IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 410 OF 2017

IN THE MATTER OF THE ARBITRATION

AND

IN THE MATTER OF THE ARBITRATION ACT CAP. 15 [R.E 2002]

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 30(3) OF THE ARBITRATION ACT CAP. 15 R.E 2002

BETWEEN

A-ONE PRODUCTS AND BOTTLERS LIMITED .....APPLICANT

VERSUS

GUANZOU TECHLONG PACKAGING

MACHINERY COMPANY LIMITED.....2ND RESPONDENT

HONG KONG HUA YUN

INDUSTRIAL LIMITED.....2ND RESPONDENT

03/12/2018&01/02/2019

JUDGMENT

MWANDAMBO, J

The filing of a foreign arbitral award for recognition and enforcement has generated resistance from the petitioner against whom the award was made.

Accordingly, the petitioner has invoked the provisions of section 30 (3) of the Arbitration Act, Cap 15 [RE 2002] (the Act) for an order of the Court refusing to register the award against the petitioner for being bad and so not capable of enforcement in Tanzania.

Briefly, the petitioner and the respondents herein were parties to arbitration proceedings before China International Economic and Trade Arbitration Commission (CIETAC) in the People's Republic of China. The petitioner lost in the said proceedings per award No.0676 delivered on 22nd May 2017. Its attempt to challenge the said award and have it cancelled before the Fourth Intermediate People's Court of Beijing did not succeed. The said Court dismissed that application and that resulted into the filing of the award in this Court for enforcement at the request of the respondents represented by IMMMA Advocates.

In terms of rule 4 of the Arbitration Rules, GN No 427 of 1957 the award was received by the in a sealed envelope by the Registrar who caused to be opened Miscellaneous Commercial Case No.342 of 2017 and subsequently, the Court notified the petitioner of the filing of the award requiring her to appear on a specified date to show cause why the reliefs sought should not be granted. I take it that by the relief sought had reference to enforcement of the award if the petitioner failed to show cause. In response, the petitioner filed the instant petition under section 30 (3) of the Act for an order of the Court refusing to register the award for being bad as shall become apparent later. For convenience, by an order made on 9th March 2018 the two matters were consolidated into one so much so that should the Court find good cause to refuse to enforce the award, registration as an enforceable decree of the Court would have become infructuous.

The petitioner's complaints are made clear at para 8 of the amended petition in which it contends that the award made by CIETAC is bad in law as it was fraught

with favouritism and perversions of law. It is contended further that the award was made not only contrary to the evidence produced before the tribunal but also based on fabricated evidence. Not amused, the respondents field their answer disputing the petitioner's allegations and contended that the Court lacks jurisdiction to re-open the award and evaluate the evidence or reconsider the decision made by the arbitration tribunal. The respondents contend further that the matters raised in the amended petition were considered and finally determined by a competent Court in the People's Republic of China on an application for cancelation of the impugned award. On the basis of the above, the respondents urge the Court to dismiss the petition.

Prior to the hearing of petition the Court had to determine a preliminary objection challenging the same for being filed before the award had been accepted as having been duly filed. That preliminary objection was dismissed in a ruling delivered on 9th March 2018 paving a way to the hearing of the petition on merits which was conducted by way of written submissions. The petitioner did to through Dr. Masumbuko Lamwai learned Advocate whilst Mr. Gaspar Nyika learned Advocate filed the same on behalf of the respondents. It will be recalled that the respondents had contended in their answer to the amended petition that the Court lacks jurisdiction to determine the petition whose purpose is geared towards reopening the award with a view to reconsidering the evidence produced before the arbitration tribunal. I find it convenient to begin my discussion with that point.

Mr. Nyika submits in essence that the petition lacks legal basis because the matters complained of were finally and conclusively determined by the arbitration tribunal and subsequently considered and determined in an application for annulment of the award by a Court of competent jurisdiction in the People's Republic of China. It is the learned Advocate's submission that it is not open to the petitioner to institute a petition under section 30 (3) of the Act because that section

gives power to the Court to refuse to enforce the award altogether or adjourn the hearing for a specified time considered to be reasonable for the purpose of enabling a party to take necessary steps to have the award annulled by a competent tribunal. The learned Advocate submits that contrary to the spirit of the law, the petitioner is asking the Court to refuse registration of the award which is beyond the Court's power under section 30 (3) of the Act. Submitting further, the learned Advocate argues that the power to refuse registration of an arbitration award does not exist under the law and so the petition is not legally maintainable.

The learned Advocate reinforces his submissions by referring to Article V (1) (e) of the New York Convention For Recognition and Enforcement of Arbitral Awards of 1958 ratified by Tanzania. On those submissions, Mr. Nyika invites the Court to dismiss the petition.

Dr. Lamwai's response to the foregoing submissions is anchored on the ruling of this Court delivered on 9th March 2018 in which Mruma, J ruled that the filing of an award is an administrative procedure towards registration and ultimately enforcement of the award. The learned Advocate takes the view that this Court has the requisite power to under section 30 (3) of the Act to refuse registration of the award as the same is yet to be registered and made a decree of the Court.

I have given due consideration to the competing arguments by the learned Advocates on the point and I think the determination of it turns on a narrow compass. Dr. Lamwai concedes at page 7 of his submissions in chief that the arbitration award whose enforcement is challenged meets the conditions set out under section 30 (1) (a) – (d) of the Act. The learned Advocate takes issue with the award with reference to section 30 (1) (e) of the Act which stipulates:

> *30 (1) in order that a foreign award may be enforceable under this part, it must:-*

(a) n. a

(b) n. a

(c) n. a

(d) n. a

(e) have been in respect of a matter which may lawfully be referred to arbitration under the law in Tanzania

and its enforcement must not be contrary to public policy or the law of Tanzania."

The burden on Dr. Lamwai's argument lies in the scope of section 30(3) of the Act in the light of the petitioner's complaint against the enforceability of the arbitration award. It is trite that the spirit of section 30 (3) of the Act is to forestall enforcement of a foreign award pending annulment of it before a competent tribunal. The challenge against enforcement envisaged under section 30 (3) of the Act is aimed at achieving either of two orders. One, an order for refusal to enforce the award upon proof of existence of conditions other than those set out under section 30 (1) (a) and (b) and (c) or section 30 (2) (b) and (c) of the Act, Two, an order for adjournment of the hearing of an application for enforcement of the foreign award until after expiration of a specified period deemed reasonably sufficient to enable the party against whom enforcement is sought to take necessary steps to have the said award annulled by the competent tribunal. It follows thus that a party who seeks to invoke the Court's power under that section must show in the petition that there are grounds entitling him to contest the award before a competent tribunal in which case the Court can either refuse to enforce the award or adjourn the hearing of the application for enforcement.

Mr. Nyika submits and I think rightly so that the petitioner has not satisfied the conditions under section 30 (3) of the Act for the Court to exercise its power under the section. Admittedly the use of the petitioner's use of the phrase an order refusing registration of the award may not be free from difficulties but I think it must be construed as the same as recognition of the award in line with Article V(1)(e) (e) of the New York Convention For Recognition And Enforcement of Foreign Arbitral Awards which is part of our law and so I take the view that whatever phrase is used everything the petition boils down to resistance to the enforcement of the award which begins with the filing of it before it is recognized and enforced as a decree of the Court. Paragraph 8 of the amended petition discloses grounds which would ordinarily entitle the petitioner to challenge the validity of the award in line with section 30 (3) of the Act and if satisfied, the Court would decline enforcement of the award or adjourn the hearing for enforcement until such time the Court may consider reasonably sufficient to enable the petitioner take steps to challenge the award before the competent tribunal. However, the petitioner concedes at para 9 of the amended petition having unsuccessfully challenged the validity of the same award. As rightly submitted by Mr. Nyika, once the competent tribunal in the People's Republic of China had dismissed the petitioner's application for annulment (cancellation) of the award nothing was left of the petitioner to resist enforcement before this Court under section 30 (3) of the Act.

One may have some sympathy with the petitioner in its complaint against the arbitration tribunal but this being a Court of law, it cannot act on sympathy but in accordance with the law. That means that since the petitioner has already exhausted her remedies by challenging the validity of the award, she cannot seek to resist enforcement of it as she does. I think the learned Advocate for the petitioner might be aware the refusal to enforce the award or the registration of

it is not an end in itself. Section 30 (3) of the Act under which the petitioner has filed the petition empowers the Court to refuse enforcement or adjourn the hearing pending challenging the award before a competent tribunal. As seen above, the petitioner has exhausted that remedy.

In other words what purpose will it be served by refusing registration of the award if no other steps will be taken to challenge the validity of the award, in the country where it was made? In line with Article V (1) (e) of the New York Convention For Recognition And Enforcement of Foreign Arbitral Awards, this Court's jurisdiction is limited to refusing enforcement or to recognize foreign awards where the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the Country in which or under the law which, that award was made. Indeed that article is in tandem with section 30 (3) of the Act and since the petition has failed to meet the conditions precedent for the Court's exercise of its power under section 30 (3) of the Act, I would uphold Mr. Nyika's submission that the petition is legally unmaintainable with the attendant consequences. Having so said, I find no useful purpose engaging into a discussion whether the complaint against the award are meritorious warranting the order sought.

In the event, the petition which I have held to be legally untenable stands dismissed with costs. Having dismissed the petition, the foreign award dated 22nd May 2017 duly filed in this Court shall now become enforceable as a decree of the Court. Order accordingly.

Dated at Dar es Salaam this 1st day of February 2019

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

L.J.S Mwandambo

JUDGE