THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

MISC. ARBITRATION CAUSE NO.04 OF 2002.

R.R.P (U) LIMITED ……..APPLICANT

-VERSUS-

ASSIST (U) LTD……. RESPONDENT

BEFORE: THE HON. MR. JUSTICE R.O. OKUMU WENGI

RULING:

This is a chamber application seeking orders to partially vary and or set aside an award by a single Arbitrator Eng. Hans Mwesigwa dated 15/5/2002. The application also seeks other associated orders. The grounds for the application brought under section 35 of the arbitration and conciliation Act 7 of 2000 and rule 13 of the arbitration rules are that

(a) the arbitrator was not impartial

(b) the arbitrator ignored some evidence of the applicant.

(c) The arbitrator failed to evaluate evidence relating to a claim for damages

(d) Having found a breach of contract by the Respondent the arbitrator failed to make an award favourable to the applicant.

The motion was supported by the affidavit of Bunnet Bagombeka filed in court on 5th June 2002 that in essence raised the above grounds. In reply Mr. Collins Opio filed an affidavit on 21st June 2002 in which he contested all the grounds raised in the application.

In his written submissions learned counsel for the Applicant Mr. Patrick Mugisha argued firstly that the arbitrator reached a wrong conclusion that payment for the leased equipment was to

cover the entire period and not only for the recorded time when the equipment was used. Secondly that the arbitrator was wrong in deciding that payment for the leased equipment fell due on presentation of an invoice without a certificate. The applicant contested the award made in respect of the leased equipment while the same was idle due to a mechanical failure and lack of murram. Thirdly counsel argued that general damages for loss of business should have been awarded as the applicants contract got terminated when the equipment he had leased was non-functional. Finally the applicants counsel was unhappy with the decision of the arbitrator on costs being borne by either side.

For the Respondent it was firstly argued that the application was bad in law for non compliance with Rule 7 and 8 of the Arbitration Rules counsel also cited sections 35 and 39 of the Arbitration Act which in his view had not been complied with a result of which was to vitiate the entire complaint. He also cited Re Arbitration of Mulfibhai Madhvani vs. Lakham & Co. Ltd Misc cause 4 of 1956. Finally he invoked section 10 of the Arbitration and Conciliation Act to say that this application was not properly before court. Learned counsel John Mary Mugisha then contended that the arbitrator did not err in any way on the issue of the non tasking of the leased equipment and the intention of the parties were properly integrated into his decision. He then strongly contended that there was no evidence of partiality or bias of the arbitrator. Counsel then cited Total (U) Ltd vs Burambe General Agencies Arbitration Application No. 3/98 to say that courts should as a general rule uphold arbitral awards and only interfere with them in exceptional circumstances. Finally the learned Advocate contended that the Respondent was not party to the contract between the applicant and the latter's clients and could not be held liable in damages for its termination. He asked court to dismiss the application with costs.

First of all I decided not to give reasons for my ruling on the objection raised to the application by counsel for the Respondent Mr. J.M. Mugisha. The reason was, as I now state it, that an application brought under section Act 7 of 2000 as this one is, was proper. This application was brought to set aside the award under section 35 (2) (a) (vi). It is clearly different in nature from objection to award proceedings under rules 7 and 8 of the Arbitration Rules. The application was also not barred under subjection (3) of the section 35.

In deciding this application I am aware that as much as possible courts must usually uphold the arbitrator's award as a general rule. In order to set aside an award it is necessary for this court to find that there was evident partiality in the arbitrator. Specifically I must find first that the award of shs 48,225,007 was tainted with partiality on the part of the arbitrator. In this regard the arbitrator allowed a claim of shs 40,851,720 which was disputed for among other things lack of murram. In the arbitrators view the payment was due whether or not there was murram as lack of murram did not constitute force majeure. However the agreement did not refer to such events in terms of force majeure. It merely referred to "extraordinary circumstances" arising during the performance of the work which had to be notified to the lessor. The records also provided for entries relating to the "hours when machines were standing (idle) and the reason therefore" as well as "General comments". Since there was evidence of Notification of the murram problem (vide RRP letter of 20/3/2001 to Assist and General Comments of 15/2/2001 etc) this issue clearly constituted extraordinary circumstances without necessarily being factors of force majeure. By importing the extreme concept of force majeure into the agreement, the arbitrator allowed himself to be swayed to one side in spite of evidence in support of the contrary position. In my view this arose from an inevitable bias and the award of shs 40,851,720 must be set aside.

On the second issue the arbitrator was articulate and fluent when he wrote:-

> "However it is also true that due to poor equipment supplied by ASSIST, RRP performed the contract with the Ministry of Works so poorly that this can be construed as breach of contract by Assist... The performance of machinery supplied by assist to RRP was certainly far below expected capacity as evidenced by several exhibits e.g. (lists 4 categories of exhibits)... From the evidence presented, the following can be concluded:
>
> (a) the breakdowns were very frequent and could not allow for effective execution of the said work according to schedule.
>
> (b) The delays in repairs were far beyond the limits set out in the contract
>
> (c) The actual performance of most machines.... were all below normal capacity of such machines. It will be observed that equipment is tasked according to design capacity and when this goes below a certain level then the equipment is non — performing..."

In a surprising turn the arbitrator invoked country singer Kenny Rogers' lyrics in "the Gambler:"
"...Every gambler knows, the only way to surviving is
….Knowing when to walk away,
….Knowing when to run."

The arbitrator then admonished that the applicant "should have known when to walk away or run from the contract when ASSIST was frustrating them with poor equipment." He then concluded: "while ASSIST may not have been party to the agreement between RRP and MOW, it was aware of the purpose for which this equipment was being hired and that is why payments were pegged to certification by MOW"

He then made his bulleted award in the following terms:-

"7.4.2 Award (A4).

The arbitrator behaves that both parties did harm to each other. ASSIST through the supply of equipment that was lacking in integrity which had a negative impact on RRP's work.

RRP through failure to act according to the contract clauses by not paying due amounts on time and for refusal to sign site documents.

In the circumstances and in the spirits of reconciliation the Arbitrator funds both parties breached the contract but each one should suffer the damage caused to its company. No award in monetary terms for breach of contract and no liquidated damages for any party."

He finally made a similarly reasoned award of costs being shared out and borne by each party. From the evidence and the finding by the arbitrator, it is clear that the applicant refused to endorse site records as he disputed what he considered to be the indiscriminate records and claims for machinery that was idle. In some instances reasons for non tasking of the equipment and appropriate comments were given relating to murram problems. The problem is that the arbitrator felt that the applicant was not wise and for this reason he found against the applicant. Without having to deprecate the arbitrator's perhaps lifelong respect for Kenny Rogers' musical advice to gamblers I must say right away that the arbitration did not arise out of a wagering (and

therefore illegal) contract. He did find a case for breach of contract by the Respondent. The issue of not running away when it was time to do

so was a matter for mitigation of losses but could not be justifiably treated as a breach of contract by itself. It was not the opportunity for the arbitrator to himself run away from resolving the issue of determining appropriate damages given that he did find a case of breach of contract by the Respondent. By so acting the arbitrator allowed himself to lean on the side of the Respondent thus tending to be biased to his advantage. For this reason I would set aside the arbitrators award A4 by which he denied the applicant an appropriate award of general damages for breach of contract by the Respondent. As stated earlier the award of shs 40,851,720 is set aside. On both instances of setting aside the applicant will be entitled to costs of this application. As a consequence enforcement of the other awards namely shs 7,373,287/= and shs 121,543,610 and interest of 20% will abide determination of the claim for general damages or deposit in court by the Respondent of the sum of shs 128,916,897 as security for due performance of and eventual award of damages to the applicant. The respondent will have 45 days to do so (to deposit the security) and I make this order in view of section 35 of the Judicature statute.

As I take leave of this matter I would like to comment on a development on the ADR practice that has been brought to my attention by a number of advocates and their clients. They have expressed misgivings at apparent high arbitration fees being charged by the state Arbitration body CADER. There is also some uneasiness towards radio advertisements run by the said Cader on their ADR interventions. I must say that certain commercial messages by Cader or their sponsors that have been brought to my notice may seem to be sending mixed signals to some court users and causing some discomfort to members of the Bar and possibly the Bench. For instance the radio messages to the following effect could have been more wisely framed:

(i) A judge in court cannot hear your dispute...
(ii) Cader mediations are cheaper than going to the courts.
(iii) In courts people fight against each other
(iv) Your decision can be registered in court like any other judgment...
(v) Cader was established by the government and is supported by the Courts.

My comments take the messages as they have been broadcast or represented and only raise a few implications and issues arising from an ADR debate within the industry. It is well known that there are court based mediations here and in other jurisdictions and it is the duty of courts to decide disputes as well as cases. To say that courts do not intervene in settling disputed except in full trials is not true. Secondly while court filing fees are evidently low, arbitration fees charged, even where a party had paid court fees, and further fees charged have not always been cheaper. It must also be understood that lawyer participation in adversarial proceedings before court, is not mandatory but legal costs and lawyers fees would usually be applicable either way. A disputant might easily get misled about the cost effectiveness of Cader interventions when such facts as fees are suppressed by the advertisements. Further, mediation agreements are not “other judgments” and court judgments are not registered, even if they are consent judgments pursuant to a mediation. One may also ask what support do the courts give to Cader. For instance does the same support go to other ADR providers or to disputants who participate in court assisted mediations. These questions arise yet it should not be the idea that all Cader generated decisions or awards are endorsed by the courts.

It is normal that ADR arbitral awards continue to be challenged in courts. The courts do as a matter of principle endeavour to give effect to mutually negotiated agreements. But this does not mean that courts have abdicated their central mandate of settling disputes as a service. This role is not ousted and is being performed as much as possible at minimal cost and with increasing user friendliness. It might turn out to be a reckless abuse of commercial free speech to solicit alternative dispute resolution business using messages that may amount to misrepresentations. Indeed provision of Dispute Resolution services like other law based services are delicate and touting or advertising has always been restricted to protect the public in case unscrupulous providers appear on the scene. Since judiciary services are not really advertised, ADR providers ought to use restraint in announcing their services particularly when fees are charged. Moreover customers of legal services such as ADR and are entitled to receive truthful information of the services as a Constitutional right. It seems to be the time to call for substantive legislation on the participation of the people in the administration of Justice as envisaged in the constitution of Uganda 1995 and specifically on Mediation and ADR. Indeed the constitution has allowed the people to take the Judiciary in their hands as it were by enlarging adjudication, hitherto adversary

in nature and making it participatory. It has also introduced or re invented ADR mechanisms such as mediation and reconciliation in such a way that court proceedings need not always take the adversarial route that the Cader messages characterise in terms of routine belligerence. There is damage in such characterisation in that it may tend to point at a commonplace failure by judges to control proceedings and parties over whose controversies they preside. A generalisation in this characterisation would not be far from contempt of court if the judiciary is depicted as allowing routine degenerative conduct of cases and of rendering service expensively. If the cost of legal professional representation is high this is not entirely the same as saying that judiciary services per se are expensive. A legal regime might solve and address the question of parallel ADR activities that tend to emphasise and seek to derive legitimacy by citing the perceived inadequacies of judicial resolution of disputes. And even if a state enterprise is desired, the market force propelled by a vibrant private or industry based mediation and arbitration providers might better be encouraged as they would attract willing disputants while balancing off the resort to abrasive solicitation. It would be a sad day when many legal practitioners, judicial officers and even the disputing public adopt a lukewarm attitude to ADR providers and the real advantage of the process. This might arise when subconscious radio messages turn out to be inaccurate yet the mainstream judicial process, so central in governance, has already been casually and cumulatively undermined by them. Increasing resistance to proposed court arbitration orders may also be a warning that all is not well in a commercialised mediation paradigm. Perhaps the fraternity which has resolutely espoused commercial arbitration-mediation must be on a constant watch out for undesirable tendencies that might undermine a versatile mechanism or process that is so important as alternative Dispute Resolution (ADR) in modern times. The Radio messages I have attempted to point to clearly need to be reviewed by the sponsors so that they reflect the fact that the people in charge of the ADR Providers being extolled have a sound grasp of the legal service in which they are introducing their activities and that they are not only responsible but are accountable, competent and under professional control and regulation. Such providers must be able to correctly impart informed instructions to their advertising or rather Public Relations agents and to generally avoid staining the evolving regime that is enabling them to survive, the stiff competition in the legal profession, somewhere between the Bar and Bench. The message in the above comment is advisory and has been an opportunity to appraise one aspect, namely the emerging information component, in the process of diversification of judiciary

activities in Uganda. However, needless to say, it relates to serious matters of governance and the dangers of commercial creativity in the process of interpreting the new constitutional mandate for the judiciary. Due regard must be had to existing institutional, policy and legal framework as well as the operative norms and aspirations of the people. Care should be taken not to appear to recklessly appropriate the political dispensation that recognises popular and participatory commercial justice delivery system. There are also predictable pitfalls in a context of marketing as opposed to efforts at dissemination, and universal legal education.

R.O. Okumu Wengi
JUDGE
26/9/2002.