

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 84 OF 2021

(Arising from the Commercial Cause No. 7 of 2021)

VOLTALIA PORTUGAL S.A..... APPLICANT

VERSUS

NEXTGEN SOLAWAZI LIMITED..... RESPONDENT

RULING OF THE COURT

K. T. R Mteule, J

28/9/2021 & 6/10/2021

This Ruling is in respect of application filed by the applicant **Volitalia Portugal S.A** for leave to appeal to the Court of Appeal against the Decision of this Court in **Miscellaneous Commercial Court No. 7 of 2021** which was filed by the Respondent **Nextgen Solawazi Limited** for registration and adoption of an arbitral award as a decree of the court.

Historically, this application originates from a dispute involving the instant parties which was referred to the **International Court of Arbitration** at the **International Chambers of Commerce** where it was arbitrated in favour of the applicant. The final award of the arbitration was forwarded to this court by the arbitrator and filed for registration vide **Miscellaneous Commercial Cause No. 7 of 2020**. The Respondent attempted to challenge the Arbitration Award through

two petitions, one being **Miscellaneous Commercial Cause No. 12 of 2021** which was struck out on technical ground and another one **Miscellaneous Commercial Cause No. 44 of 2021** which was dismissed for being time barred.

After the dismissal of both petitions, **Miscellaneous Commercial Court No. 7 of 2021** for registration and adoption of the arbitral Award as a decree of the court was called for hearing. Thereafter the court ruled against the registration consequently dismissing **Miscellaneous Commercial Court No. 7 of 2021**. This has aggrieved the applicant who wants to appeal to the Court of Appeal to challenge the dismissal of the request to register the arbitral award in absence of any petition to challenge the arbitral award.

According to the applicant's affidavit and submissions, the intended appeal involve serious triable legal issues to be determined by the Court of Appeal. These issues were consolidated during the applicant's submission to comprise:

- (a) Whether the Court was correct to frame issues for determination and rule on competency of the arbitration proceedings by its own motion and in absence of a Petition to challenge the arbitration award;
- (b) Whether the Court was correct to frame issues for determination and rule on competency of the arbitration proceedings by its own motion without affording an opportunity for the Applicant to address the Court on the same in contravention with the right to be heard principle; and
- (c) Whether the Court was correct to refuse to examine the proper parties in Miscellaneous Commercial Cause No. 1 of 2018 which

revoked the arbitration clause between the respondent and Voltalia S.A, France and whether the Court was correct to blindly ignore the pendency of Civil Appeal No. 272 of 2019 between Voltalia S.A, France, and the Respondent, arising from Miscellaneous Commercial Cause No. 1 of 2018 to the effect of ruling out that the decision in Miscellaneous Commercial Cause No. 1 of 2018 had not been appealed against in the Court of Appeal of Tanzania.

In the submission, the counsel for the applicant began to put forward what is obvious that granting of leave to appeal to the Court of Appeal falls squarely within the discretion of the Court.

According to the applicant, the application has satisfied the prerequisites for granting of the leave to appeal which are:

- (1) Whether the intended appeal stands reasonable chances of success;
- (2) Whether the proceedings as a whole reveal disturbing features as to require the Court of Appeal to go into them for guidance;
- (3) Whether there is a point of law or point of public importance that may be discerned in the proceedings or decision sought to be appealed from; and
- (4) Whether the grounds appealed from show prima facie or an arguable appeal.

The applicant continued to submit in a bid to justify existence of triable or arguable issues present in the intended appeal. With regards to the first proposed triable issue, the applicant submitted that the Court erred in Law by determining the competency of the arbitration tribunal in

absence of the Respondent's petition to challenge the arbitral award. According to the applicant, this contravenes **Section 67 and 70 of the Arbitration Act No. 2 of 2020 (The Act)** and **Regulation 63 (1) (a) to (e) of the Arbitration (Rules of Procedures) Regulations, GN. No. 146 of 2021 (The Regulations)**.

In her submission, the applicant combined the second and the third indicated triable issues and submitted that the applicant was denied the right to be heard before the court. According to the applicant, the court did not give her any chance to address it in the found irregularities. According to the applicant, the reasoning of the Hon. Judge that the arbitration clause in the EPC agreement was revoked in **High Court Miscellaneous Cause No 1 of 2018** leading to the dismissal of the Arbitral award could have different outcome if the applicant was afforded opportunity to address the court to let it informed that **Miscellaneous Cause No 1 of 2018** did not involve the applicant but her sister company Voltalia S.A France.

In trying to establish the importance of right to be heard the applicant cited the cases of **Margwe Erron and Others vs. Moshi Bahalulu, Civil Appeal No. 111 of 2014 at Arusha (Unreported); Elizabeth Mpoki and Others vs. MAF Europe Dodoma, Civil Application No. 436/1 of 2016, Court of Appeal of Tanzania at Dar es Salaam (Unreported)**

According to the applicant, failure to afford parties right to be heard amounts to triable issue which worth involvement of the Court of Appeal.



In response to the applicant's averments, the Respondent countered the contents of the affidavit and submitted against the applicants written submissions. The Respondent contended that throughout the submission, the applicant has tried to indicate the grounds of the intended appeal without showing the points of law which require the attention of the Court of Appeal. To support this contention the Respondent cited the case of **Step In Limited vs. Dar es Salaam Institute of Technologies, Misc. Commercial Cause No. 328 of 2015,**

Submitting on the intended grounds of appeal, the Respondent challenged the issue as to whether the Court was correct to frame issues for determination and rule on competency of the arbitration proceedings by its own motion and in absence of a Petition to challenge the arbitration award. He argued that the applicant moved the court to register the arbitration award and enforce the same as a decree of the court. According to the Respondent, the only issue which was before the court was whether the leave of the court should be granted under Section 68 (1) of the Act. According to the applicant this issue responded to what was brought to court by the applicant and the court exercised its discretion under the law.

On the issue of denied right to be heard, the Respondent disputed any existence of this situation in the impugned decision. According to the Respondent, the applicant was given opportunity to address the court but she disregarded to make submission and this cannot be termed as denial of right to be heard.

The respondent addressed the issue of Chances of success of the intended appeal by submitting that the applicant has not formulated

grounds which deserve attention of the Court of Appeal to the ruling or the proceedings in accordance with what is directed in the cases of **Sango Bay Estate Limited and Others vs Dresdner Bank A G (1971) 1 EA 17 (CAK); Guatam Jayram Chavda vs Covell Mattwews partnershi Limited Misc Application No 98 of 2010 CA, (Unreported); Simon Kabaka Daniel vs Mwita Marwa Nyang'snyi and Others [1989] TLR, pg 64 and Rajabu Kadimwa Ng'eni and Others vs. Iddi Adam [1991] TLS pg 38.** The Respondent stated that the applicant has not established any chance of success of the intended appeal.

Having gone through the submissions of the parties and their affidavits the issue to be considered by this court is whether the applicant has established sufficient grounds to warrant leave to appeal to the Court of Appeal.

To answer the above issue, I would first point out that leave to appeal is within the courts discretion as rightly submitted by the parties. I am also in line with parties' views that this discretion must be exercised judiciously while avoiding going to the merit of the preferred grounds of appeal. I agree with the parties that there should be some conditions to be met by the applicant to justify granting of leave to appeal. Some of these conditions have been enumerated by the applicant to include chances of success, existence of disturbing features in the proceedings, existence of point of law or point of public importance in the proceedings and existence of prima facie or an arguable appeal. This is not disputed by the Respondent.

From the above conditions, the most important is the existence of arguable grounds of appeal. The others also matter, but it is risk to

delve into them without touching the merit of the intended appeal as if this is an appellate court. It is a well settled position that, the court shall consider the grounds for seeking leave to appeal in isolation of the submissions seeming to challenge the findings of the High Court. This position is already stated in case laws, one being **Jireys Nestory Mutalemwa vs. Ngorogoro Conservation Area Authority, CAT, Application No. 154 of 2016, Lilla, JA (Unreported)**. In this case, the Court of Appeal observed that among the factors which should guide the court in exercising its discretion to grant leave to appeal, is the existence of arguable grounds in the intended appeal. I hereunder quote the words of their Lordships:

"The duty of the Court at this stage is to confine itself to the determination of whether the proposed grounds raise an arguable issue(s) before the Court in the event leave is granted. It is for this reason the Court brushed away the requirement to show that the appeal stands better chances of success as a factor to be considered for the grant of leave to appeal. It is logical that holding so at this stage amounts to prejudging the merits of the appeal."

Although parties in this application submitted in details for and against the grounds of appeal, guided by the established principle, it is my obligation to confine my decision on whether the applicant has presented any arguable issue to be considered on appeal while carefully avoiding going into the merits of the grounds of appeal.

Guided by the above cited **Jireys Nestory Mutalemwa**, I have examined the grounds of appeal without dwelling much on the submission which touched their substantive context. The issues which

surround the grounds of appeal are the appropriateness of the procedure used to consider the registration of the arbitral award without a petition to challenge it, whether parties were afforded right to be heard and whether Miscellaneous Commercial Cause No. 1 of 2018 which revoked an arbitration clause between the Respondent and Voltalia S.A, France was relevant to lead decision in the matter which resulted the impugned ruling. Throughout the submissions, there arose a hot debate on these issues. This court is not in a position to resolve any of them. They all need an eye of the superior court.

In my view, it is the Court of Appeal which is seized with powers to declare whether the appellant is wrong or right in these arguments. The merit of these issues needs a deeper scrutinization to the details of the impugned decision of this court and this is in the domain of the Court of Appeal. I therefore find these issues to be arguable grounds on appeal. This affirmatively answers the issue at to whether there is a sufficient ground to justify leave to appeal.

Having found that the applicant has sufficiently established sufficient cause to warrant leave to appeal, I hereby grant the application. No order as to costs.

Dated at Dar es Salaam this 6th Day of October 2021



Katarina T. Revocati Mteule

JUDGE

6/10/2021