AG upon the Treasury

Registrar. The mandatory obligation of notifying the AG as spelt out in the provision was not complied with. I thus agree to Mr. Hoseah that since the said statutory duty had not been fulfilled, the proceedings conducted in the absence of the AG's involvement were thus misconduct on the part of the arbitrators.

From the wording in the provision the Treasury Registrar was the one tasked with the duty or obligation. However, it did not stop the respondent or even the arbitrators to point out the irregularity. The averment is therefore not an afterthought as contended by the respondent nor intended to frustrate the respondent's enjoyment of the award awarded. Similarly, the respondent's plea that the Court invoke the doctrine of estoppel and stop the petitioner from denying the fact that he voluntary participated in the arbitral proceedings; I do not see the point why should I, since the petitioner has *first and foremost* not refuted voluntarily taking part in the arbitration proceedings. And this I believe was based on the fact that arbitration is ordinarily upon parties' consent which is usually reflected in their agreements.

Secondly, the voluntariness of parties to go for arbitration does not override the legal requirement, which in this case was that the AG should

be notified so that he can be involved in the arbitration proceedings. *Thirdly,* the petitioner had no control over the amendments, rather the one required to strictly adhere.

This ground alone is in my view sufficient to dispose of the petition, that the arbitration proceedings and the award therefrom was improperly procured, since the AG who is guardian of the public property including those under the Treasury Registrar was not involved as required by section 3 (5) of the Treasury Registrar, Cap. 370 as amended by Written Law (Miscellaneous Amendment) (Act. No. 3) Act, 2016.

For the foregoing, I thus proceed to set aside the award and costs awarded by the arbitrators. No order as to costs.

It is so ordered.

P.S.FIKIRINI

JUDGE

26th SEPTEMBER, 2019