

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM.**

**MISC. COMMERCIAL CAUSE NO. 7 OF 2020**

**VOLTALIA PORTUGAL S.A. ----- CLAIMANT**

**Vs**

**NEXTGEN SOLAWAZI LIMITED -----RESPONDENT**

**RULING**

**B. K. PHILLIP, J**

The claimant herein is a legal entity registered under the laws of Portugal. It deals with procurement and construction of photovoltaic power facilities among others. The respondent is company incorporated under the laws of the United Republic of Tanzania, carrying on a business of generating and supplying electricity for rural electrification projects in Tanzania. In December, 2016 the claimant and the respondent entered into an agreement, namely "EPC agreement" in which the claimant agreed to deliver to the respondent a Photovoltaic facility ( " the PV Facility" ) together with a transmission line connecting the PV Facility with a 33kV transmission line to be constructed by Tanzania National Electricity Company ("TANESCO"). In the course of

implementation of the said EPC agreement disputes arose, consequently, the claimant to lodged a case against the respondent at the International Court of Arbitration of the International Chamber of Commerce in London, United Kingdom, ( Henceforth "ICC International Court of Arbitration") vide Case No. 23831/TO, pursuant to submission clause 19.4 of the EPC Agreement.

The aforesaid case was presided over by Mr. Abdul-Lateef Jinadu who was the sole Arbitrator. Upon delivering the award, the Arbitrator requested the Deputy Counsel of the Secretariat of the ICC International Court of Arbitration to register the final award in this Court. Thus, vide a letter dated 20<sup>th</sup> February 2020, the Deputy Counsel of the Secretariat of ICC International Court of Arbitration forwarded to this Court the Final Award for registration as a Court decree.

At the hearing of this matter the learned advocates Jeremiah Tarimo and Jovinson Kagirwa appeared for the Claimant and respondent respectively.

Submitting for the claimant, Mr. Tarimo invited this Court to register the Award as a Court decree pursuant to the provisions of section 68 (1) (2) of the Arbitration Act, 2020 (Henceforth "Act No 2/2020") and Regulation 51 (7) of the Arbitration (Rules of Procedure) Regulations, 2021, GN. No. 146 of 2021 (Henceforth "GN. No. 146/2021").

Furthermore, Mr. Tarimo referred this court to the provisions of Section 70(1) of Act No 2/2020 and Regulation 63 (1) of the GN. No. 146 of 2021 and went on to submit that after the dismissal of the petition that was filed by the respondent to challenge the Award, there is no any petition challenging the award as required under Act No. 2/2020, Mr. Tarimo referred this Court to the provisions of section 70 (1) of Act No. 2/2020 and Regulation 63 (1) of GN. No. 146/2021 to bolster his argument. He insisted that under the circumstances, this court should register the Award as a Court decree. To cement his arguments he cited the following cases; **East African Development Bank Vs Blueline Enterprises Limited (2009) Civil Appeal No.101 of 2009 (CA)** (unreported), **National Insurance Corporation (T) Limited Vs Shengena Limited (2015), Civil Application No. 230 of 2015 (CA)** (unreported), **Hashim Madogo and two others Vs Minister for Industry and Trade and two others, Civil Appeal No.27 of 2003, (CA)**, (unreported).

Before proceeding further with the arguments raised by the learned advocates, let me point out here that this application is among the applications which were filed under the repealed Arbitration Act, Cap 15. Now, with the advent of Act No. 2/2020, it has to be determined in accordance with the provisions of Act No. 2/2020. This is pursuant to section 91 (4) of Act No.2/2020 which provides as follows;

Section 91 (1), (2), (3), (4) and (5).

*1) "The arbitration Act, 1931 is hereby repealed.*

*2) Anything done or concluded and the repealed Act or regulations shall be deemed to have been done or concluded under this Act.*

- 3) Any arbitration arrangement concluded before the coming into effect of this Act which has not yet materialized shall be renegotiated and brought in line with this Act.*
- 4) Any proceedings pending shall be proceeded in the light of this Act.*
- 5) Any Award which has been granted shall be deemed to have been granted under this Act."*

In this matter, I was confronted with different views from Mr. Tarimo and Mr. Kagirwa on the interpretation and application of the provisions of Act No. 2/2020, to wit; Mr. Kagirwa was of the view that under Act No. 2/2020 a party can challenge registration of an Award orally without filing any petition for challenging the same. In this case there is no any petition challenging the Award as the petition that was filed by the respondent's advocate was dismissed by this court. However, Mr. Kagirwa insisted to make his submission against the claimant's request for enforcement of the Award as a Court Decree orally. On the other hand, Mr. Tarimo is of the view that a party can challenge the Award by filing a formal application by way of petition. There is no room for challenging a registration of an Arbitral Award orally.

From the foregoing, I found myself compelled to make a determination of the above stated controversy before embarking on the determination of the merits of the application. Having said the above, let me proceed with the analysis of submissions made by Mr. Kagirwa.

In rebuttal, Mr. Kagirwa conceded that there is no any petition filed in court to challenge the award, but contended that the application for

registration of the Award has been made orally, so he has a right to challenge the award by way of oral submissions too as the same is tainted with serious irregularities in contravention of Section 70(1) of the Arbitration Act 2/2020. To cement his argument he referred this Court to the provisions of Regulation 51(7) of GN.No.146/2021.

In rejoinder, Mr. Tarimo reiterated his submission in chief. He insisted that Regulation 63 (1) of GN.No.146/2021, provides clearly how an Arbitral Award can be challenged, that is, it can be challenged by filling a petition and the contents of the petition are well stipulated in that Regulation. Moreover, Mr. Tarimo contended that according to Regulation 51(4) of GN. No. 146/2021 the claimant is not required to file a formal application for registration of an Arbitral Award as a Court decree. The Claimant is only required to transmit the award to the Court. So the Court is moved to register the award by way of a letter attached with the relevant attachments stipulated in the law.

I have dispassionately analyzed the submissions made by the learned advocates and perused the provisions of Act No. 2/2020, and G.N. No. 146 of 2021. Let me start with Mr. Kagirwa's argument that the claimant has made this application orally. This Award was transmitted to this Court for registration as a Court decree under the provisions of Section 12(2) of the repealed Arbitration Act Cap. 15 and Article 4 of the Arbitration Rules. So, in my considered view, the procedure under which the Award has been transmitted to this Court cannot be subjected to the provisions of Act No. 2/2020 as the same was filed under the repealed Law (Cap 15). Under the repealed Arbitration Act, (Cap 15) an Arbitral Award was supposed to be filed in court for registration as a court decree by writing a letter accompanied with the certified copies of the

Award together with the evidence on reference and the minutes of the proceedings.

However, good enough, Act No. 2/2020 has a provision similar to the provisions of Rule 4 of the repealed Arbitration Rules which were made under Cap 15, that is, Regulation 51(4) (5) of GN. No. 146/2021 which provides as follows;

*4) The arbitral tribunal shall, within time limit provided for under the Law of Limitation Act, at the request of any party to the award or any person claiming under him and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, **cause the award or a signed copy of it, to be filed in the court and notice of the filing shall be given to the parties by the arbitrators.***

*5) Notwithstanding the provisions of sub regulation (4), the arbitral tribunal may in the letter transmitting the award to the parties, **allow any party to the proceedings to file a certified copy of the award together with the proceedings thereof with the court for the purposes of registration of the same.***

*(emphasis added)*

In conclusion, the manner of filing an Award in court for registration is similar to the one that was provided in the repealed law, Cap 15. So, for the sake of arguments, even if this court decides to subject the way this award was transmitted to this Court to the provisions of Act No.2/2020 as per the views held by Mr. Kagirwa, the same will be found to be properly filed

From the foregoing Mr. Kagirwa's contention that this application was filed orally pursuant to the provisions of Regulation 51(7) of GN. No. 146/2021 is a misconception. Not only that Mr. Kagirwa's argument is not valid because the provision of Regulation 51(7) of GN. No. 146/2021, is not applicable in the matter in hand as the same is for registration and enforcement of an made Award under the provision of section 73 (1). Similarly, Mr. Tarimo was wrong to refer this court to Regulation 51(7) of GN. No. 146/2021 as the same is not applicable in the circumstances of this case.

For ease of understanding let me reproduce the provisions of Regulation 51 (7) hereunder;

*7) "A leave to enforce an award under Section 73(1) shall be made orally or by way of an application."*

To my understanding the Award referred to in Regulation 51(7) of GN. No. 146/2021 is the one made by the court upon the determination of a petition challenging the award for various grounds and the original award is varied by the court or otherwise pursuant to the provisions of section 69, 70 and 71 of Act No. 2/2020. The award in the instant case was not made under Section 69, 70 or 71 of Act No. 2/2020.

According to sections 69 (1) and 70 (1) of Act No.2/2020 an award can be challenged on substantive jurisdiction or on serious irregularities by making an application before the court. For ease of understanding let me reproduce the provisions of section 69 (1) (a) (b) and 70 (1) of Act No.2/ 2020 hereunder;

*"69(1) A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to court:-*

- a) *challenging any award of the arbitral tribunal as to its substantive jurisdiction or*
- b) *for an order declaring an award made by the arbitral tribunal on the merits to be of no effect, in whole or in part, on grounds that the arbitral tribunal did not have substantive jurisdiction.*

*70(1) A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the arbitral tribunal, the proceedings or the award”.*

As regards the modality of challenging an Award under Act No. 2/2020, the same is provided under the provisions of Regulation 63 (a) of GN. No. 146/2021 which provides clearly that all applications made under Act No. 2/2020 shall be by way of petition, save as otherwise provided. Regulation 63 (1)(a) –(e) of GN.No.146/2021 reads as follows;

*"63(1) Save as is otherwise provided, all applications made under the provisions of the Act or these Regulation shall;*

- a) *Be made by way of petition and be titled "In the matter of the arbitration and in the mater of the Act" and reference shall be made in the application to the relevant section of the Act.*
- b) *Contain a brief statement, in summary form, of the material facts, shall be divided into paragraphs numbered consecutively and shall state the nature of the relief sought or the questions of law for the determination of the Court as the case may be;*
- c) *Annexed to it the submission, the minutes or proceedings of the arbitral tribunal award or the ruling to which the petition*



*relates, or a copy of it certified by the petitioner or his advocate to be a true copy.*

- d) Annexed to it the submission, the minutes or proceedings of the arbitral tribunal award or the ruling to which the petition relates, or a copy of it certified by the petitioner or his advocate to be a true copy.*
- e) Specific the persons affected by it and upon whom notice is required to be given as provided in this Regulations and shall state the address, in details, of each of them;*

Thus, an application for challenging an Award has to be made by filing a petition pursuant to Regulation 63 of GN.No.146/2020.

Having said the above, It is the finding of this court that in the absence of a petition challenging the award, Mr. Kagirwa has no right to submit anything which is aimed at challenging the registration of the Award as he has nowhere to rely on in his submissions.

Now, let me proceed with the determination of the merits of this matter. The Award in question is a foreign Award. It was made by an Arbitrator appointed by the ICC International Court of Arbitration, in London. Therefore, its registration in this court is governed by the provisions of Regulation 66 (3) of GN.No.146/2021 which provides as follows;

- 3) "In order for a foreign award to be enforceable under the Act and these Regulations, it shall-*
  - a) Have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;*

- b) Have been made by the arbitral tribunal provided for in the agreement or constituted in manner agreed upon by the parties;*
- c) Have been made in conformity with the law governing the arbitration procedure.*
- d) Have become final in the country in which it was made;*
- e) Have been in respect of a matter which may lawfully be referred to arbitration under the laws of Tanzania, and its enforcement shall not be contrary to the public policy or the laws of Tanzania; and*
- f) Not contradicts conditions for enforcement of the foreign award as stipulated under Section 83(2) and (4) of the Act.*

In order for a foreign award to be registered and enforced as a court decree ,the above quoted conditions must be met.

Having perused the Award in question together with the proceedings thereof, I have noted that there is a ruling on jurisdictional issue. The Ruling reveals that the respondent in this matter raised a concern before the Arbitrator that the ICC International Court of Arbitration had no jurisdiction to determine the dispute between the parties herein on the following ground, that this Court in its ruling **Between Nextgen Solawazi Limited and Voltania S.A. France , Misc Commercial Cause No 1 of 2018** (unreported) dated 13<sup>th</sup> December 2018, Lady Justice Sehel, J as she then was, revoked the submission clause 19.4 of the EPC Agreement for being ambiguous.

In its ruling the Sole Arbitrator Mr. Abdul- Lateef Jinadu said the following ;

12.6 *"I therefore find and decide that regardless of the position under the Arbitration Act which I have found and decided applies to the arbitration agreement, I am not bound by the order of the Honourable Justice B. M. A Sehel of the Commercial Division of the High court of Tanzania sitting in Dar es Salaam dated 13<sup>th</sup> December, 2018.*

12.7 *As regards the judgment of the Honourable Judge Mwandambo of the Commercial Division of the High Court of Tanzania sitting in Dar es Salaam dated 13<sup>th</sup> December, 2018, on the basis of my finding that the arbitration agreement is governed by the Arbitration Act, I find and decide that I am not bound by this Judgment".*

Fortunately, I got opportunity to read the ruling of Lady Justice Sehel, J as she then. In her Ruling Lady Justice Sehel J as she then was, said the following;-

*"Clause 19.4 of the EPC Agreement say nothing more than the procedural use of the ICC Rules and the appointment of arbitrator by such procedural rules. It is not clear as to whether the appointed arbitrator(s) is conferred with the mandate of resolving the dispute by way of "arbitration", "mediation", or "reconciliation". Furthermore, clause 19.4 of the EPC Agreement does not name the arbitral tribunal. It is not stated whether parties intended for an "ad hoc" or "an institutional body". If it is an institutional body, it is not named in the arbitration clause. ICC*

*which the respondent chose to go was not named as a chosen body for the parties to refer their disputes. The step taken by the respondent to go to ICC as a chosen arbitral body is inconsistent with the parties' agreement. The parties have not agreed to submit themselves to ICC rather they agreed to use ICC Rules in resolving their disputes and in appointing the arbitrator. Clause 19.4 of the EPC Agreement raises a lot of legal issues in terms of the arbitral body if any, the medium of resolving disputes, and number of arbitrator (s) as such I see that Clause 19.4 of the EPC Agreement lacks the necessary attributes for it to be legally enforced and upheld.*

*Therefore, according to the circumstances of this petition, I find merit to it. Pursuant to Section 4 of the Arbitration Act, Cap. 151 do hereby revoke the submission clause 19.4 of the EPC Agreement for being ambiguous such that it raises complicated issued of law explained herein”.*

From the foregoing, the pertinent question that arises here is whether or not the Award in hand sought to be registered and enforced as a court decree meets the conditions stipulated in the Provisions of Regulation 66 (3) of GN.No.146 of 2021.Let me say outright here that , I am of the settled legal opinion that this Award has not met all the conditions stipulated in Regulation 66 (3) of GN. No.146/2021 as I shall elaborate soon hereunder.

The fact that the order of this Court reproduced herein above revoked the submission clause 91.4 of EPC agreement through which the sole Arbitrator relied upon to determine the dispute between the parties

herein, shows that the Award has been made not in a manner agreed upon by the parties contrary to Regulation 66 (3) (b) of GN. No. 146/2021. In her findings Lady Justice Sehel J, as she then was, stated clearly that the submission clause 91.4 was ambiguous as it did not indicate how the Arbitrator would be appointed and the manner in which the dispute would be determined either by mediation or Arbitration. Not only that, the effect of the aforesaid order of this Court was to deprive the ICC International Court of Arbitration the jurisdiction to determine the dispute between the parties as well as the powers of the Arbitrator to preside over the case , since the order of this court was made before the determination of the dispute between the parties. From the foregoing, it is obvious that the Award is in conflict with the order of this court. In my considered view, the decision of the Sole Arbitrator on the jurisdictional issue cannot prevail over the order of this court which stands unchallenged to date.

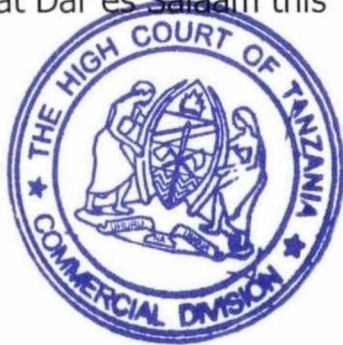
Also, I wish to point out here that I have taken into consideration the reasons given by the Sole Arbitrator in his ruling on the jurisdictional issue. It has to be noted that the reasons stated by the Arbitrator in his ruling cannot be of any help now because at this stage, this court is required to determine whether or not the Award can be enforceable in Tanzania as a Court decree while this court had already revoked the submission clause from which this Award derives its legitimacy and the order revoking the submission clause was made prior to the determination of the dispute between the parties herein. In my considered opinion, under the circumstances, this Award cannot be enforced by this court as a court decree as enforcing it as a court decree will be tantamount to overruling the orders of this court which is

totally contrary to the well laid down legal principles. This court is now *functus officio*. It cannot reverse its own order revoking the submission clause 91.4 of EPC agreement. At this moment this court has no powers to deal with the issue on whether or not the order of this court revoking the submission clause 91.4 of EPC agreement was correct. The only way to challenge the aforesaid order of this court was to appeal to Court of Appeal.

I have also noted that in his submission Mr. Tarimo did not make any submission to show and prove that the Award has met the conditions stipulated in Regulation 66 (3) of GN. No. 146/2021 as required in as Regulation 66(4) (c) of GN. No. 146/2021.

In the upshot, for the reasons explained herein above, this court declines to register the award as a court decree. The application is dismissed. I give no order as to costs.

Date at Dar es Salaam this 26<sup>th</sup> day of May 2021



**B. K. PHILLIP**

**JUDGE**