IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO.49 OF 2020

(ARISING FROM MISC. COMMERCIAL CAUSE NO.40 OF 2020)

IN THE MATTER OF ARBITRATION ACT, [CAP 15 R.E. 2019

IN THE MATTER OF AN APPLICATION FOR REMITTAL OF ARBITRAL AWARD PUBLISHED ON 17TH MARCH, 2020 BY XAVERY M. NDALAHWA (SOLE ARBITRATOR) FOR RECONSIDERATION)

BETWEEN

LUGANUZA INVESTMENT COMPANY LIMITED ..... PETITIONER

VERSUS

M/S. THE TRUSTEE OF ORTHODOX CHURCH OF TANZANIA

HOLY ARCHDIOCESE OF MWANZA ..... RESPONDENT

Date of Last Order:22/02/2021

Date of Ruling: 29/03/2021

RULING

MAGOIGA, J.

The petitioner, LUGANUZA INVESTMENT COMPANY LIMITED under the provisions of section 15(1) of the Arbitration Act,[Cap 15 R.E.2019] and Rules 5,6, 7 and 8 of the Arbitration Rules and any other provision of the law has preferred this petition against the above named respondent praying for this court to be pleased to give in her favour, the following orders, namely:-

i. This Honourable court to issue and order remitting Arbitral Award published on 17th day of March, 2020 by Mr. Xavery M. Ndalahwa (Sole Arbitrator) for further reconsideration as the court may direct.

ii. In the alternative, having exercised jurisdiction beyond his powers, this Honourable court be pleased to set aside the Award on the grounds stated under paragraph 6.2 and 6.4 hereinabove.

iii. Costs of this petition, and

iv. Any other such order as the court may deem fit and just.

The background/facts pertaining to this petition are imperative, albeit in brief, to be stated. On 16th day of March, 2018, the respondent entered into written contract by the petitioner for construction and completion of the proposed Holy Archdiocese of Mwanza main administrative office building and cultural centre on Plot No.463/1, Block "C" Nyegezi area-Mwanza city. The terms and conditions of construction were clearly stipulated in Agreement and its annexure dully executed by parties (herein after to be referred to as "the Agreement"). The contractor executed some of the works, but in the course of implementation of the Agreement a dispute arose. The petitioner's concerns were whether the contract price included

VAT, re-pricing of the re-measured work was justifiable; there was any overpayment to the petitioner and contract terminated. Consequently, parties referred their disputes to Arbitration as per the terms of the Agreement. Mr. Xavery M. Ndalahwa was appointed as the sole arbitrator. On 17th day of March, 2020, Mr. Ndalahwa having dully heard and considered the matter issued the final award which reads as follows:

1. **That the claimant is to be paid Tshs.45,862,556.80 by the respondent.**
2. **That, if the amount in 1 above is not paid within 30 days from the date of award, there should be an interest of 12% per year till full payment.**
3. **That the claimant to handle over the site to the respondent within seven days of the date of this order,**
4. **That each party to bear his costs**

Aggrieved by the decision of the sole arbitrator, the petitioner lodged this petition alleging that, the sole arbitrator misconducted himself on the following grounds:-

1. That the award was improperly procured in that, given the circumstances of this dispute, the sole arbitrator acted unfairly and wrongly granted the sum of TZS.45,862,566.80 based on 63.5% of the total amount to the petitioner. The Arbitrator was bound to apply the contractual rates for the works executed as per the technical team report or else the Arbitrator was empowered by the NCC Arbitration Rules to appoint a Technical expert to assist him in establishing the value of the works done in circumstances. The contract between the parties was not lump sum contract but it was based on established quantities in the BOQ. Therefore, the Arbitrator's analysis based on percentage was obvious wrong and un-contractual.
2. That the award was improperly procured in that the sole arbitrator misdirected himself and acted beyond his jurisdiction regarding liquidated damages. That issue of liquidated damages was never framed and parties were not given any opportunity to address the Arbitrator in that regard. The Arbitrator condemned the petitioner for liquidated damages without affording it an opportunity to be heard in that respect. As such the honourable Arbitrator offended the doctrine

of natural justice which is the pillar in any Arbitral proceedings such as this one.

3. That the award was improperly procured as the sole Arbitrator failed to grant the parties opportunity to file and argue on a bill of costs thereby departed to the principle of costs to follow the vent hence denied the petitioner's right to be heard.
4. That the award was improperly procured as the sole Arbitrator failed to consider and/or apply VAT principle against claim by the petitioner. That as far as VAT is dealt with by Tanzania Revenue Authority, and then, he was to seek assistance from TRA in addressing this issue properly before making final decision on the same.
5. That the award contains fundamental errors of law manifest on the face of the award and the record. The enforcement of the award is contrary to jurisdictional requirements and due process and fair hearing requirements thus biased decision amount to gross misconduct.

Upon being served with the petition, the respondent filed a reply to the petition disputing all allegations leveled against the arbitrator. The respondent maintained that the award was justified and maintained that it

was issued on the weight of evidence adduced by the parties and no way was any relevant law disregarded. The respondent further pointed out that, the award has been mutually executed and satisfied between parties and concluded that the instant petition is an academic exercise on the part of the petition worth to be dismissed with costs.

When this petition was called on for hearing, the petitioner was enjoying the legal services of Messrs. Elias Kisamo and Musa Kyobia, learned advocates from Dar es Salaam based legal clinic of Thadeson Advocates; while the respondent was enjoying the legal services of Mr. Josephat Rweyemamu, learned advocate, from Bukoba based legal clinic of Josephat Rweyememu Advocates. The hearing of this petition was done orally.

Submitting in support of the petition, Mr. Kisamo started by bringing to the attention of the court that, this petition was filed under the provisions of section 15(1) of the repealed Arbitration Act, [Cap 15 R.E. 2019], and Rules 5,6,7,and 8 of the Arbitration Rules but with the coming into force of the Arbitration Act, 2020 to be referred herein as the **'Act"**, by virtue of section 91 (4) which recognizes the application of the new law including to pending proceedings, like the instant one.

Having stated the law as it stands now, Mr. Kisamo reiterated the provisions under which this petition was preferred and pointed out that, as of now the relevant provisions allows challenge of the award under section 70 (2) of the new Act and that the challenge has to be on serious irregularity affecting the arbitral tribunal, the proceedings or the award. Mr. Kisamo to be specific pointed out that, the relevant law that guide court in determination of the petition is section 70(2) which contains paragraphs (a) to (i). The learned advocate to be precise pointed out that section 70(2) (f) and (i) are the relevant to this petition. On paragraph (f) of subsection 2 to section 70, Mr. Kisamo pointed out that, it deals with uncertainty or ambiguity as to the effect of the award and paragraph (i) of subsection 2 of section 70 deals with any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitral tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award. Further, Mr. Kisamo submitted that the court has powers under sub section 3 of section 70 where serious irregularities are proven to grant the prayers as contained in the petition. Equally, Mr. Kisamo pointed out that sub section 3 has a proviso which bars the court to refrain from granting the reliefs as set out in sub section 3 where the court

is satisfied that, it is inappropriate to remit the matters in question for reconsideration.

On the foregoing, Mr. Kisamo pointed out that the grounds upon which this petition is premised are as stated at page 4 of the petition numbered 6:1, 6:2, 6:3 and 6:4. The learned advocate for the petitioner, therefore, went on to submit that, in ground 1, the Agreement stems from the Agreement in which parties agreed to execute certain construction works and the contractual price was TZS.522,974,269.10 and that under clause 8.5 of the agreement, it was agreed that the contract price should not be altered nor adjusted in any way unless it complies with contractual provisions.

Expounding more on this point, Mr. Kisamo submitted that, the sole Arbitrator in his final award ordered the respondent to pay the petitioner Tshs.45,862,566.80 after considering only three documents; which are technical report, Bill of Quantity (BOQ) containing contractual price based on valuation done based on the rates as per contract on 31/03/2019, and the altered Bill of Quantity which was Tshs.488,001,936.45. According to Mr. Kisamo, what the petitioner was claiming was costs due to increased work done which was Tshs.760,192,911.45 minus the contractual price of Tshs.522,974,269.01 is equal to Tshs.237,218,642.00, an amount which the

petitioner was claiming and was entitled as per work done. It was the view of Mr. Kisamo that, since they applied wrong figures and rates then the arbitrator obviously arrived at wrong and far below figures of Tshs.45,862,566.80. Therefore, it was the conclusion of the learned advocate for the petitioner that the petitioner was underpaid and an amount of Tshs.191,356,075.00 was not paid. According to Mr. Kisamo, this is where the arbitrator erred and caused substantial injustice. He thus invited this court to intervene as prayed in the petition.

Another concern raised was on liquidated damages, which Mr. Kisamo submitted that, it is a contractual matter which from it to be paid delay must be proved. The learned advocate referred this court to Clause 43:1 of the contract which stated that for delay and damage can only come to play, only if, there was delay and concluded that parties were at no issue on delay and no issue of delay was framed. Mr. Kisamo pointed out that, delay was caused by increase of the scope of work and by determining an issue not framed denied parties right to be heard and that affect the validity of the award.

In the alternative, Mr. Kisamo argued that if the petitioner was liable to pay liquidated damages it was limited to 5% of the contractual sum which is

Tshs.26,248,713.00 but to the contrary the petitioner was held liable at Tshs.760,192,911.45 which was wrong because the contract price was Tshs.522,974,269.01, hence, concluded that the arbitrator arrived at wrong figures as the calculations were based on wrong numbers.

The third concern by Mr. Kisamo was that, the sole arbitrator denied parties right to be heard on bill of costs. According to the Mr. Kisamo, parties were entitled to file costs but unilaterally he apportioned the costs to parties.

Another point of concern argued by Mr. Kyobia was that the contractual amount did not include Value Added Tax but the petitioner was held liable to pay VAT while the contract was silent on VAT, and no exemption was received from the respondent. Failure by the arbitrator to consider it was wrong, submitted Mr. Kyobia. According to Mr. Kyobia, it was wrong for the Arbitrator to include VAT in the amount while the contract was silent.

On the totality of the reasons advanced, the learned advocates for the petitioner strongly urged this court to grant this petition as prayed in the petition.

In rebuttal, Mr. Rweyemamu told the court that, before indulging into the grounds raised and argued, he prayed to argue the basis of this application.

Mr. Rweyememu submitted that the Arbitral Tribunal entertained the matter under clause 45:1 of the contract title **"Settlement of Disputes"**. The learned advocate pointed out that under that clause, in particular, sub clause 45:10 parties agreed that the award of the arbitrator shall be final and binding upon them. The parties to that contract on their own volition submitted themselves to the Arbitrator by doing all necessary meetings, filed pleadings and from the beginning without any kind of objections to the end. Mr. Rweyememu went on to tell the court further that, the award was reached on March 2020 and the petitioner initiated and notified the respondent to execute the award by a letter dated 18/04/2020 and the petitioner has already handed over the site. On 22/05/2020, the respondent received demand notice to pay the money to TRA on behalf of the petitioner and to herself whereby on 20/06/2020 the awarded money was paid as directed and both payments were acknowledged by the petitioner.

On the foregoing, the learned advocate for the respondent argued that, the award has already been mutually executed in full by parties. So there is nothing to challenge because parties have mutually completed executing the award. To buttress his point, the learned advocate cited the cases of SHELL AND BP TANZANIA LTD vs. UNIVERSITY OF DAR ES SALAAM, CIVIL

APPLICATION NO.68 OF 1999, KIGOMA UJIJI MUNICIPAL COUNCIL vs. NYAKIRANG'ANI CONSTRUCTION LIMITED, MISC. COMMERCIAL CASE NO. 239 OF 2015, TANZANIA MOTORS SERVICES LIMITED vs. TANN TRACK AGENCY LIMITED, CIVIL APPLICATION NO. 86 OF 2014, AND ABDALLAH RASHID vs. LEORNARD BAKEBERA, CIVIL APPLICATION NO.2 OF 1998- all of which in their totality underscore the point that, once a decree is executed, no proceedings can be opened again because everything, including execution may have been overtaken by events.

Guided by the above stance on execution, the learned advocate for the respondent argued that, it will involve the petitioner to remit back Tshs. 45,864,566.80 which he had pocketed way back in 2020. The learned advocate for the respondent equated the instant application as a person who eats their cake and still wants to have it!

Seeking the remittance of the award back to the arbitrator is equal or tantamount to making an application which has been already executed. On that note, Mr. Rweyememu strongly urged this court not to entertain this petition and invited this court to dismiss same with costs.

As regards to the grounds to challenge the award, Mr. Rweyemamu submitted that, the disputed contract had several documents all of which were to be read together with the main contract because all form an integral part of the contract. The arguments by Mr. Kisamo were based on one document, pointed out Mr. Rweyememu, and termed it as uncalled for conduct by the petitioner. The learned advocate pointed out that, a document called **"Specific conditions"** and pointed clause 7 of the contract document which said categorically that dispute settlement will be as provided under clause 45:1. On the execution of the contract, the arbitrator refused the Technical Report because it was against the contract and therefore the prices in the contract were to determine the works.

It was, therefore, the strong argument of Mr. Rweyememu that, the arbitrator was justified to rely on the contract terms than being driven by other terms which were to exhaul all terms of the contract and would be of no importance to drafting and signing contracts. The learned advocate for the respondent went on to point out that, under clause 3:6:1 the contract allowed alterations and variations of similar characters and the arbitrator was justified in his decision.

Mr.Rweyememu pointed out that the calculations made by the arbitrator were justified, in particular, when one adds the value of the works done with the contractual sum one gets Tshs.760.192,911.45 which is the value of the contract and not the value of the works done and all this was in favour of the petitioner. So according to the learned advocate, before the termination of the contract, when one take Tshs.760,192,911.46 times 63.5 divide by 100 you gets Tshs.482,722,498.80 minus 398,850,286.40 already paid one gets Tshs. 83,782,212.40, money which when one deducts Tshs.38,009,645.70 being liquidated damages leaves a balance of Tshs.45,862,566.80 which was paid in full. The liquidated damages calculated and deducted was justified because it was pleaded, argued and evidence given and was supported by the contract, strongly submitted Mr. Rweyemamu.

The learned advocate for the respondent further submitted that, under Rule 7(2) of the Arbitration Rules, the arbitrator shall have jurisdiction to determine any question of law arising in the arbitration and make a decision thereon.

Mr. Rweyemamu charged that, on Value Added Tax(VAT) and the argument that, it was not included in the rates, was brief and to the point that Clause

18 of the contract says all taxes are included in rates while pricing. And in his view, this argument was brought forward out of context because the tendered document was very clear on the point. Equally, the learned advocate for the respondent argued that, the allegations and argument that, there was a promise to get tax exemption is devoid of any useful merits for simple reason that it is nowhere reflected in the documents.

On allegations that the arbitrator not awarding costs and denied the petitioner right to be heard on costs, Mr. Rweyemamu's arguments in rebuttal were brief to the point that since each party partially won and partially lost, the order of each party to bear his own costs was justified in the circumstances. According to Mr. Rweyemamu, awarding costs, like any other adjudicating bodies, lies with the discretionary powers of the decision maker, so is the arbitrator, in the arbitration before him and to condemn him is being unfair so long as he acted within his powers.

In the totality of the above submission the learned advocate for the respondent prayed that this court agrees with him and proceeds to dismiss this petition with costs.

In rejoinder, Mr. Kisamo not moved by the rebuttal submissions and cases cited by Mr. Rweyemamu, and as such submitted that, the petition before the court is competent and that the authorities cited were dealing with execution of the decree and not registration and enforcement of the arbitration award which is a legal right under section 70 (1) (2) and (3) of the new Arbitration Act, 2020. According to Mr. Kisamo, they are here to contest the enforcement of the award and not registration of the award because by being accepted by the deputy Registrar and given a number registration was complete.

Further in rejoinder, Mr. Kisamo submitted that, satisfaction of the award outside the court is not a bar to come to court to challenge an award either wholly or partially and that an award cannot be said to have been executed or satisfied unless and until the same is registered and a decree of the court issued capable of being executed. On that note, Mr. Kisamo prayed that, this court finds that, the petition is proper before the court and proceeded to determine the same on merits.

On the merits of the petition, it was the argument in rejoinder of the petitioner that, both parties and arbitrator had no right to increase or decrease the figures. According to Mr. Kisamo, the concept of 63.5 per cent

was rejected and because the work done was 83% and by arbitrator excluding the amount of work done.

On liquidated damages, it was the submission in reply of Mr. Kisamo that, they are raising a question of right to be heard because the arbitrator applied 5% of the contractual price, which was Tshs.522,974,269.00, hence, arrived at wrong figures at the detriment of the petitioner.

On VAT it was the submission in rejoinder of Mr. Kisamo that, VAT is a question of law and must be charged and the petitioner was legally empowered to claim it and be refunded by the respondent. According to Mr.Kisamo, the contract had no VAT component, therefore, when it arises, it has to be paid by the respondent and not the petitioner.

As to the issue of costs, it was the rejoinder reply of Mr. Kisamo that, awarding costs in arbitration proceedings is not discretionary but the arbitrator was mandatorily required to give parties right to be heard before making an order as to who bears the costs. Mr. Kisamo pointed out that, in arbitral proceedings, the order of costs must be part of the award under Rule 45 of the Arbitration (Rules of Procedure) Regulations, 2021, the discretionary power was exercised irrationary, and was, thus, wrong.

In the foregoing, Mr. Kisabo prayed that this petition be allowed on the first prayer with no costs or in the alternative be set aside with costs.

This marked the end of hearing of this hotly contested petition.

The noble task of this court now is to determine the merits and demerits of this petition on the basis of the arguments for and against the same.

In my considered opinion, I find apposite that, I start with the first point raised by Mr. Rweyemamu, learned advocate for the respondent that, execution of the impugned arbitral award has been fully satisfied and it cannot be challenged now. Indeed, I must admit this point raises a very important legal issue as to whether a fully satisfied arbitral award between parties before its registration can later be challenged when presented for registration. According to Mr. Kisamo, the point raised do not fit in the situation we have because up to now there is no decree of the court that can be recognized and capable of being enforceable as decree between parties and be so satisfied to speak. The learned advocates for the petitioner, had it that even the cases cited by Mr. Rweyememu the learned senior advocate for the respondent were dealing with decrees of the court which were capable of being executed and as such distinguishable from the

situation we have here as of now. While on the other part, Mr. Rweyemamu strongly submitted that, once the arbitral award has been fully satisfied between parties as awarded, any preferred challenge shall have been overtaken by events and is improper to entertain such move.

Further on the point, Mr. Rweyememu submitted that, in the construction agreement it was agreed under clause 45:10 that the award shall be final and binding upon the parties.

Having dispassionately considered the hotly argued point of objection taken by Mr. Rweyememu, it is apposite to take note that, parties to a contract in our jurisdiction are allowed to decide on a forum and choice of law for the determination of contractual dispute as rightly held in the case SUNSHINE FURNITURE CO. LTD vs. MAERSK (CHINA) SHIPPING CO. LTD AND NYOTA TANZANIA LIMITED, CIVIL APPEAL NO.98 OF 2016 (DSM) CAT (UNREPORTED).

In my view, when parties to a contract choose to subject themselves to arbitration process, they are, indeed, subjecting themselves to the process which may be legally binding to them and may impact on their rights. The terms and conditions set out in clauses in the contract which parties dully

execute are not meant to be ornaments but under the doctrine of sanctity of the contract are to be interpreted to give effect of what parties agreed unless exceptions to the same are proved as set out in section 70 (2) of the Arbitration Act, 2020. See the case of SIMON KICHELE CHACHA vs. AVELINE M. KILAWE, CIVIL APPEAL NO.160 OF 2018, MWANZA (CAT) (UNREPORTED) underscoring the effect of sanctity of contract.

Further, in my considered view, the intention of the parliament under section 70 (2) is to allows the court only in obvious cases of serious irregularities likely to cause substantial injustice to exercise its powers, and in doing so, courts will be supporting the credibility of the arbitral process by correcting fundamental errors rather than interfering with the autonomy of the arbitral process.

With the above position in mind and now that I am obliged to determine the instant petition in the light of the new Arbitration Act, 2020, my above considered views are supported by, among others, the general principles as set out in the provisions of section 4 of the Arbitration Act, 2020, in particular, section 4(b) and (c). The said section, among others, and for easy of reference provides that:

Section 4. The provisions of this Act are founded on the following principles, and shall be construed accordingly:

(a) NA

(b) The parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and

(c) In matters governed by this Act, the court shall not intervene except as provided by this Act.

Reading between the lines of the above provisions, the issue I can answer is whether an objection that an award to has been fully satisfied out of court can be a bar to the petitioner challenging the impugned award? There is no short cut and easy answer to this question. However, going by the provisions of the new Act that regulates the arbitral process now in our jurisdiction, in my view, can give light in the way.

It should be as well noted that, finality clauses in agreements is an important feature, arbitration agreements inclusive, and key factor that attracts many parties to choose arbitration when choosing dispute resolution mechanism for some reasons that it saves time and costs and

avoid long protracted litigations to the parties. Like any other standard contracts, in my view as well, final clauses will depend on the validity of the arbitral award to the parties and should not mandatorily be construed as agreement to exclude challenge of arbitral award and right to appeal because that will be against the obvious provisions of the law that allows the challenge and appeal as provided for under section 70(1), (2), (3) and (4) of the Arbitration Act, 2020. For easy of reference section 70 provides that:

> ***Section 70 (1) A party to arbitral award 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 irregularity of one or more of the following kinds which the court considers has caused or likely to cause substantial injustice to the applicant:***
>
> ***(a) failure by the arbitral tribunal to comply with section 35;***

(b) the arbitral tribunal has exceeded its powers otherwise than by exceeding its substantive jurisdiction;

(c) failure by the arbitral tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the arbitral tribunal to deal with all issues that were raised before it;

(e) any arbitral institution or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud, or procured in a manner that is contrary to the public policy;

(h) failure to comply with the requirements as to the form of the award;

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitral tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award;

(3) the court may, where it determines that there is a serious irregularity affecting the arbitral tribunal, the proceedings or the award-

(a) remit the award to the arbitral tribunal, in whole or in part for reconsideration;

(b) set aside the award in whole or in part; or

(c) declare the award to be of no effect, in whole or in part:

Provided that, the court shall not exercise its powers to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it will be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

(4) the leave of the court shall be required for any appeal against a decision of the court under this section.

However, borrowing a leave from Nigeria where finality clauses were tested in the case of TAYLOR WOODROW (NIG) LTD vs. SUDDEUTSEHE ETNA-WERK GMBH (1993) 4NWLR (PT.286) 127 It was held that:

"you have constituted your own tribunal; you are bound by its

decision, the only exception to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted is now, I think, firmly established, viz: where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."

Yet in another Nigerian case of NITEL vs. OKEKE [2017]9 NWLR (PT.1571) 439, the Supreme Court of Nigeria faced with finality clause in the contract held that:-

> ***"courts should not therefore upset the expectation of the parties except for the clearest evidence of wrong doing or manifest illegality on the part of the arbitrator"***

In my own view, therefore, guided by the law and the above cited cases, the finality of the award will much depend on its validity than the words attached to the contract in dispute because this court cannot close its eyes to illegally procured award for whatever reasons as stipulated in section 70 (2) (3) and (4) of the Arbitration Act, 2020 in our jurisdiction.

On that premise and back to the instant petition, therefore, there is no dispute that, parties under clause 45 of the agreement chose that, the forum and their dispute shall be governed by the arbitration proceedings. Not only that but also that, under clause 45:10 that the award shall be final and binding upon the parties. What is paramount in my considered opinion is to test the award against any challenge before the court can affirm the finality of the award.

In my further considered opinion, I don't agree with Mr. Kisamo that, upon filing of an award then same is considered registered, hence, capable of being challenged. But once an award is issued, it goes several steps before the same becomes capable of being recognized and enforceable by the court as decree. These are; filing, challenge (if any), recognition and enforcement as provided under section 68 read together with section 78 of the Arbitration Act, 2020. The act of filing an award in court, therefore, transforms, in my opinion, the private unenforceable arrangements (arbitration proceedings) into fully enforceable decree of the High Court. Hence, an award by the arbitral tribunal is deemed to be a decree, upon recognition by the court and instantly same is enforceable like a decree of the court if not successfully challenged. To this end, I subscribe to the

argument of Mr. Kisamo, and rightly so in my opinion that, a mere satisfaction of the award out of court cannot be a bar by a party to arbitral tribunal to challenge, even where it can be established the petition to be merited. If parties to the arbitral proceedings agree not to file their award and satisfy the same without involvement of the court, then that is allowed but the moment they invoke the court intervention, in my opinion and guided by the above cited provisions of the law, the court can look into the award provided the challenge was filed in time and without malice.

To that end, therefore, I am entitled now to look into the grounds of challenge as argued and rebutted by the learned trained legal minds of the parties in this petition. The first ground of challenge of the award was, according to Mr. Kisabo, based on section 70 (2) (f) of the Arbitration Act, 2020. The said provision talks of an uncertainty or ambiguity as to the effect of the award.

Having considered the hotly rival arguments, I found out that, the gist of their arguments is grounded on the calculations and rates but not on the uncertainty or ambiguity as to the effect of the award. The phrase "uncertainty or ambiguity as to the effect" in my view pertains to an award which is not clear and cannot be enforced. The effect of the award in

dispute are, certain and unambiguous in its effect. Truly, I find no uncertainty or ambiguity as to the effect of the award in the impugned arbitral award. Further guided by the holding in the case of D.B. SHAPRIYA AND CO LTD vs. BISH INTERNATIONAL BV (2) [2003] EA 2002 in which it was held that:

> ***"courts cannot interfere with the findings of the facts 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 erroneous proposition of law is stated an award and forms the basis of that award a court can set aside the award or remit it." (Emphasis mine).***

It is from the above guidance and having considered all submitted by parties' legal minds that, I find the first ground of challenge is devoid of any useful merits. Indeed, all considered I find no uncertainty or ambiguity to the effect of the award by the sole arbitrator on evaluation of evidence adduced by the parties during arbitration proceedings. The sole arbitrator considered all evidence and arrived at the figure based on evidence by

parties and no serious misconduct was proved on ground one of the complaints. Therefore, this court hereby rejects and dismisses the first ground for want of merits.

This takes me to the second ground of complaint, that the arbitrator misdirected himself and acted beyond his jurisdiction regarding liquidated damages as the issue of liquidated damages was not framed and parties were not given an opportunity to address the tribunal in that regard, hence, both parties were condemned unheard. Having considered all arguments on this point, I find it unmerited and will not take much of this court's time. The reasons, I am taking this stance are not far to fetch. **One,** it is not true that parties were not heard on this point, as rightly argued by Mr. Rweyemamu and rightly so in my own opinion supported by the record, it was one of the claims of the respondent before the sole arbitrator and parties submitted on the same and were cross examined by the learned advocate for the petitioner (claimant by then) at page 38-39 of the typed proceedings where it was the term of the contract that the claimant will pay liquidated damages in case of delay to complete the work. **Two,** therefore, based on the above reason, the argument that the claimant was not heard dies a natural death and was a point raised and argued as an afterthought

on the part of the petitioner. **Three,** had the sole arbitrator not made a findings on this issue, it could be a ground because it was one of the claims, was argued and rebutted by both parties, evidence tendered and the holding on the same did not deny any of the parties right to be heard as argued. Therefore, same must be and is hereby rejected and dismissed as well for want of merits.

As regard to the third ground of challenge of the award that, the sole arbitrator failed to grant parties an opportunity to file and argue bill of costs thereby departed the principle of costs follow the event, hence, denied the petitioner's right to be heard and this was equally pegged on paragraph (i) of section 70 of the Arbitration Act, 2020. Having carefully considered this point along all what was argued for and against on this issue; I am with certainty to find this point without any useful merits. My reasons for my stance are not farfetched. **One,** the award of costs in arbitral proceedings is guided by the provisions of section 63 (1) and (2) of the Arbitration Act, 2020. The said provisions provide the following:

Section 63(1) Subject to any agreement by the parties, the arbitral tribunal may make an award allocating the costs of the arbitration as between parties.

(2) the arbitral tribunal shall, unless the parties otherwise agree, award costs on the general principal that costs follow the event, except where it appears to the arbitral tribunal that in the circumstances it is not appropriate in relation to the whole or part of the costs.

From the above literal wording of the relevant section in the Act, dealing with awarding of costs, therefore, in my view, the argument by Mr. Kisamo that, the arbitral tribunal was, first, to invite parties to file costs before the issuance of the award is unfounded and is not supported by law. By all strength of imagination, this cannot be a serious irregularity because the grant of the costs as stipulated in the provision above is within the discretion of the arbitral tribunal to grant and not to grant. In this petition, the sole arbitrator ordered each party to bear her own costs and gave reasons that since both parties have partially succeeded and partially lost. This was within the provisions of sub section (1) of section 70. Therefore, costs, in my view, is consequential to the decision of the arbitral tribunal and in facts was an answer to last and usual reliefs that what parties are entitled to.

Even if, for the sake of argument, one can invoke sections 64 and 65 of the Arbitration Act, 2020, still it will not assist the petitioner because in their agreement subject of the arbitral proceedings, nowhere it provided for recoverable costs of arbitration.

From the foregoing, I find this ground seriously unmerited and devoid of any useful merits in this petition and same must be and is hereby dismissed in its entirety.

This trickles me to the last ground that, the arbitrator failed to consider and/or apply VAT principles against claim by the petitioner and as far as VAT is concern the arbitrator was to seek assistance from TRA in addressing this issue properly before making final decision on the same. Having gone thorough arbitral proceedings and having careful considered the rival arguments from the trained legal minds for the parties', this point is akin to fail in its face value. The reasons am taking this stance are not farfetched. **One**, as correctly argued by Mr. Rweyemamu and rightly so in my own considered opinion, clause 18 was very clear and loud that, the prices included all taxes in the rates while pricing. The sanctity of contract principle is that the court can only intervene where it can be established that same was tainted with fraud or any other form which is unacceptable

in law. In this petition, I find none was established. Further even if the issue of VAT was not addressed in the terms of the contract expressly, it can still stand because is a requirement of the law for all business transactions to be subjected to tax, hence, it falls under the implied terms of a contract that all parties ought to have known. **Two,** Mr. Rweyememu argued that, following the issuance of arbitral award, the petitioner issued tax invoice of Tshs.45,862,566.80 inclusive VAT to the respondent, which money was paid accordingly, but now he is claiming the issue of VAT was not considered and it needed TRA assistance, this shows the instant petition was preferred as an afterthought on the part of the petitioner. I quite agree and subscribe to this argument. There was no need to seek TRA assistance and failure to seek one does not become serious irregularity as argued by the learned advocates for the petitioner. Not only that but also that, final certificate of payment was issued by the agent of the petitioner, therefore, it can certainly be said the whole petition was preferred without any useful merits.

In the foregoing, therefore, this ground, like other grounds, must be and is hereby dismissed for want of any useful merits in the circumstances of this petition.

However, before winding up this ruling, I noted that in paragraph 7 of the petition, the petitioner pointed out that the arbitral tribunal award contained fundamental errors of law manifest on the face of the award and record. The petitioner went on to state that the enforcement of the award is contrary to jurisdictional requirements and due process and fair hearing thus biased decision amount to gross misconduct. But I further noted that nothing was submitted on this point by the learned advocates for the petitioner. Their silence on this point is that, it was ingeniously abandoned. This court as well will not make and finding on this point as well.

All taken into account and having found that the instant petition is devoid of any serious irregularity. In the circumstances, the parties had subjected themselves to the arbitral process and are bound by the award given by the arbitral tribunal, because they even went further and satisfied the award meaning they agree with findings of the arbitral tribunal. And indeed, even the recognition and enforcement envisaged under Misc. Commercial cause 40 of 2020 is an academic exercise because once the parties agree the award to be final, as in this case, the registration and enforcement becomes of no essence, save where a challenge can be merited. This is not the case here.

To cum it all, therefore, I find this petition misconceived and without any iota of any useful merits as such same must be and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 29th day of March, 2021.

S. M. MAGOIGA

JUDGE

29/03/2021