

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CAUSE NO.54 OF 2021**

**(ARISING FROM MISC. COMMERCIAL CAUSE NO.54 OF 2021)**

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

**IN THE MATTER OF AN APPLICATION FOR DISMISSAL OF  
ARBITRAL AWARD PUBLISHED ON 22<sup>ND</sup> OCTOBER, 2020 BY MR.  
CORNEL TRYPHONE (SOLE ARBITRATOR)**

**BETWEEN**

**WORLD VISION TANZANIA ..... PETITIONER**

**VERSUS**

**LAZAFI COMPANY LIMITED ..... RESPONDENT**

Date of Last Order: 01/12/2021

Date of Ruling: 15/12/2021

**RULING**

**MAGOIGA, J.**

The petitioner, WORLD VISION TANZANIA under the provisions of section 70 (1) of the Arbitration Act,[Cap 15 R.E.2020 ] and Regulation 63 of the Arbitration (Rules and Procedure) Regulations 2021 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 order, namely:-



- i. That the respondent's application for registration of the final award (save for costs) published on the 22<sup>nd</sup> day of October 2020 be dismissed owing to the manifest serious irregularity in conducting the arbitral proceedings contrary to what was agreed by the parties.

The background/facts pertaining to this petition are imperative, albeit in brief, to be stated. In between May, 2016 and August, 2018, parties herein signed various construction contracts for execution of various projects within Maswa and Itilima districts, Simiyu region in Tanzania, of which the issue of Value Added Tax (VAT) emerged as dispute between parties. In the said contracts, parties had agreed that in case of dispute which will not be solved amicably, Maswa District Engineer shall appoint an arbitrator who shall conduct arbitration as per applicable laws of Tanzania.

Further facts were that in the course executing their contracts, a dispute arose between parties on payment of VAT arising from payments for works done. As per their agreement, Maswa District Engineer as agreed appointed Mr. Cornel Tryphone, Sole Arbitrator to hear parties. Mr. Cornel Tryphone, Arbitrator inter parties conducted arbitration proceedings which culminated into the final award in the following orders, namely:-



- i. The contracts were VAT exclusive;
- ii. The respondent was liable to pay VAT;
- iii. The claimant is entitled to claim VAT in the circumstances;
- iv. The claimant is entitled to Tshs.42,151,830.15 uncollected VAT; Tshs.21,075,915.08 penalty as per Tax Administration Act; Tshs. 27,182,306.45 interest on uncollected VAT and penalties; interest of 25% per annum on TShs.7,337,405.78 from the date of award to the date of full settlement, costs of final award to the claimant and general damages to the tune of Tshs.27,123,015.50.

The claimant upon getting extension to file an award for registration, managed to file the final award for registration on 18.10,2021. Upon being served with summons and final award for registration, the respondent, through the legal services of Mr. Nicodemus Mbugha from Stratton and Company Advocates filed this petition challenging the registration of the award on one grounds that:-

- i. Clause 17 of the contract specifically stated that "in the event of disputes, they shall be settled by mutual discussion after seeking the advice of the District Engineer Maswa District. If such discussion is not successful, an arbitrator shall be appointed by

Maswa District Engineer and the arbitrator will proceed as per the applicable laws of Tanzania;

- ii. The Maswa District Engineer, instead of appointing an arbitrator, proceeded to refer the matter to NCC wherein NCC appointed one Mr. Cornel Tryphone. In essence the Maswa District Engineer nominated an arbitral institution instead of appointing an arbitrator;
- iii. In principal, the Maswa District Engineer's action is contrary to what the parties agreed as regards the arbitral proceedings. He was supposed to appoint the arbitrator and not refer the matter to NCC for them to appoint the arbitrator for the parties;
- iv. The arbitrator even confirmed in writing to NCC accepting the NCC appointment, hence, the proceedings were conducted not in accordance to what the parties agreed rendering the arbitral proceedings void.

On the foregoing the learned advocate for the petitioner prayed that, final award be dismissed owing to the manifest serious irregularity in conducting the arbitral proceedings contrary to what parties agreed , hence, this ruling.



Upon being served with the petition, the respondent through the legal services of Ms. Chiku Chande, learned advocate from M & T Attorneys filed a reply to the petition disputing all allegations leveled against the arbitrator. The respondent maintained that the award was justified and should be registered, and maintained that, the appointment of sole arbitrator was done by the Maswa District Engineer to a registered arbitrator. Ms. Chande replied that, no dispute was raised as to his appointment at all material time he was conducting the proceedings. And that notification of NCC was done because NCC is the regulatory authority of the arbitration but never appoint an arbitrator as alleged and prayed that the instant petition be dismissed with costs.

When this petition was called on for hearing, the petitioner was enjoying the legal services of Mr. Nicodemus Mbugha, learned advocate, while the respondent was enjoying the legal services of Ms. Chiku Chande, learned advocate. The hearing of this petition was done orally.

Submitting in support of the petition, Mr. Mbugha started by bringing to the attention of the court that, this petition was filed under the provisions of section 70 (1) of the Arbitration Act, [Cap 15 R.E. 2020], and Rule 63(1) of the Arbitration (Rules and Procedure) Regulations, 2021. The learned



advocate for the petitioner pointed out that, the background of the matter was as stated in paragraphs 3-4 of the petition which he prayed to adopt.

Mr. Mbugha went on to argue that, their petition is made under section 70 (2) (c) of the [Cap 15 R.E. 2020 and that the challenge was on serious irregularity affecting the arbitral award, by conducting arbitral proceedings contrary to the procedure parties agreed. In this, Mr. Mbugha meant that the appointment of the arbitrator was wrongly done. However, when probed by the court as to whether this issue was raised during trial arbitral proceedings, Mr. Mbugha was candid enough to say not, it was not.

Another point argued was that the proceedings were tainted because the arbitrator decided what was not agreed between parties by ordering the petitioner to pay VAT. According to Mr. Mbugha, VAT being a statutory requirement as such by ordering the petition to pay VAT vitiated the proceedings.

On that note, the learned advocate for the petition prayed that their petition be allowed as prayed.

In rebuttal against the grant of the petition, Ms. Chande prayed to adopt the contents of the reply to petition. According Ms. Chande, the



appointment of the arbitrator was proper because the arbitrator was appointed by the Maswa District Engineer vide annexure LZF- 01 and upon that appointment he informed the regulatory authority- NCC. More to the point, the learned advocate for the respondent pointed out that this issue was not raised and the petitioner was fully represented before the arbitrator. It was Ms. Chande view that, what the petitioner is doing now is an afterthought futile exercise as no objection was taken against the appointment nor any thing that could challenge his powers as everything was oaky as agreed between parties.

On VAT issue it was the reply of Ms. Chande that same was correctly considered and justly decided by the arbitrator. The learned advocate for the respondent argued that, the award was given based on evidence and requirement of law as the contracts were silent and the whole dispute hinges on who is legible to pay VAT and concluded that it is the petitioner.

On that note the learned advocate for the respondent urged this court to dismiss this petition with costs and proceed to register the award as prayed.





In rejoinder, Mr. Mbugha replied that the letter of appointment was not certified so its authentic is questionable.

This marked the end of hearing of this petition.

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

However, before going into the merits or otherwise, I wish to point out that, this petition was filed under section 70(1) of the Arbitration Act, [Cap 15 R.E. 2020] but section 70 (1) do not deals with challenging of the award but the proper section dealing with challenging awards is section 75 (1) and (2) of the Arbitration Act, [Cap 15 R.E. 2020]. So, for the interest of justice and guided by the overriding principle to do justice to parties without being constrained with technicalities, I will regard this as minor curable typographical error that be cured by taking up the matter as was correctly preferred under section 75 (1) and (2) (c) of the Arbitration Act, [Cap 15 R.E. 2020].

Having dutifully considered the grounds as set out in paragraph 5 (a) to (d) of the petition, I found that the complaint of the petitioner boils down to challenge the appointment of the arbitrator as such vitiated the whole





proceedings and the award arising there from. According to Mr. Mbugha, the arbitrator was appointed by NCC and this was contrary to what parties had earlier agreed in their contracts that, the arbitrator to be appointed by the Maswa District Engineer. Much as the arbitrator was not appointed by the Maswa District Engineer, the whole proceedings and resultant award were tainted and vitiated and void, insisted Mr. Mbugha.

On the other adversary part, Ms. Chande, had a diametrical different view that the appointment of the arbitrator was done as parties agreed by Maswa District Engineer vide annexure LZP-01. More so, the learned advocate for the respondent argued that this point was not raised at the trial arbitral proceedings but is coming now as an afterthought on the part of the petitioner. And in strong terms, the learned advocate for the respondent urged this court to dismiss this petition with costs for being unmerited.

Having carefully and dutifully considered the rivaling arguments for and against this petition, with due respect to Mr. Mbugha, this petition is highly unmerited and deserve a dismissal order. The reasons I am taking this stance are abound. **One**, as correctly argued by Ms. Chande and admitted by Mr. Mbugha when probed by the court and rightly so in my own view,



this issue was not raised at trial arbitral proceedings as required under section 35 and 36 of the Arbitration Act, [Cap 15 R.E.2020]. The said section provides for how do deal with objection to substantive jurisdiction and determination of preliminary point of jurisdiction. **Two**, according to annexure LZF-01 it is without any doubt the appointment of the arbitrator was done by Eng. C Ngalula of Maswa District Council and for easy of reference, I beg to quote him verbatim:

**“With this note I now appoint CORNEL TRYPOHNE as approved in NCC APPROVED LIST OF ARBITRATOS to proceed with the matter as per the applicable laws of Tanzania.”**

**Signed**

**Eng C. Ngalula.**

With the above quoted sentence/word it is unheard and uncalled for to challenge the appointment of arbitrator on pretext that it was NCC which appointed the arbitrator. Not only that, according to annexure LZF-02, the NCC was informing the arbitrator of his appointment and to take up the matter of which he did. Three, I find the arguments by Mr. Mbugha and the whole petition is aimed at delaying the respondent from enjoying the



fruits of justice as parties agreed and same is wholly rejected and dismissed for want of merits on the above reasons.

The other issues that the arbitrator decided what parties did not agree and the letter of appointment was not authenticated, I find them very unfounded in the circumstances of this petition. What was in dispute was the payment of VAT how then it can be outside the decision of the arbitrator is strange and unfounded.

That said and done, this petition is found hopelessly unmerited in all respects and same must be and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 15<sup>th</sup> day of December, 2021.



**S. M. MAGOIGA,**

**JUDGE**

**15/12/2021**