IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO.24 OF 2022

AND

IN THE MATTER OF ARBITRATION

AND

IN THE MATTER OF ARBITRATION ACT NO. 20 OF 2020

AND

IN THE MATTER OF REFUSAL OF REGISTRATION AND ENFORCEMENT OF ARBITRAL AWARD [2018] Z.G.M.Z.J.C ZIMO.1420

BETWEEN

JOC TEXTILES (TANZANIA) COMPANY LIMITED ..... PETITIONER

VERSUS

HIGH HOPE INT'L GROUP JIANSU NATIVE

PRODUCE IMPORT & EXPORT CORP LIMITED ..... RESPONDENT

Date of Last Order: 04.10.2022

Date of Ruling:25.11.2022

RULING

MAGOIGA, J.

The petitioner, JOC TEXTILES (TANZANIA) COMPANY LIMITED by way of petition filed under the provisions section 78(1), (2) (a) (i) (aa) (bb), (c) (ii) of the Arbitration Act, 2020 Act. No.2 of 2020 and Rule 63 (1) (a) (b) and (c) of the Arbitral (Rules of Procedure) Regulations, 2021 against the above

named respondent praying for this court be pleased on the reasons as contained in the petition to grant the following orders, namely:-

a. Arbitral award [2018] Z.G.M.Z.J.C ZI MO. 1420 between the respondent and the petitioner not be registered and enforced;
b. Costs of this petition;
c. Any other reliefs this honourable court may deem fit to grant.

Upon being served with the petition, the respondent filed a reply to the petition stating the reasons why the prayers contained in the petition should not be granted and prayed that the instant petition be dismissed with costs.

The facts pertaining to this petition are imperative to be stated. The petitioner was formerly known and operated in the name of DAHONG TEXTILE (TANZANIA) COMPANY LIMITED which was later changed to the present name. Using the former name, parties herein executed contract for the supply of 10 sets of Rotor Spinning Machine worth USD.4,200,000.00. Further facts were that unknown to the petitioner, in 2018 came to learn of what was termed as Supplementary Agreement executed between the respondent, YANCHENG HONGHUA TEXTILE MACHINERY COMPANY LIMITED and the petitioner. In the original contract parties did not specify the

jurisdiction to which the dispute would be resolved in the event of dispute among the parties. In 2018, the respondent sought to execute the Supplementary Agreement against the petitioner, which act forced the petitioner to institute Commercial Case No.09 of 2018 against the other parties to the Supplementary Agreement in which the court declared the said Supplementary Agreement a nullity for want of the petitioner's consent.

In June 2022, the petitioner was served with notice to appear in Misc. Commercial Cause No.06 of 2022 and show cause why the reliefs sought in the Supplementary Agreement by way of arbitration in China should not be registered and enforced, hence, this ruling.

The petitioner is enjoying the legal services of Mr. Daibu Kambo, learned advocate and the respondent is equally enjoying the legal services of Mr. Rico Adolf, learned advocate.

The petition was argued by way of written submissions. Mr. Kambo reiterated the contents of the petition and reply thereto that the creation of Supplementary Agreement was done without their consent and that which agreement has been declared by this court as nullity by the default judgement of this court dated 09th day of August, 2019. According to Mr.

Kambo, much as the judgement of this court remains in force which declared the said Supplementary Agreement a nullity and un-enforceable, no way an award stemming from the same agreement can be registered and be enforced in our jurisdiction. Other argument by Mr. Kambo was that, the illegality of the Supplementary Agreement was brought to the attention of the arbitrator but for undisclosed reasons, the arbitrator disregarded the same and went ahead.

Further arguments by Mr. Kambo was that the respondent was dully served with the proceedings in Commercial case on 08th day of October, 2018 well before the arbitration proceedings were concluded but took no any remedial measure to date. To Mr. Kambo, the award sought to be registered and enforced is no award in the eyes of law in Tanzania.

Mr. Kambo pointed out that the key question is whether this court which declared the Supplementary Agreement void ab initio and inoperative between parties can register and allow enforcement of the award relating to the same agreement between same parties now? The learned counsel for petitioner was quick to provide negative answer and urged this court to refuse registration and enforcement of the foreign award which is not operative in the legal eyes of this country.

On the other hand of the respondent, Mr. Adolf argued that the petitioner's counsel arguments are misconceived and equally posed a question that whether the judgement issued by the High court of Tanzania can be a ground for refusal of registration of the award where parties agreed that the law applicable is that of China?

According to Mr. Adolf, much as the decision of High Court of Tanzania was delivered after the award was issued way back in 14th May, 2019 and as such pre-date and precede the judgement which was decided on 09/08/2019, then, no way this court can refuse to register this award.

Mr. Adolf pointed out that the provisions under which the instant petition was pegged do not fit in the situation we have because what the law provides is not what the petitioner is seeking. The learned advocate for the respondent cited section 83 (2) of the Act provides for four situations which the court can refuse to register the award which are; capacity to enter into agreement, that were not properly presented, invalid of the agreement under the law the parties have subjected it, and failing any indication of the law, the state was made. Guided by the above provisions, Mr. Adolf strongly argued that it is not the case here because the Supplementary Agreement was clear on all

these factors, which the petitioner failed to prove to the contrary before this court.

Further Mr. Adolf argued that much as parties chose the law applicable is that of China, then, no way Tanzania laws will apply because the issue of validity of the contract was determined by the China Arbitration.

Mr. Adolf admitted that the respondent does not dispute that the agreement has been nullified in Tanzania but was quick to argue that much as the section 83 of the Act (but actually is section 78(2) looks at the invalidity in China as the place of choice of law and not Tanzania, then for the court to refuse to register an award the petitioner ought have shown that the agreement was not valid in China. It was further arguments of Mr. Adolf that the judgement of Tanzania cannot apply retrospectively on the rights of the parties because it was preceded by the decision in China and in accordance with the law of China.

On that note, the learned advocate for the respondent concluded that under the principle of sanctity of contract, this petition lacks merits and should be dismissed with costs.

In rejoinder, the learned advocate for the petitioner argued that it was the recognition of the Supplementary Agreement that prompted the Commercial Case which the respondent was served but decided not to participate and has never wanted to challenge it. The learned advocate pointed out that, the two matters were concurrently ongoing but the respondent opted not to participate in the proceedings that was challenging the validity of the Supplementary Agreement and has not attempted to challenge the decision of the High Court meaning that the contract is void ab initio and inoperative between parties and that neither party can claim anything out of it.

On the argument that the judgement did not act retrospectively, Mr. Komba argued that the phrase void abi initio means from its inception and not from when the judgement was pronounced. On that note, Mr. Komba insisted that this court cannot one hand, declare the Supplementary Agreement void abi nitio, and on the other hand, recognize it by way of Arbitration that will amount to double standard not expected of this court.

Citing the provisions under which this petition was pegged, the learned advocate for the petitioner rejoined that, the lack presentation was the subject of the decision in the Commercial Case and as such the envisaged refusal is under the said provisions.

On that note, reiterated his earlier prayers to refuse registration and enforcement of the award emanating from invalid Agreement with costs.

The task of this court now is to determine the merits or otherwise of this petition. However, before going into that, I feel it apposite to highlight some legal procedure for enforcement of awards be it local or foreign award in Tanzania. The procedure is that both need to be filed in the High Court for an order for its registration and enforcement. When registered a decree is to be issued for its enforcement as per section 78(1) and 79 of the Arbitration Act, 2020 [Cap 15 R.E. 2019] (herein to be referred as the **'ACT'**). Once filed, the court has to invite the respondent to show cause, if any, why the respective award should not be registered. The respondent upon served with notice, if wishes, may file a petition to challenge the registration of the award which has the effect of being enforced as decree of the court as provided for 78(2) of the Act. The determination of the petition has two or more outcomes; one, the court can set aside, returned to arbitral tribunal with directions or be registered as decree of the court for its enforcement.

With that in mind, in Tanzania it should be noted that arbitral awards deals with private rights may be recognized and enforced.

Now back to the issue at hand, having heard the rivaling arguments of the learned advocates for parties' in this petition poses, I must admit, this petition pose a very delicate issue that how will the court proceed if the foreign award conflicts with the judgement in relation to the same dispute between same parties?

In answering the above issue, I will allow the provisions of the Act regulating foreign awards to guide me. This petition was solely pegged under section 78(2) which is in part XI of the Act dealing refusal of recognition and enforcement of arbitral awards. This court by its judgement in Commercial case No. 09 of 2018 determined the validity of the Supplementary Agreement by declaring the said agreement void abi nitio for the reasons stated in the said judgement subject of this award. In my respective opinion, therefore, as rightly argued by Mr. Kambo, and rightly so in my own opinion that parties were not presented in the formation of the Supplementary Agreement and as such this court cannot swallow its words and say the award is enforceable in the circumstances of this petition. This court is not prepared for that now.

Indeed, by the way, looking at the second time to the Supplementary Agreement was only executed by stamp and not even a seal of the company,

hence making it more worse that one can think a company can enter a contract by a mere stamp.

With that note and without much ado, the arguments by Mr. Adolf sound logic but are far from convincing this court to find otherwise. That said and done, are wholly rejected and fails the test of the day in this matter.

On the reasons given above, I hereby answer the issue that where there is a conflict between foreign award and the local decision same must be refused, as I hereby do. Any foreign award that that conflicts with the decision of this court on the same issue and parties, is hence, un-enforceable. This petition is, thus, allowed with costs.

It is so ordered.

Dated at Dar es Salaam this 25th day of November, 2022.

S. M. MAGOIGA

JUDGE

25/11/2022