IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

CONSOLIDATED COMMERCIAL CAUSE
NO. 4 & NO.9 OF 2020
IN THE MATTER OF ARBITRATION ACT
BETWEEN
THE REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA .....PETITIONER
AND
AFRIQ ENGINEERING & CONSTRUCTION COMPANY LIMITED .....RESPONDENT

Last Order: 16/02/2021
Ruling: 14/04/2021

RULING

NANGELA, J:,

On 23rd March 2020, the Petitioner herein filed before this Court a Petition which is the subject of this ruling. The Petitioner is challenging an Award dated 13th November 2019, issued by one Engineer Sudhir J. Chavda, Sole Arbitrator.

In its Petition, the Petitioner is praying as follows:

1. *A declaration that the whole Arbitration Proceedings and the Final Award of Eng. Sudhir J. Chavda, Sole Arbitrator, dated 13th November 2019 is a nullity.*

2. *This honourable Court be pleased to set aside the Award of the Sole Arbitrator Eng. Sudhir J. Chavda, dated 13th November 2019 for reasons and grounds set out under paragraph 26(a) to (o) of the Petition.*
3. *Costs of this Petition be awarded to the Petitioner.*
4. *Any other reliefs that this Honourable Court may deem just to grant.*

It is worth noting that, the law governing arbitral proceedings in Tanzania has undergone reforms which culminated into the coming into force the new Arbitration Act, 2020 on the 18th day of January 2021, vide Government Notice No. 101 published on 15/1/2021. As such, by virtue of its sections 90 and 91, my considerations in this ruling will be, as well, guided by this law as it is now the governing law in arbitration cases, including those which were pending before it came into force. Before delving into the nitty-gritty of the Petition, however, let me narrate, albeit briefly, the facts surrounding the filing of this Petition.

I. Background

On 3rd July 2017, the Respondent, a limited liability company incorporated under the laws of Tanzania, allegedly concluded a contract with the Petitioner, a religious organization, duly registered under the laws of the United Republic of Tanzania. The contract, known as *Proposed Construction of Diocese Investment Building on Plot No.7 Main Cathedral Madukani Area, Dodoma*

Municipality (Now City), was for a sum of **TZS 4,915, 616,655.86** (Four Billion Nine Hundred Fifteen Million Six Hundred Sixteen Thousand Six Hundred Fifty Five, Eighty Six Cents Only).

The execution period for this contract was twelve (12) months, from its commencement date. The Petitioner engaged the services of **M/S K&M Archplan (T) Ltd** as its project's Lead Consultant. It was agreed that, the date for site possession, would be the 3rd July 2017. However, in one of the site meetings, which involved all relevant parties, it was agreed that, the site was to be handed over to the Respondent on 8th July 2017. In view of that, that date became the official commencement date of the project; and, the agreed completion date was 7th September 2018.

According to the contract, the Petitioner was to release an advance payment of **TZS 737,342, 498.00**, equal to 15% of the contract sum, upon submission of Performance Guarantee and Advance Payment Guarantee. The Respondent allegedly furnished not only the Performance Guarantee and Advance Payment Guarantee, but also the Contractor's All Risks Insurance Policy.

It is alleged that, instead of paying the advanced payment at once, as per the contract, the Petitioner paid in parts, the first batch being **TZS**

100,000,000/=,which was made payable on 02nd September 2017, and **TZS 30,000,000/=** paid on of 04th September, 2017. The third batch was for **TZS 300,000,000/=** which was paid to the Respondent on 06th September 2017.

On 13th October 2017, a 2nd Site Meeting was allegedly convened, and the Respondent is said to have raised a red flag regarding the partial payments of the advance payment. Three days later, i.e., on 16th October 2017, the last batch of the partial payments, amounting to **TZS 227,342,498.00** was released.

On the other hand, and, over a course of time, things did not go smoothly as they should have gone because, later, the Petitioner terminated the contract. The Respondent protested against the said termination and notified the Petitioner that, there was now a dispute between the two parties which effectively triggered the arbitral process for the sake of obtaining justice.

II. The Arbitral Process

There being an unresolved dispute between the parties, eventually, and relying on the arbitration clause in the contract, the arbitral process was set in motion and, the **National Construction Council (NCC)**, appointed, **Engineer Sudhir J. Chavda** as the Sole Arbitrator. The proceedings were governed by the NCC Arbitration Rules, 2001 Edition.

The Sole Arbitrator heard the parties, received their oral and written evidence and, having analyzed 32 issues agreed upon by the parties, handed down his **AWARD** on **13th November 2019** in favour of the Claimant and, **DIRECTED** as follows:

1. ***A DECLARATION THAT**, regardless of other names used in the Contract or elsewhere, the "Respondent" is the "REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA" of P. O. Box 15, Dodoma, Tanzania.*
2. ***THAT**, the above named Respondent (i.e. The "Registered Trustees of the Diocese of Central Tanganyika") shall pay the Claimant the following sums by date 31st December 2019: TZS **(excl.VAT)***
   (a) Works executed at the site.....800,000,000.00
   (b) Pumping Water.....20,000,000.00
   (c) Idle Plant and Machinery.....100,000,000.00
   (d) Advance Payment Guarantee Costs + Legal Costs+interest charges.....170,000,000.00
   (e) Loss of Profit @15% on contract work unexecuted, i.e., TZS 3,477 m less 800m x 15%=401,550,000/(rounded-off).....400,000,000.00
   (f) Demobilization Costs.....100,000,000.00
   (g) Damages (in terms of paras 6.2.4 & 6.3.2 of the Award).....750,000,000.00
   (h) Exemplary Damages for Respondent's steps taken as given in para 8.22(d) (hereinabove.....250,000,000.00

TOTAL TZS (VAT inclusive) 2,590,000,000.00

(Tanzania Shillings Two Billion Five Hundred and Ninety Million Only VAT inclusive)

3. ***INTEREST CHARGES***

Should the Respondent delay in settling the above sum, either in whole or in part, out of the above amount totalling ***TZS 2,590,000,000/-,*** *the amount not settled by date 31st December, 2019 to attract interest charges, computed from 1st January 2020, at a rate of 18% per annum also payable by the Respondent to the Claimant.*

4. ***ORDER*** *that, the Office Bearers of the Respondent, namely Rt. Rev. Dr. Dickson Daudi Chilongani, as Chairman of the Board of Trustees and Rev. Canon John Musa Ntando, as the Secretary General, shall expeditiously approach the Prevention and Combating of Corruption Bureau (PCCB) in terms of paras 6.33.8 and 8.22 (e) herein above (i.e., of the Award).*
5. *THAT, the Respondent bears the full cost of this arbitration and make payment to the National Construction Council in the sum of* ***TZS 61,878,625/=*** *being the VAT-inclusive cost of this arbitration.*
6. *THAT, the Respondent pays the Claimant a sum of* ***60,000,000/-*** *towards the Claimant's Cost of arbitration, inclusive of associated legal costs and fees.*
7. ***THAT****, the Respondent meets his own costs amounting to* ***TZS 64,383,000/-*** *inclusive of associated legal costs and fees.*

III. The Filing of the Award

On 21st January 2020, the Sole Arbitrator, acting under Section 12 (2) of the Arbitration Act, Cap.15 [R.E. 2002], filed his Award in this Court as **Misc. Commercial Cause No.4 of 2020**). However, its filing was faced with a number of objections and issue

triggering a ruling of this Court dated **26th February 2020**. In that February 2020 ruling, I granted the Petitioner, upon an application, an opportunity to file this Petition.

IV. The Filing of this Petition

The Petitioner has filed this Petition under section **15 (1), (2)** and **section 16 of the Arbitration Act, Cap.15 R.E.2019,** and **Rules 5, 6, 7** and **8** of the **Arbitration Rules**, challenging the enforcement of the Arbitral Award. As I stated earlier herein, although the filing was made under the old law, taking into account the provisions I cited earlier herein above, I will consider the petition in light of the new law.

In **paragraph 26 (a) to (o)** of the Petition, the Petitioner raised a number of grounds which I need not reproduce here. There was also raised, in this Petition, **a preliminary legal issue** against the filing the award in **Misc. Commercial Cause No.4 of 2020.**

In response to the filing of the Petition, the Respondent filed an answer to it, and, among others, raised about **three preliminary objections** as well. All these objections were consolidated, heard and disposed of by this Court in its **Consolidated Ruling No. 4 & NO.9 of 2020**, dated 05th November 2020.

Following the disposal of the preliminary objections, the parties were instructed to proceed with the hearing of this main petition.

On 16th February 2021, when the parties appeared before me, they agreed to dispose of the Petition by way of written submissions. A schedule of filing was given and they have duly complied with it. I will, therefore, summarise their rival submissions here below.

V. The Parties Submissions

As I stated earlier here above, the Petitioner raised about 15 grounds challenging the validity of the Arbitral Award and, has lengthily submitted on those grounds *in seriatim*. The gist of the Petitioner's 1st ground is that, the arbitration and the award were improperly procured as the arbitrator had no jurisdiction to determine the matter and deliver his final award. The reason assigned to that ground is, that, the Respondent had failed to adhere to the dispute resolution procedure set out in the Arbitration Agreement and the NCC Arbitration Rules 2001.

Submitting on that first ground, the Petitioner has contended that, right from the start of the arbitral proceedings an alarm was raised to the effect that, the Sole Arbitrator lacked jurisdiction. It was contended that, the reference to the tribunal was invalid due to there being issuance of an improper notice of arbitration.

According to the Petitioner's submission, on 10th August 2018, the Respondent approached the National Construction Council (referred hereafter as the "**NCC**"), requesting for an Arbitral tribunal to be formed as there was a dispute that necessitated the attention of the NCC's appointed tribunal.

It was submitted that, the initiation of the Claim was in accordance with Clause 40 of the Contract governing the parties relations, and the letter initiating the proceedings was issued under **Rule 4.1 (a), (b), (c), (d) and (e) of the NCC Rules, 2001.** However, the Petitioner submitted that, the parties indentified as having dispute with the Claimant were not copied with the letter or made a party to the claim.

It was further submitted that, although the parties agreed to be governed by the NCC Rules 2001, the Petitioner never agreed on the appointment of the Arbitrator and/ or never signed the *Arbitration Agreement Form* to empower the Arbitrator to preside over and /or indicate that the Petitioner had submitted to his jurisdiction as per Rule 5(3) of the NCC Rules, 2001.

It is a further submission by the Petitioner that, on 12th March 2018, the Respondent lodged its claim with the NCC (Arbitral Tribunal), a claim which, according to the filed statement of claim, was brought against **a party not issued with a notice of arbitration**, **i.e., the**

Diocese of Central Tanganyika (DCT), Anglican Church of Tanzania, (referred hereafter as the "**DCT**") contrary to **Rule 4 of the NCC Rules**. It is on that ground, that, the Petitioner alleged to have contested the Sole Arbitrator's jurisdiction, but the latter proceeded and delivered his Award.

The second limb of the Petitioner's submission regarding jurisdiction is that, the Respondent initiated the Proceedings contrary to the Rules governing Arbitration, hence robbing the Arbitrator power to entertain the claims before him. Reference was made to Rules 4.1 and 5.1 of the NCC Rule 2001 which governed the Arbitral process. It was the Petitioner's further contention that, the parties were not involved in the appointment of the arbitrator in line with Rule 5.3 of the NCC Rules 2001.

It was argued, therefore, that, the arbitrator conferred to himself jurisdiction, without first asking if the parties consent to his appointment. Besides, the Petitioner contends that, it is on record that the appointment of the Arbitrator was rejected by the Petitioner who requested the NCC to follow the procedure and, that; the Petitioner's plea was ignored. As such, the Petitioner did not sign any form agreeing with the appointment of the arbitrator. The Petitioner concluded the first ground by insisting that, the Arbitral Award was

entered without jurisdiction, hence non-binding on the parties and should be set aside.

As regards the **second ground**, the Petitioner submitted that, the arbitration proceeded at the same time when there were already before the ordinary Courts determined and pending matters on the same issues, hence a violation of the mandatory requirements of the law. The Petitioner contended that, since there were already **Civil Case No.15 of 2018**, and others pending in Court at the time of instituting the Claim, the jurisdiction of the arbitrator was ousted, and he proceeded without jurisdiction.

As regards the **third ground of the Petition**, the Petitioner submitted that, the award had been improperly procured and the arbitrator lacked jurisdiction to hear the matter because the Respondent was wrongly sued. In other words, what is being contended here is that, the Claim was brought against a wrong party incapable of being sued.

It was submitted that, the award, which was handed down on the 13th November 2019, was procured under the name of *The Registered Trustee of Diocese of Central Tanganyika*, an entity which was never notified to be a party in the Notice to NCC to form an arbitral tribunal against the Petitioner. The Petitioner contended that, such an act was against the NCC Rules 2001 which

requires that notice be issued to proper parties before commencement of the arbitration.

It was argued, therefore, that, the mistake constituted a fatal defect that goes to the roots of the claim and an omission which warrants this Court to set aside the award as it was improperly procured. On that regard, this Court was invited to consider the decision of the Court of Appeal in the Case on **Mvita Construction Company vs Tanzania Harbour Authority, Civil Appeal No.94 of 2001 (Unreported),** concerning an improperly procured arbitral decision.

It was a further submission by the Petitioner that, an objection was registered before the Sole Arbitrator to the effect that the arbitral proceedings were instituted against a wrong Respondent who could not be issued with any order. It was contended that, the *Diocese of Central Tanganyika, (DCT) Anglican Church of Tanzania*, was an unincorporated entity.

It was the Petitioner's submission that, societies or associations registered under the Societies' Act, are not legal entities capable of suing or being sued in their own names as they can only be sued through their Trustees. In a bid to persuade this Court and to further bolster its submission, the Petitioner placed reliance on the decision of the High Court of Kenya in the case **African Orthodox Church of Kenya vs Rev. Charles**

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Omuroka and Lagos Ministry for Orthodox Renewal, Civil Case No.299 of 2013, HC of Kenya, at Kakamega.

It was contended further that, any order obtained against an unincorporated entity will be unenforceable. Reliance was as well placed on the case of **Singida Sisal Production & General Supply vs Rofal General Trading Limited & 4 Others, Commercial Review No. 17 of 2017, HC, ComDv, (DSM), (unreported).** It was the Petitioner's contention, therefore, that, even if the arbitrator was vested with jurisdiction, then he ought to have ruled that the proceedings were preferred against an improper party and have them struck out.

As regards **the fourth ground of the Petition**, the Petitioner submitted that, the Arbitrator committed misconduct for failure to analyse and determine all issues raised by the parties. The Petitioner argued that, some issues were left unattended. Reliance was placed on the case of **Mahawi Enterprises Ltd vs Serengeti Breweries Ltd, Misc. Comm. Cause No.9 of 2018**, (**unreported**), regarding failure to address all issues.

Concerning the **Fifth Ground of the Petition**, the Petitioner submitted that, the arbitrator committed misconduct due to his failure to address, specifically; each of the prayers made by the parties. It was the Petitioner's submission that, the Sole Arbitrator travelled beyond his

jurisdiction and addressed prayers which were never pleaded by the Respondent.

The Petitioner contended that, the Arbitrator declared, in the Award, that, "regardless of other names used in the Contract or elsewhere, the "Respondent" is "**THE REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA of P.O. Box 15, Dodoma, Tanzania**." The Petitioner argued that, the Sole Arbitrator made such a conclusion while well aware that the Petitioner was not a Respondent to the Arbitration Claim and no any Notice was ever issued to initiate the arbitration proceedings against the said **"REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA of P.O. Box 15, Dodoma, Tanzania."**

Further, the Petitioner submitted that, the Sole Arbitrator made a determination, among others, that, the Petitioner, **("THE REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA of P.O. Box 15, Dodoma, Tanzania"),** who was initially not made a party to the dispute, be condemn to pay **TZS 2,590,000,000/=** by 31st December 2019, (VAT-exclusive).

The Petitioner submitted further that, the Arbitrator awarded the Respondent the stated amount herein above, plus 18% interest thereon, without there being analysis of each claims or basis for it, and, that, he made

orders for matters which were not pleaded. In view of that, the Petitioner submitted that, the award which was based on un-pleaded facts, was contrary to the law and practice since parties are bound to their own pleadings.

To support that legal position, the Petitioner referred to this Court its own decisions, in the cases of **Leonard Nyang'uye vs Republic, Misc. Crim. Appl. No.39 of 2016, (HC) (Dsm) (Unreported)** and **NICO Insurance (T) Ltd vs Philip Paul Owoya, Civil Appeal No.151 of 2017, (HC) (Dsm) (Unreported)**.

Concerning the **Sixth ground of the Petition**, the Petitioner submitted that, the Sole Arbitrator committed gross misconduct and exceeded his powers in declaring that, "regardless of other names used in the Contract or elsewhere, the Respondent (Petitioner herein) is the "Respondent" (i.e., "**THE REGISTERED TRUSTEES OF THE DIOCESE OF CENTRAL TANGANYIKA of P.O. Box 15, Dodoma, Tanzania.**"

The Petitioner argued that, the award ought to have been issued to a person to whom a notice was issued against but not to a party to whom no notice of the arbitration proceedings was ever issued. It was argued that, there has been an issue of suing a wrong person and, thus, changes in the names of the right party cannot be done simply in the manner the Arbitrator adopted.

As regards the **seventh and eighth grounds** of the Petition, the same is argued in the manner adopted in the **fifth** and the **sixth grounds**. In short, what the Petitioner is contending is that, the Arbitrator committed a gross misconduct in determining and holding that, the Petitioner, who was not made a party to the Claim, should pay the **TZS 2,590,000,000/=** by 31st December 2019, (VAT-exclusive). It was argued that, the Sole arbitrator did no analysis of each claim and did not provide the basis for that in decision his award.

As for the **ninth ground**, the Petitioner assailed the award of 18% interest as being illegal and unjustified. He claimed that, by so doing, the Arbitrator exceeded his mandate for he did so without any legal basis. The Petitioner relied on the case of **Vodacom Tanzania Ltd vs FST Services Limited, Civil Appeal No.14 of 2016, (CAT) (Unreported)** arguing that, illegality is one of the important considerations for setting aside an award as it goes to the root of justice dispensation.

Finally, as regards the **tenth, eleventh and twelfth grounds of the Petition**, the Petitioner submitted that, the Sole Arbitrator exceeded his mandate by making orders that the office bearers of the Petitioner Rt. Rev. Dr Chilongani and his Secretary General, Rev. Canon John Musa Ntandu, should approach the PCCB in terms of paragraphs 6.33.8 and 8.22 of the Award. The

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Petitioner also decries the costs and fees awarded by the Arbitrator as unjustified and that, the Arbitrator lacked jurisdiction.

On the 5th February 2021, the Respondent filed a very lengthy reply submission. Long as it seems to be, I will nevertheless go through its content and summarise it. In its submission, the Respondent, apart from narrating the brief facts of the case, conceded that the issue regarding the appropriate legal names of the parties arose during the arbitral proceedings.

It is the Respondent's submission, however, that, the parties agreed to settle it in accordance with clause 40 of the Contract under the NCC Rules. The Court has been referred to **pages 7 to 18** of the "**Summary of Case and Award**" and, that, the Arbitrator **found**, **determined** and made a **Declaratory Order** that, the name of the employer under the Contract is the "**Registered Trustees of the Diocese of Central Tanganyika.**" It was the Respondent's submission that, under clause 40 of the Agreement to Arbitrate, the Parties agreed that, the **Arbitrator's Award shall be final and binding.**

The Respondent has made a further submission regarding the applicable law, and contends that, since the Arbitration Act, No.2 of 2020 came into force on 18th of January 2021, and given that section 90 (1) and 91 (2),

(4) and (5) are applicable, the Arbitrator's Award which is subject to this Petition is now deemed to have been granted under the Arbitration Act, 2020, and, that, the pending proceedings are to be proceeded under the new law as well. In my view, and as I stated earlier, that is now the correct position since the law has come into force.

Proceeding from that context, the Respondent submitted that, any challenge to the Sole Arbitrator's Award, should be on the basis of the grounds provided for by the Act, under section 69 and 70, *i.e.,* the challenge should be based on either **substantive jurisdiction** or **serious irregularity** or **on both**. Reference was made to section 75 of the Act, and the Respondent noted that, the since the Award is being challenged on jurisdictional point of view, it needs to be addressed in light of section 75 of the Arbitration Act, 2020.

The Respondent has referred to this Court a number of cases that have laid down the principles that are relevant for consideration when setting aside an Arbitral Award. These cases include:

(a) *D.B. Shapriya & Co. Ltd vs Bish International B.V [2003] 2 E.A 404;*

(b) *TANESCO v Dowans Holdings (Costa Rica) & Another, Civil Appl. No.8 of 2011 (HC) (unreported);*

(c) *Vodacom (T) Ltd v FTS Services Ltd, Civil Appeal No.14 of 2016, CAT (Unreported); and*

(d) Mahawi Enterprises Ltd vs Serengeti Breweries Ltd, Misc. Commercial Cause No.9 of 2018, (unreported).

Submitting in response to the Petitioner's grounds, it was the Respondent's submissions that, the Petitioner has not submitted on grounds 26 (n) and 26 (o). According to the Respondent, looking at the Petition, the Petitioner admits and intimates to have been a party to the Contract and to the Arbitration proceedings.

Besides, the Respondent contends that, in essence, the Petitioner is precluded from reopening and re-arguing in this Court the issues that were specifically referred to the Arbitral Tribunal for decision and which were determined in accordance with the parties' agreement.

In particular, and responding to grounds one, two and three of the Petition, which touches on jurisdiction of the Arbitrator, the Respondent has contended that, such issues, which included whether **(i)** the Respondent failed to adhere to the dispute resolution procedure set out in the Agreement as per the NCC Rules, **(ii)** the matter in the arbitral proceedings was partly determined by this Court, hence jurisdiction ousted, and **(iii)** the Respondent sued a wrong party, were together first determined by the Arbitrator through an Interim Award dated 7th January 2019, under Rule 7.2(e) of the NCC Rules.

It was a further submission that, the Petitioner agreed about the jurisdiction of the Arbitrator at the High Court of Tanzania, Dodoma Registry, thus, is precluded

from bringing a fresh application on the same issue. Reference was made to **Misc.Appl.No.15 of 2019**. This Court was requested to take judicial notice of the proceedings and orders of the Court dated 11th March 2019, and no order to re-file was sought by the Petitioner upon withdrawal of the suit.

Relying on a number of decided decisions, the Respondent argued that, the issue of the Arbitrator's jurisdiction is, therefore, not maintainable under the doctrine of Issue Estoppel and sub-rule (3) of Order XXIII of the Civil Procedure Code, Cap.33 R.E. 2019. The Respondent has as well urged this Court to rely on the decision of the Court of Appeal in the case of **NBC vs Alfred Mwita, Civil Appl.No.172 of 2015** and determine that, the parties in the **Misc.Appl. No.15 of 2019**, are the same parties in this Petition. Reliance was as well placed on the decision of the Court of Appeal in **Civil Appeal No.51 of 2016 between TUCTA and Engineering Systems Consultants Ltd, (unreported)**, to the effect that, the Petitioner was not prejudiced.

The Respondent has further submitted that, the Arbitrator had the requisite jurisdiction and thus, per the Evidence Act, Cap.6 R.E. 2019, the Petitioner is estopped from challenging his jurisdiction. Reliance was placed on section 123 of the Evidence Act and the **Dowans case**

(supra), page 46 and 47, **TUCTA's case** (supra) at page 18-20, as well as the case of **Bahadurali E. Shamji and Another vs Treasury Registrar- Ministry of Finace-Tanzania and Another, Misc.Com. Case No.14 of 2001 (Unreported)**; the case of **ICEA Lion General Insurance Ltd and Another vs Fortunatus Lwanyantila Masha, Civil Appeal No.17 of 2019 (Unreported)** and the English case of **Heyman vs Darwins Ltd [1942] A.C. 356**.

A further argument regarding preclusion of the Petitioner from raising the issue of jurisdiction of the Arbitrator was made reliance being put on the **NCC Rules 3.1 (b)** and **Section 75 (2) (a) of the Arbitration Act, 2020**. It was argued that, having raised the issue of jurisdiction and there having been made, by the Arbitrator, an interim award on the 7th January 2019, the Petitioner was bound to comply with NCC Rule 3.1(b) and **Section 75 (2) (a) of the Arbitration Act, 2020**, to take the matter to Court for an order before the publication of the Final Award on 13th November 2019.

As such, it was contended that, the Petitioner was not diligent enough. Reliance was placed on the case of **Barclays Bank Tanzania Ltd vs Hood Transport & Another, Civil Appl. No.134 of 2014 (CAT) (unreported)**.

According to the Respondent, having withdrawn the **Misc. Appl. No.15 of 2019** from the Court without leave to re-file it, the Petitioner's conduct amounted to loss of right to object in accordance with section 75 (2) (a) of the Arbitration Act, 2020 or an act of acquiescence, it was so argued by the Petitioner. Several decisions were relied upon from India and well as the **TUCTA Case (supra)** at pages 18-20.

It was further contended that, the NCC Rules 7.0, 7.1, 7.2 (a), (b), (c) and (e) and section 123 of the Evidence Act, Cap.6 R.E.2019, preclude the Petitioner from denying the Jurisdiction of the Arbitrator. In the same manner, reliance was placed on the doctrine of election and promissory estoppels, and it was argued that, these precluded the Petitioner as well from denying the Jurisdiction of the Arbitrator.

As regards the issue of issuance of notice, the Respondent submitted that, the Petitioner was issued with a proper notice as per Clause 40 of the Agreement. It was contended that, the Respondent issued such a Notice on 22nd April 2018 to **Diocese of Central Tanganyika, the Anglican Church of Tanzania,** and that the Respondent filed a Statement of Claim before the Arbitral Tribunal against **the Diocese of Central Tanganyika, the Anglican Church of Tanzania,** on

12th March 2019, together with an application for an Interim Award to determine who was the employer.

It was a further contention by the Respondent that, the Petitioner is not complaining about any apparent error of law on the Award and the Award cannot be set aside for want of notice. In any case, the Respondent maintained, citing the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha, Civil Appeal No.45 of 2017 (unreported)**, that, parties are bound by their pleadings. On that basis, the Respondent contended that, the Petitioner does agree, that, the Respondent issued a Notice to the **Diocese of Central Tanganyika, the Anglican Church of Tanzania.** Reference was made to the *Vol.1: Summary of Case and Award, at page 83para 24.*

Reliance has been as well placed on statements of the witnesses including the Petitioner's principals during the hearing process. In its submission, the Respondent submitted (see page 17 of the submission) that, the Sole Arbitrator used the said evidence and the NCC Rule 7.2 (b) to make correction or amendment in the name of the employer under the contract to be the Registered Trustees of the Diocese of Central Tanganyika of P. O. Box 15, Dodoma. (See *Vol.1: Summary of Case and Award, at page 29, ISSUE No.1 items 6.1.1, 6.1.2 and*

6.1.4; page 35, ISSUE 7 item 6.7; page 49 item 6.31 and page 58, item 8.23(A)).

Besides, the Respondent submitted, that, the Petitioner agreed to the said amendments. The *Respondent* submitted, therefore, that, the Petitioner has not complained of any error apparent on record, hence, as per the principles set out in various cases cited herein earlier, the Award cannot be set aside. Reliance was also placed on the doctrine of election and the Indian case of **State of Punjab and Others vs Dhanjit Singh Sandhu, Civil Appeal No.5698-5699 of 2009**.

In short, taking the Respondent's submissions on grounds of the Petition, the Respondent submitted that, the Arbitrator had jurisdiction, the issues and each of the prayers were fully addressed and determined and, that, the Arbitrator's jurisdiction did not depend on whether the parties have sued each other properly. Further, that, the award was properly procured.

It has also been submitted that, the Arbitrator conducted himself properly in determining that the name of the Respondent in the Claim was the Registered Trustees of the Diocese of Central Tanganyika of P. O. Box 15, Dodoma, and, that, by so doing, did not exceed his powers. As regards the Arbitrator's order that the officer bearers of the Petitioner should submit themselves

to the PCCB, the Respondent argued that, the order was merely directory and not mandatory.

After their lengthy submissions, the Respondent has requested this Court to dismiss the Petition with costs and proceed with registration of the award as a decree of this Court, thereby granting the prayers as prayed.

On 12th February 2021, the Petitioner filed rejoinder submission, reiterating what was stated in its submission in chief. In short, among other issues, the Petitioner rejoined that, after a lawful termination of the contract, it was the Respondent who rushed to the Court without adhering to the 60 days rule provided for in the Contract for amicable settlement of their dispute and, filed **Misc. Commercial Appl.No.99 of 2018,** under a certificate of urgency, and **Commercial case No.60 of 2018**, seeking remedies for breach of contract.

The Petitioner further rejoined that, despite being asked to follow the appropriate procedure which was arbitration, the Respondent was adamant and filed again **Misc. Commercial case No.167 of 2019**, and, that, all these cases were struck out with costs. It was the Petitioner's argument, therefore, that, the filing of the **Misc. Application No.214 of 2018** was meant to restrain the Respondent from pursuing parallel proceedings as there was already a matter in court.

The Petitioner has vehemently disputed the assertion that by virtue of section 75 of the Arbitration Act, 2020, it has lost its right to raise objection. The Petitioner maintained that in line with the Trustees Incorporation Act, Cap.318 R.E 2002, the Respondent ought to have issued a Notice to sue to an incorporated entity. Further that, the process of selecting and appointing the arbitrator should have been a joint process by all parties.

It was the Petitioner's submission that, under the Arbitration Act, Cap.15 R.E. 2019, parties were supposed to sign **Form 1 and 2 of the 2nd Schedule**, which forms were not signed by the Petitioner to evidence that the Petitioner agreed to the proceedings and jurisdiction of the Arbitrator. In the final analysis, the Petitioner prayed that the petition be allowed with costs and the award be set aside.

VI. Deliberations

As I stated earlier, all parties have filed lengthy submissions and each of what they raised could only be summarised, in my view, in the manner I endeavoured to summarise them. There are as well a number of decisions they have referred to in their attempt to convince this court to rule in favour of either of them. From their submissions, the key issues are whether **the Sole Arbitrator had jurisdiction** and, if he had jurisdiction,

whether there was any misconduct on his part which would warrant the setting aside of the Award, as prayed.

Agreeably, as once stated by this Court, arbitral proceedings are ordinarily not to be subjected to scrutiny with the finesse of a toothcomb. See **CATIC International Engineering (T) Ltd vs University of Dar-es-Salaam, Misc. Commercial Case No.1 of 2020 (unreported).** It was observed, in that case, that:

> *"What a court called upon to set aside an arbitral award ... has to decide is, whether the arbitral award was prima facie good or right on face of it, not whether the reasons (whether of law or facts or both) given by the arbitral tribunal for the award were right or sound, unless the reason(s) form part of the award."*

This Court, citing the case of **Fidelity Management SA and Others vs Myriad International Holdings BV and another [2005] EWHC 1193; [2005] 2 ALL (Comm), in 312, at [2] - [5], Morison J.**, observed, that:

> *"When considering arbitral awards ... as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes,*

inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it."

I am as well in full agreement with the Respondent Counsel's set of principles which has been set out on page 4-5 of his submissions. Some of them were set out in the **Vodacom Tanzania Ltd vs FTS Services Ltd, Civil Appeal No.14 of 2016, (CAT) (unreported)**, to the effect that:

"any application to the High Court for review of an arbitral award is not an appeal and, therefore, cannot be disposed of in a form of rehearing..."

Besides, the Court stated that, once parties to arbitration:

"choose their own arbitrator to be their judge who should resolve their dispute, they cannot object to his decision, either upon law or facts, if the award is good on the face of it. The Courts, as a result, cannot interfere with the award on the ground of misconduct except for errors of law manifest on its face."

In the same vein, it is trite law that, a mistake of fact or law is not a ground for setting aside or remitting an award for further consideration. The case of **Mahawi Enterprises Ltd vs Serengeti Breweries Ltd, Misc. Commercial Cause No.9 of 2018 (HC Comm. Division) (unreported)**, was alive to that position. I am, therefore, fully aware of the above stated principles plus others which I will consider in the course of my deliberations.

To begin with, one of the nagging questions that have made the parties to lock horns is: **whether the Arbitrator had jurisdiction**. In other words, the Petitioner is challenging the jurisdiction of the Sole Arbitrator while the Respondent is shielding the Arbitrator. In particular, the Respondent counsel has contended that, the issue of jurisdiction cannot be raised in this Court since it was determined by the Arbitrator and, for that reason, the Petitioner is estopped. The Petitioner has vehemently disputed that submission maintaining its stance, that, the Sole Arbitrator's jurisdiction was not properly vested on him.

In my view, as it was stated by this Court in the case of **Medical Stores Department vs Cool Care Services Limited, Misc. Comm. Cause No.13 of 2020 (unreported),** although Courts are cautious of disturbing arbitral decisions, it is trite that, in an

appropriate case, an arbitral award can be set aside. That can happen, for instance, if it is established that the arbitrator "**misconducted**" himself or **had proceeded without or beyond his jurisdiction**. These are common but separate and distinct grounds for challenging an award.

As regards the issue of an arbitrator's jurisdiction, it is a cardinal principle that, such an issue is fundamental to any adjudicator and cannot just be ignored. In principle, if it will be established that the arbitrator lacked jurisdiction, such a finding will have far reaching effects as it will render the Award null and void.

The Court of Appeal of Tanzania emphasized, in the case of **M/S Tanzania China Friendship Textile Co. Ltd vs Our Lady of the Usambara Sisters [2006] TLR .70,** that, any claim regarding jurisdiction of a court (or a tribunal) is a substantive claim.

In that case, the Court of Appeal had the following to say:

> *"The issue of jurisdiction of the court can be raised at any stage even before an appellate court. It is a substantive claim...."*

Similarly, in **Mvita Construction Company vs Tanzania Harbours Authority, Civil Appeal No.94 of 2001 (unreported),** the Court of Appeal reiterated a similar position, holding that:

"in arbitration, like in a court of law, want of jurisdiction renders a decision and award a nullity. Also, both in court cases and in arbitration objection to jurisdiction can be raised at any stage of the proceedings. In a civil case objection can be raised even at the final appeal stage and, in an arbitration, objection can be raised even after publication of an award. However, in arbitration, a party can waive objection to the jurisdiction of the arbitrator."

That being said, even if the Petitioner may have not raised its contention on jurisdiction in the form of a Preliminary Objection, the gist of the matter in his Petition is that, the Petitioner is challenging the jurisdiction of the Sole Arbitrator, a point also raised as an objection when the Petitioner was made to appear before the Arbitrator.

In view of what the Court of Appeal observed in the cases of **M/S Tanzania China Friendship Textile Co. Ltd** (supra) and **Mvita Construction Ltd (supra)**, I do not think that it is appropriate to contend, as the learned counsel for the Respondent did, that, the Petitioner should be estopped from raising that issue before this Court. By itself, a want of Jurisdiction is a glaring error on face of record which has the potential of vitiating proceedings and, thereby, rendering everything done by a

court or a tribunal a nullity. **But the key question that follows is:** ***was there such a glaring problem?***

It is trite in any arbitration proceedings, that, the arbitrator should derive his/her authority from the contract. This was authoritatively stated by the Court of Appeal of Tanzania in the case of **Mvita Construction Company vs Tanzania Harbour Authority, Civil Appeal No.94 of 2001** (unreported). In that case, the Court of Appeal of Tanzania stated in paragraph 3, at page 22 that:

> *"...under the law of Tanzania, an arbitrator's authority, power, and jurisdiction are founded on the agreement of the parties to a contract to submit present or future differences to arbitration."*

It follows, therefore, that, where there is an issue touching on the jurisdiction of the Arbitrator, the Court cannot close its eyes or fold its hands but will surely look at the provision under the contract which purport to gives such jurisdiction to the arbitrator and ascertain what it really provides.

In the present Petition, there is not dispute that the contract which the Respondent signed with the "**DCT**" had a **Clause 40.1-40.5**, which called upon the parties to refer disputes to an arbitrator. This is the clause that gives powers or jurisdiction to the arbitrator. The Clause

referred to provide for procedures to be followed to commence arbitration proceedings. It reads as follows:

> *"40.1 If a dispute of any whatsoever arise between the Employer or Architect on his behalf, and the contractor in connection with, or arising out of, the contract or execution of Works, whether during the execution of Works or after their completion or abandonment or after repudiation or after termination of the contract then, either the Employer or the Contractor* ***may give Notice to the Other party****, with copy for information to the Architect,* ***of his intention to commence arbitration****, as hereinafter provided as to the matter in dispute.*
>
> *40.2. Where notice of intention to commence arbitration has been given in accordance with sub-clause 40.1 of this clause,* ***arbitration of such dispute shall not be commenced*** *unless attempt has first been made by the parties to settle such dispute amicably. Provided that,* ***unless the parties otherwise agree, arbitration may commence after 60 days after the day on which notice of intention to commence arbitration was given****, whether or not any attempt for amicable settlement thereof has been made.*
>
> *40.3. Any dispute of which amicable settlement has not been reached within the period stated in sub-clause 40.2 of this Clause* ***shall finally be settled****, unless the parties otherwise agree,* ***under the Arbitration Rules of the National Construction Council****.*
>
> *40.4. The Arbitrator(s) appointed pursuant to the provisions of sub-clause 40.3 of this Clause* ***shall have full power*** *to open up, review and revise any decisions, opinion, instruction,*

determination, certificate or evaluation of the Architect or Quantity Surveyor related dispute.

40.5 The award of the Arbitrator shall be final and binding on the parties."

From the above cited Clause, initiation of arbitration proceedings was (though not mandatorily) conditioned upon there being: **(i)** a notice from one party to the other, **(ii)** an attempt for amicable settlement, and **(iii)** where parties have agreed otherwise, upon expiry of 60 days after the day on which notice of intention to commence arbitration was given, the matter be sent to an arbitrator.

As it may be noticed here above, **in situations where notice was issued,** Clause 40.3 was to be invoked after fulfilling the set conditions in Clause 40.1 and 40.2 of the Arbitration Agreement. In this Petition, however, it has been alleged that no notice was issued by the Respondent. This means that a different approach needed to be taken since Clause 40.2 the outlined steps under clause 40.1 and 40.2 regarding notice were inapplicable.

However, Clause 40.2 had a proviso which gave an avenue to the parties in case 60 days had elapsed without settlement. With the lapse of 60 days without amicable solution, therefore, the available avenue was to invoke clause 40.3, a fact which the Respondent did on 22nd April 2018, by requesting for the formation of a

tribunal and on 12th March 2019 filed a Statement of Claim.

Clause 40.3 vests powers on the NCC to invoke its rules and appoint arbitrator(s) and **Clause 40.4 vests jurisdiction on the appointed arbitrator(s) under the NCC Rules to entertain the matters which are laid before him**. One of the Petitioner's contentions regarding jurisdiction in this Petition is that, the Respondent initiated the Proceedings contrary to the rules governing arbitration, hence robbing the Arbitrator power to entertain the claims before him.

It was contented that, Clause 40.1 and 40.2 of the Agreement were not adhered to before invoking Clause 40.3 and subsequently Clause 40.4. However, the Respondent has argued that, this matter was resolved through an **Interim Award dated January 2019** (see *Vol.1: Summary of Case and Award, at page 8 and 9 and appendices page 80 to -100),* and, that, the Arbitrator made a determination under rule 7.2(a) of the NCC Rules that he had jurisdiction to hear and determine the dispute.

In my view, I find that, the Arbitrator rightful invoked the NCC Rule 7.2 (a) to determine his jurisdiction over the matter having been appointed under Clause 40.3 of the Agreement. This, I hold, is rightfully so because, there being no notice as per Clause 40.1 and 40.2 of the

Contract, and the 60 days having lapsed without amicable solution, the only available avenue was to proceed under Clause 40.3 and 40.4 of the Agreement, and, thus, even in the absence of the said notice under Clause 40.1, the Arbitrator's jurisdiction could not be challenged on that basis. As a result, the Arbitrator was rightfully vested jurisdiction to entertain claims brought by the Respondent.

Having determined the issue regarding whether the Sole Arbitrator was lawfully vested with jurisdiction to entertain the matters laid before him, the second part of the main question was**, whether there was any misconduct on his part which would warrant the setting aside of the Award as prayed**. In other words, **how did he exercise his powers?**

The above issue is also an important one. It is an important issue because; if the arbitrator exceeded or abused his powers, say by committing a misconduct which affects the award by rendering it as one improperly procured, there will be a reason to set it aside as prayed.

Misconduct on the part of an arbitrator has always been a ground to set aside an award. Even if this term was not defined under the Arbitration Act, Cap.15, R.E 2019 (now repealed), and, it has not, as well been defined under the Arbitration Act, 2020, some previous case laws have attempted to define it.

In the case of **National Housing Trust vs YP Seaton & Associates Company Limited [2015] UKPC 43,** The Privy Council, stated, at para. 51, in relation to the term misconduct, that:

> *"As Atkin J remarked with regard to the word "misconduct" in **Williams v Wallis and Cox [1914] 2 KB 478, 485**: "That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice."*

In the like manner, **Russell on Arbitration (20th ed (1982))** put it at p. 409, that:

> *"Misconduct' is often used in a technical sense as denoting **irregularity**, and not any moral turpitude. But the term also **covers cases** where **there is a breach of natural justice**. Much confusion is caused by the fact that the expression is used to describe both these quite separate grounds for setting aside an award; and it is not wholly clear in some of the decided cases on which of these two grounds a particular award has been set aside."*

Looking at our law, section 70 (1), (2) and (3) of the Arbitration Act, 2020, has provided room to a party to arbitration to challenge an award either on the ground of serious irregularity affecting the tribunal, or the proceedings or the award itself. Under this provision, where the decision of an arbitrator is tainted with serious

irregularities, it may be remitted to the tribunal, set aside in whole or in part or be declared to be of no effect.

The expression "serious irregularity" is defined under section 70(2) (a) to (i) of the Act. By all intent and purpose the list cannot be closed or exhaustive. And, in my view, all these will fall within the definition of "misconduct" as defined by **Russell (supra)** or the **National Housing Trust case (supra).** That being said, the question that follows is: ***was there an irregularity of the serious nature committed by the Sole Arbitrator to warrant setting aside the Award or otherwise?***

As it may be gathered from the Petitioner's petition and submissions, one of the Petitioner's complaints is that, although the Respondent lodged its claim with the Arbitral Tribunal against **the Diocese of Central Tanganyika (DCT), Anglican Church of Tanzania**, the award handed down on the 13th November 2019 was procured under the name of **The Registered Trustee of Diocese of Central Tanganyika,** an entity which, in the Notice to NCC to form an arbitral tribunal against the Petitioner, was never notified to be a party. It was argued, therefore, that it was a wrongly procured award.

In its reply submission, the Respondent has conceded to the fact that the **Statement of Claim** lodged at the tribunal, was against "**DCT**" as a party.

However, the Respondent has contended that, the names of the parties as per the contract were the **"DCT"** on the one hand and the Respondent on the other hand.

Further, is was the Respondent's contention that, relying on the evidence laid before him and the NCC Rule 7.2 (b), the Sole Arbitrator **'made correction or amendment' in the name of the employer under the contract substituting it for the Registered Trustees of the Diocese of Central Tanganyika of P. O. Box 15, Dodoma**.' (See *Vol.1: Summary of Case and Award, at page 29, ISSUE No.1 items 6.1.1, 6.1.2 and 6.1.4; page 35, ISSUE 7 item 6.7; page 49 item 6.31 and page 58, item 8.23(A)).*

By so doing, it was argued, that, the Arbitrator **found**, **determined** and made a **Declaratory Order** that the name of the employer under the Contract is the **"Registered Trustees of the Diocese of Central Tanganyika."**

I have carefully considered these rival submissions and has asked myself the question: *Was it proper for the arbitrator to amend the pleadings filed by the parties and* ***substitute the name of "DCT"****, an entity not incorporated and hence incapable of suing or being sued,* ***with that of "Registered Trustees of the Diocese of Central Tanganyika"?***

In my humble view, one of the cardinal principles in any arbitral process is that, the Arbitrator must be seen to act impartially. An unbiased or impartial decision making is a crucial part of any dispute resolution process. Section 4 (a) (i) of the Arbitration Act, 2020 provides that:

> *"The provisions of this Act are founded on the following principles, and shall be construed accordingly:*
>
> *(a) to obtain the fair resolution of disputes by* ***an impartial arbitral tribunal*** *without undue delay or incurring unreasonable expense; and..." (Emphasis added).*

In the case of ***Metropolitan Properties -vs- Lannon (1968)3 ALL ER 304,*** the famous English Judge, Lord Denning once held that:

> *"In considering whether there was a real likelihood of bias.... the court looks at the impression which would be given to other people ....what right minded persons would think."*

In our instant case at hand, and in response to the question I posed regarding the propriety of the Arbitrator to make **corrections or amendment** in the pleadings and the contract itself and substituting therein the name of the employer under the contract as being the "**Registered Trustees of the Diocese of Central Tanganyika"**, I find that such was an act done, not only in excess of the Arbitrator's jurisdiction, but also un-procedurally.

It was done in a manner that manifested bias on the part of the arbitrator, and, thus, amounting to a serious irregularity or misconduct under Section 70 (2) (b) of the Arbitration Act, 2020. And, this being an illegality or error of law apparent on the face of the award, makes it necessary for the Court to make an order that is adverse to that award. **(See the CAT,** decisions in **Vodacom's case supra, at page 19-20 and Shapriya's case (supra) at page 11).**

Perhaps I should expound further on the reasons for the above finding. In essence, it undisputed that, the question regarding the appropriate name of the person sued as a "Respondent" in the Statement of the Claim, was an issue addressed in the Award. The Respondent has also conceded that, the "Petitioner" (as **Registered Trustees of the Diocese of Central Tanganyika"**) was not made a party to the Claim. However, the Respondent stated that, the Arbitrator considered that issue in his Interim Award and made an amendment or corrections on that name of the appropriate party. (See *Vol.1: Summary of Case and Award, at page 29, ISSUE No.1 items 6.1.1, 6.1.2 and 6.1.4; page 35, ISSUE 7 item 6.7; page 49 item 6.31 and page 58, item 8.23(A)).*

Be that as it may, it is clear to me, as I stated herein above, that, the approach taken by the arbitrator was erroneous. He should not have proceeded that way

and step into the shoes of the Claimant (**Respondent herein**) to "amend" or "correct" the pleadings and substitute therein the name of the "**Registered Trustees of the Diocese of Central Tanganyika.**" That was not within his powers. By doing so, it made him assume the role of a party to the arbitration and not a neutral arbitrator. It also manifested a sense of bias since it was not his duty to correct pleadings that pleaded a wrong or entity incapable of being sued.

In principle, impartiality is a fact which relates to a state of mind, and may, at times, be evidenced through conduct demonstrating that state of mind. An arbitrator is partial towards one party if he displays preference for, or partiality towards one party or against another, or whether a third person will reasonably apprehend such partiality. In the instant Petition, a reasonable person looking at what the arbitrator did would definitely perceive the arbitrator' state of mind as constituting partiality, or would have a reasonable apprehension of it being so.

I also hold so because; impartiality of the individual adjudicating a dispute between parties, is one of the fundamental expectations of both parties to the respective dispute. Whether the adjudicators are judges or party-appointed arbitrators, it makes little or no difference – the expectations of claimants and

respondents will always remain the same. Consequently, where there is any form of lack of impartiality, an arbitral award, like a judgment of a court, will be open to challenge.

In view of the above, therefore, what the Arbitrator ought to have done, having found that the "**DCT**" was a party who appeared in the Contract but was an entity which was nevertheless incapable of being sued, was to strike-out the Statement of the Claim, as it was "unmaintainable", for being filed against an entity which is incapable of being sued.

It is indeed a well known legal position, as stated by this Court (I.C.Mugeta, J) in **Kanisa La Anglikana Ujiji vs Abel s/o Samson Heguye, Labour Rev.5 of 2019** (**unreported**) (citing the case of the **Registered Trustees of the Catholic Diocese of Arusha vs The Board of Trustee of Simanjiro Pastoral Education Trust, Civil Case No.3/1998, HC (Arusha)** (**unreported**), that:

> *"No other body of unincorporated trustees can sue or be sued in any court of law [or tribunal] as they have no legal personality."*

In this instant Petition, the "**DCT**", which the Respondent certainly admitted to be the one who was sued under the Statement of the Claim lodged before the Arbitrator, is an unincorporated entity which, under the Societies' Act, is not one of the legal entities capable of

suing or being sued in their own names, but can only be sued through its Trustees.

With that fact being undisputed, the persuasive case of **African Orthodox Church of Kenya vs Rev. Charles Omuroka and Lagos Ministry for Orthodox Renewal, Civil Case No.299 of 2013, HC of Kenya, at Kakamega,** and the decision of this Court, in the case of **Singida Sisal Production & General Supply vs Rofal General Trading Limited & 4 Others, Commercial Review No. 17 of 2017, HC, ComDv, (DSM), (unreported)**, become relevant. The two cases point to the effect that, any order obtained against unincorporated entity will be unenforceable. This is a fact known to all, and I believe, including the Sole Arbitrator.

By taking upon himself to do what ought to have been done by the parties, it may as well be argued that the arbitrator abused his position.

I hold so because, since the arbitrator was vested with jurisdiction, as I have stated herein, what he ought to have done was to rule that, the proceedings were preferred against an improper party (the **"DCT"**) and have them struck out. Continuing to correct or amend the pleadings, as he did, amounted into stepping into the shoes of the Respondent (Complainant) and, that is tantamount to an abuse of his position as a neutral

umpire and, that out rightly constitutes misconduct or a serious irregularity.

I am of the firm view, therefore, that, such a course taken by the Sole Arbitrator was fatal to the proceedings and the award having been procured under that circumstance, was tainted with an illegality, was wrongly procured and, as a matter of law, should be set aside.

The above findings make it necessary to uphold the **third**, **fifth** and **sixth** grounds of the Petition, not on the basis of lack of jurisdiction but on the basis of there being a serious misconduct on the part of the Sole Arbitrator affecting the proceedings and the Award itself.

In view of the findings I made herein, I find no reasons why I should proceed to address the rest of the grounds raised by the Petitioner or the submissions made by the parties since, by upholding the three grounds as I did herein above, that suffices to lower the curtains of this Petitions.

VII. Conclusion and Orders of the Court

Having analysed the issues which I raised herein and made findings as herein above, this Court settles for the following orders:

(1) THAT, by virtue of section 70(3)(c) of the Arbitration Act, 2020, the Award handed down by the Sole Arbitrator **is hereby set aside in whole** due to there

being a serious irregularity affecting the proceedings and the Award itself.

(2) THAT, costs of this Petition shall be borne by the Respondent.

It is so ordered.

Right to Appeal is explained

DATED at **DAR-ES-SALAAM** this 14th April, 2021.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

.....
DEO JOHN NANGELA
JUDGE