

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

AT DAR ES SALAM

MISC.COMMERCIAL APPLICATION NO. 39 OF 2023

IN THE MATTER OF ARBITRATION

AND

IN THE MATTER OF ARBITRATION ACT CAP 15 (R.E 2020)

BETWEEN

THE HONOURABLE ATTORNEY GENERAL..... PETITIONER

VERSUS

AYOUB-FARID MICHEL SAAB..... RESPONDENT

RULING

Date of last Order: 26/02/2024

Date of Ruling: 15/03/2024

GONZI, J.

According to the Arbitral award, issued by ICSID Arbitral Tribunal in Washington DC, the United States, the Respondent is a Dutch National and an investor in Tanzania. He instituted the arbitration proceedings on 4th April 2019 against the Petitioner over a dispute that arose allegedly out of measures taken by the Central Bank of Tanzania against the Federal Bank of Middle East (FBME Bank), a financial institution indirectly owned by the Respondent through two corporations

incorporated in Gibraltar due to suspicions of money laundering. The measures allegedly culminated into insolvency proceedings against the FBME Bank hence resulted into destruction of the Respondent's investment in Tanzania. The respondent claimed that the measures constituted a breach of the Agreement on Encouragement and Reciprocal Protection of Investments between the United Republic of Tanzania and the Kingdom of Netherlands, dated 31st July 2001. The International Center for Settlement of Investment Disputes (ICSID) discontinued the arbitral proceedings on account of failure by the Respondent to pay the advance fees and costs of arbitration within the time frame and hence the appointed ICSID arbitrators rendered an award of costs in favour of the Government of Tanzania against the Respondent. On 25th August 2023, the petitioner filed the present petition in court against the Respondent to have the order of costs granted by the arbitral tribunal recognized and enforced in Tanzania.

The petition was filed under Sections 73(1) and 83(1) of the Arbitration Act (Cap 15 R.E 2020), Regulations 63 and 66 of the Arbitration (Rules of procedure) Regulations (G.N. No.146 of 2021 and Rule 2(2) of the Commercial Court Rules, 2012. The Petition was verified by the affidavit

of Mr. George Mandepo, Principal State Attorney from the Office of the Solicitor General of the Government. The petition was accompanied by a copy of the Bilateral Investment Treaty on Agreement on Encouragement and Reciprocal Protection of Investments (BIT) executed between the United Republic of Tanzania and the Kingdom of Netherlands in which the arbitration agreement is contained. This was marked Annexure OSG 1. It was also accompanied by the Request of Arbitration in ICSID Case No. ARB/19/8 between Ayoub-Farid Michel Saab versus the United Republic of Tanzania dated 4th April 2019 which was marked as annexure OSG 2. The petition was accompanied by Annexure OSG 3 being the copies of a letter from ICSID dated 6th July 2020 informing the parties to the dispute about the constitution of the Arbitral Tribunal made up of Prof. Nicholous Angelet, Prof. Arnaud de Nanteuil and Prof. Gerald Niyungeko. Annexure OSG 4 is a copy of a letter from the ICSID Tribunal dated 7th August 2020 to Mr. Ayoub-Farid Michel Saab of Paris France and his Advocates informing them on the deposit made by the United Republic of Tanzania of the amount of USD 100,000/= by wire transfer to ICSID being the Petitioner's portion of advance fees requested to be paid by each party via the letter of the

ICSID Tribunal to the parties dated 8th July 2024. On 19th October 2020, the Petitioner through the Office of the Solicitor General, wrote to the ICSID Legal Counsel insisting that the Respondent herein should have also paid its portion of Fees within 6 months otherwise the Petitioner would move the ICSID Secretariat to discontinue the arbitral proceedings and claim a refund of the Petitioner's portion of fees paid. On 22nd March 2021, the ICSID Secretariat wrote a letter to the Respondent herein and his Lawyers reminding the Respondent that in terms of ICSID Administrative and Financial Regulation 14(3)(d), the arbitral proceedings would be discontinued on 20th April 2021 being after expiry of 6 months since it was filed, unless by that time the Respondent herein would have paid USD 100,000 being his portion of advance fees for the arbitration services under ICSID.

On 24th June 2021, ICSID Tribunal pronounced an Order delivered in Washington, DC, the United States, discontinuing the arbitral proceedings with costs. The Order was signed by all the 3 Arbitrators constituting the Tribunal and was dispatched to parties through their communicated addresses on the same date. The relevant part of the Order that constituted the Award of the Tribunal is stipulated as follows:

ORDER: For the reasons set forth above, the Tribunal orders as follows:

- (1) The arbitral proceeding initiated by Mr. Ayoub-Farid Michel Saab, Claimant against the United Republic of Tanzania, Respondent, in ICSID Case No. ARB/19/8 is discontinued on the day of adoption of the present Order in accordance with Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations;**
- (2) The Claimant is liable to reimburse the Respondent the costs of the arbitration proceeding, consisting of the costs and fees of the Centre and of Arbitral Tribunal in the amount of USD 100,000.**
- (3) Each Party shall bear its own costs and expenses. Accordingly, the Respondent's request that the Claimant shall reimburse**

**the “cost of legal representation” and the
“disbursement costs” contained in the
Respondent’s Statement of Costs, is
rejected; and**

(4) All other requests are dismissed.

On 10th March 2022, the Petitioner through Annexure OSG 8 wrote to the Respondent in Paris, France and his Lawyers in Beirut, Lebanon using their e-mail addresses, demanding reimbursement payment of the USD 100,000 within 14 days of the letter, constituting of costs and fees of the ICSID and the Arbitral Tribunal as awarded in the Tribunal’s Order. The Petitioner gave the Respondent 4 different account options in New York and Dar es salaam for the Respondent to pay the USD 100,000 to the Petitioner. The Petitioner intimated that after lapse of the 14-days’ time frame, it would have no other option than to enforce the Tribunal’s Order at the risk of and costs to the Respondent.

Apparently, while the Petitioner was following up payment from the Respondent, the 6 months’ time-frame to enforce an arbitral Award under Item 18 of Part III of the First Column in the Schedule to the Law

of Limitation Act, Cap 89 of the Laws of Tanzania expired. Therefore, the Petitioner instituted in this Court Misc. Commercial Application No.119 of 2022 against the Respondent seeking for extension of time within which to file and register a foreign Order delivered in respect of ICSID Case No. ARB/19/8 between Ayoub-Michel Saab and the United Republic of Tanzania. After hearing both sides, this Court (as per Hon. Nangela, J.), on 28th February 2023 granted 14 days from the date of the Ruling as an extension of time within which the Petitioner to file the Application. The Ruling of this Court in Misc. Commercial Application No.119 of 2022 was attached to the present Petition as Annexure OSG 10.

The Petitioner duly filed in this Court Misc. Commercial Cause No.6 of 2023 against the Respondent seeking recognition and enforcement of the foreign arbitral Award in terms of the Order emanating from ICSID Case No. ARB/19/8 dated 24th June 2021. The petition was met with a preliminary objection from the Learned Counsel for the Respondent that the application was incompetent as it contravened Regulation 63(1) of the Arbitration (Rules of Procedure) Regulations, GN.No.146 of 2021. In its Ruling dated 4th August 2023, this Court (Hon. Nangela, J.), struck

out the application for contravening Rule 51(5) of the Arbitration (Rules of Procedure) Regulations, 2021 for being filed without there being the accompanying proceedings from which the award emanated. The Petitioner was however granted leave to re-file the application in court. The Ruling in Court Misc. Commercial Cause No.6 of 2023 was attached to the present Petition as Annexure OSG 11.

The Petitioner sought for proceedings from ICSID and in email communications, the ICSID Secretariat indicated that they had sent Tribunal's order and cost of proceedings which were attached as annexure OSG 12 to the petition.

The petitioner ultimately filed the present petition seeking for orders that:

- (i) That this Honourable Court be pleased to grant leave to recognize and enforce the ICSID Tribunal Order in ICSID Case No. ARB/19/8 between Ayoub-Farid Michel Saab versus the United Republic of Tanzania date 24th June 2021 as binding and enforceable.**

(ii) Costs of this application.

**(iii) Any other Order(s) this Honourable Court
may deem fit to grant.**

The petitioner stated in the petition that the present petition being one for enforcement of a foreign arbitral award, and that as the petitioner has complied with the requirements of Regulation 66(3) of the Arbitration (Rules of Procedure) Regulations, (GN No.146 of 2021) and has produced all necessary proofs as per Regulation 66(4) of the Arbitration (Rules of Procedure) Regulations, GN.No.146 of 2021, it should be granted.

On 9th November 2023, the Respondent's Counsel appeared in Court and prayed for time to file an Answer to the Petition and show cause why the foreign arbitral award should not be recognized and enforced in Tanzania. He was granted time up to 23rd November 2023 but he did not file the answer to the petition. On 11th December 2023, the Respondent's counsel requested again for an additional time to file the answer to the petition on account that it was difficult to get hold of the Respondent who was abroad. The Court granted an extension of time

up to 18th December 2023 for the Respondent to file the answer to the petition and the Petitioner was also given time to file a reply to the Answer to petition by 28th December 2023. The case was fixed for hearing on 26th February 2024.

On 26th February 2024, when the matter was set for hearing Ms. Consensa Kahendaguza assisted by Ms. Neisha Shao, both learned State Attorney appeared for the Petitioner. On the other hand, Mr. Seni Malimi, learned Advocate appeared for the Respondent. Mr. Malimi addressed the Court that the Respondent was not interested to oppose the petition anymore and therefore that the Respondent was not contesting the Petition except the prayer for orders as to costs. Ms. Consensa Kahendaguza, learned State Attorney, on the other hand, responded that since the Respondent was not resisting the registration and enforcement of the foreign arbitral Award, the court be pleased to have it registered as presented for enforcement. On the prayer to forgo costs of the present application, Ms. Kahendaguza agreed to relinquish the petitioner's prayer for costs. Therefore, the following is the Ruling of the Court in respect of the application for registration of the foreign arbitral award which is un-opposed.

It is settled that the award at hand is a foreign arbitral award issued by the ICSID. The petition was filed under Sections 73(1) and 83(1) of the Arbitration Act (Cap 15 R.E 2020), Regulations 63 and 66 of the Arbitration (Rules of procedure) Regulations (G.N. No.146 of 2021 and Rule 2(2) of the Commercial Court Rules, 2012. Section 83(1) of the arbitration Act, Cap 15 of the Laws of Tanzania (RE 2020) confers upon the court the jurisdiction to order the recognition and enforcement of domestic as well as foreign arbitral awards in Tanzania thereby transforming an otherwise a decision of a private individual (Arbitrator) into a binding Order or Decree of the Court. Section 83(1) provides that:

“Upon application in writing to the court, a domestic arbitral award or foreign arbitral award shall be recognised as binding and enforceable.”

The grounds to be used by the court in granting or refusing to grant an application for recognition and enforcement of a domestic or foreign arbitral Award as an Order or a Decree of the Court in Tanzania are stipulated under section 83(2) of the Arbitration Act, Cap 15 of the Laws of Tanzania. Section 83(2) provides that:

(2) Notwithstanding subsection (1), a domestic arbitral award or foreign arbitral award shall be refused if

(a) at the request of the party against whom it is invoked, that party furnishes to court proof that-

(i) parties to the arbitration agreement, pursuant to the law applicable-

***(aa) lacked capacity to enter into the agreement;
or***

(bb) were not properly represented;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the

reference to arbitration, provided that, if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; (a) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence; or

(b) if the court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under any written laws; or

(ii) the recognition or enforcement of the arbitral award would be contrary to any written laws or norms.

It is noteworthy that the 6 grounds stipulated under section 83(2)(a) are substantive grounds which can only be considered by the Court if the person against whom the award is sought to be enforced, invokes them as the grounds for his resisting the recognition and enforcement of an arbitral award. On the other hand, the 2 grounds stipulated under section 83(2)(b) are ex officio grounds which can be raised by the court suo mottu even if the party against whom the award is sought to be enforced does not raise them. It is therefore the duty of the Court to always satisfy itself on conformity with the 2 ex-officio grounds even if neither party to the application raises them.

It is trite that the current application is not opposed by the Respondent. Therefore, the grounds under section 83(2)(a) are not going to be considered in this Ruling. It is however still the duty of the court in terms of section 83(2)(b) of the Arbitration Act to assess the award as to its conformity with the 2 ex-officio grounds prescribed under section 83(2)(b) of the Arbitration Act. I therefore proceeded to consider

whether *"the subject matter of the dispute is not capable of settlement by arbitration under any written laws in Tanzania or whether the recognition or enforcement of the arbitral award would be contrary to any written laws or norms of Tanzania"*? My answer is in the negative.

The dispute that the Respondent referred to ICSID for Arbitration, as can be seen in the arbitral award, arose out of measures allegedly taken by the Central Bank of Tanzania against FBME Bank, a financial institution indirectly owned by the Respondent through two corporations incorporated in Gibraltar due to suspicions of money laundering. The Respondent lodged the claim at ICSID alleging that Tanzania had breached its obligations in terms of the Bilateral Investment Agreement for reciprocal protection of foreign investments which it had signed with the Kingdom of Netherlands. Therefore, the Respondent filed at ICSID a claim for breach of a Bilateral Investment Treaty. The award made by the arbitral tribunal is with respect to reimbursement of fees and costs incurred by one party to the arbitral proceedings while defending herself against the arbitral proceedings instituted by the adverse party. I know no law in Tanzania that would make that subject matter not capable of

settlement by way of arbitration; and hence the dispute was, and is, arbitrable.

The second test under section 83(2)(b) is whether the recognition or enforcement of the arbitral award would be contrary to any written laws or norms of Tanzania. Again, I am satisfied that the recognition and enforcement of the foreign arbitral award for reimbursement of costs of the arbitral proceedings in this matter, would not offend any laws or norms in Tanzania. It is a valid legal remedy in the courts and tribunals of Tanzania. There is no law or norm obtaining in the country that would be incompatible with recognition and enforcement of such kind of an award. I therefore find that the unchallenged foreign arbitral award in the present application, passes the dual tests under section 83(2)(b) of the Arbitration Act, Cap 15 of the Laws of Tanzania.

Having found that there is no legal obstacles for the recognition and enforcement of the foreign arbitral award in the present application, I invoke Regulation 66(1) of GN.No.146/2021 which provides that a foreign award shall, subject to the provisions of the Act, be enforceable in the High Court either by action or under the provisions of sections 73, 83 and 94 of the Act. Sections 73(1) and (2) of the Arbitration Act, which

were also cited in support of the present petition provide that: “an award made by the arbitral tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court. Where leave of the court is given, judgment may be entered in terms of an award.”

Accordingly, I grant the application. I proceed to make the following orders:

- 1) I do hereby enter judgment in terms of the award and recognize the ICSID Tribunal Order in ICSID Case No. ARB/19/8 between Ayoub-Farid Michel Saab and the United Republic of Tanzania dated 24th June 2021 as binding and enforceable in Tanzania as an Order of this Court.**
- 2) I do hereby order the Respondent to pay the Petitioner the costs of the arbitration proceeding in ICSID Case No. ARB/19/8 between Ayoub-Farid Michel Saab and the United Republic of Tanzania consisting of the costs and fees of the**

**Centre and of Arbitral Tribunal in the amount of
USD 100,000.00 (United States Dollars One
Hundred Thousand only).**

**3) Each party shall bear its own costs in the present
application.**

It is so ordered.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

A. H. GONZI

JUDGE

15/03/2024

Ruling is delivered in court this 15th day of March 2024 in the presence
of Nkamba Mshuda, learned State Attorney, for the Petitioner; and Mr.
Ibrahim Kibanda, learned Advocate for the Respondent.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

A. H. GONZI

JUDGE

15/03/2024