THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-MC-0002-05

IN THE MATTER OF THE ARBITRATION AND CONCIALATION ACT

KILIMBE MINES LIMITED APPLICANT

VERSUS

B.M. STEEL LIMITED RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. Kilembe Mines Limited, hereinafter called the applicant are seeking to set aside an arbitral award dated 13th December 2004, issued against the applicant, in favour of B.M. Steel Limited, hereinafter referred to as the respondent, in which the applicant were ordered to pay to the respondent a sum of shs.3,488,427,789.00 being special and general damages, with interest at 25% per annum on the special damages in the sum of shs.3,233,427,789.00 from 13th November 2001 to 30th June 2004, and interest on the whole sum at the rate of 6% per annum from the date of the award till payment in full, and the costs of the respondent before the arbitrator. The respondent opposes this application.
2. The brief background is that the parties entered into a lease and provision of services agreement under which the applicant let out certain areas on its premises, equipment, and supply of electricity at 33KV to the respondent on the terms and conditions set out therein. The agreement was signed on the 13th November 2001 for a term of five years. Within the first year of the agreement parties developed intermittent disputes, that resulted in the termination of the agreement, apparently by the respondent, and relocation to Mbarara. Following the relocation arbitral proceedings were commenced and an award made. It is that award that is the subject of these proceedings.

3. The application puts forth 4 grounds. Firstly, that the arbitral procedure violated the agreement of parties who had agreed on conciliation which was in progress at the time the arbitration procedure was unilaterally initiated. Secondly that the learned Arbitrator expressed evident partiality in the conduct of proceedings. Thirdly that the applicant was disabled from properly presenting all its evidence to support its case by the arbitrator. And fourthly that the arbitrator misconducted himself when he failed to distinguish between the general and special damages or to properly apply the law governing assessment of damages and hence his award in relation to damages was an obvious error.
4. The respondent opposed this application, and firstly at the hearing raised three points of law which, it was submitted by Mr. Oine, learned counsel for the respondent, would dispose of the whole application. I shall deal with those points first. Firstly Mr. Oine submitted that this application does not arise under reference number AC No. 11 of 2004, under which the respondent filed the award in this court. The award therefore that this present application intends to set aside is not the award that is registered as AC No. 11 of 2004, if I understood, Mr. Oine correctly. As this application does not arise from the cause registered as AC No. 11 of 2004, it infringes Rule 3 of the Arbitration Rules in the First Schedule to the Arbitration and Conciliation Act, hereinafter referred to as the ACA.
5. Secondly Mr. Oine submitted that the notice notifying the applicant of the filing of the award issued by the arbitrator was served on the applicant on 15th December 2004. The respodents inquired from the Registrar Commercial Court if any application to set aside the award had been filed. The Registrar responded by letter on the 17th March 2005, and notified the respodents that no application had been filed to set aside the award. He submitted therefore that this application was out of time, as it had not been filed within 90 days as required by Rule 7(1) of the Arbitration Rules.
6. Thirdly, Mr. Oine submitted that this application had been overtaken by events as the Government of Uganda which is the majority shareholder in the applicant had accepted the award, and instructed the applicant to cease any further legal proceedings in respect of the same. Mr. Oine therefore prayed that this application should be struck out.
7. Mr. Nangawala, learned counsel for the applicant, in answer to the above submissions, replied that this application was made under Section 34(3) of the ACA which provides for

the filing of an application within 30 days of receipt of the award, rather than Rule 7 of the Rules which provides for objections to be made within 90 days. The Registrar's letter must have been inadvertent as he signed the chamber summons on 19th January 2005. As regards the question of whether this application was filed under AC No. 11 of 2004 or not, this was a technicality and not a substantive matter. With regard to the instructions of the Minister to the board of the applicant to withdraw these proceedings, Mr. Nangwala stated that the PERD Statute recognises the role of the board of directors of an enterprise in corporate governance.

8. Starting with the first of the points raised by Mr. Oine, it is true that this application is listed under Miscellanous Causes and not Arbitral Causes and in particular not Arbitral Cause No. 11 of 2004, under which the award of the arbitrator was filed. Rule 3 of the Arbitral Rules states,

> "An award on being filed or registered shall be given its serial number in the civil list, and all subsquent proceedings in connection with it shall be similarly numbered."

9. Arbitral Causes and Miscallanous Causes are all part of the civil list of this court. And in any case are issued by the court, and not the parties. If this was a substantial mistake, which I do not think it is, the fault would lie at the feet of this court, and not the party who brought forth documents for filing. This is a technicality which cannot defeat substantive justice, given Article 126 (2) (e) of the Constitution of Uganda.
10. Turning to the second of the respondent's objections, Section 34 (3) provides,

> "An application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under Section 33, from the date on which that request had been disposed of by the arbitral award."

11. Rule 7 of the Arbitration Rules states,

> "(1) Any party who objects to an award filed or registered in the court may, within ninety days after the notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested."

12. It would appear to me that here we have a situation where the rules and the principal legislation are at variance over the same subject. However it is not necessary to consider this conflict or even to resolve it in order to decide the point raised by Mr. Oine. The applicant lodged this application on 12th January 2005, less than 30 days from the announcement of the award or serving of the same upon the applicant. The letter of the

Registrar of 19th March 2005 purpoting to say that no application had been filed, was obviously written in error, and cannot be dispostive of this issue.

13. Turning to the last of the preliminary points of law raised by the respondent, if I understood Mr. Oine correctly, it is the contention of the respondent, that this application had been overtaken by events and must be struck out, because the Minister in charge of Privatisation, Hon. Professor Kasenene, had directed the applicant to cease legal proceedings in respect of this matter. No authority, statutory or otherwise, is cited to support this proposition raised as a point of law. Neither did Mr. Oine seek in aid of his position the regulations of the company, in the form of articles of association. I am therefore wondering how it can be taken as a point of law. Was the Minister's directive lawful? May be far from it. Though shareholders have an interest in the company in which they hold shares, such interest is exercised in properly appointed organs of the company, including general meetings, in the case of shareholders, or any other means, authorised by law or the articles of association of the company.
14. Section 9 of the Public Enterprises Reform and Divestiture Act, provides,

> "(1) In the management of public enterprises, Government Policy shall recognise the need for the following fundamental conditions---- (a) autonomy in public enterprise management, which shall be deemed to be freedom of the enterprise to manage its operational and financial affairs efficiently without interference or hindrance;"

15. It would appear to me that the Minister's actions amounted to interference in the autonomy of the public enterprise to manage its operational and financial affairs. To institute suits or legal actions and defend the same is the competence of those in charge of the management of an enterprise, and that is the board of directors, with its management, and not for the shareholders, whether the shareholder be government or private individuals, unless the regulations of the company provide otherwise. For companies owned by government, Section 9 aforesaid reinforces the independence of management to do this. It is axiomatic that the Minister's position was inimical to the interests of the public enterprise.
16. I am satisfied that the preliminary points of law raised by Mr. Oine have no merit, and they are rejected accordingly.
17. I shall now turn to the grounds of the main application. The first ground was that arbitral proceedings violated a prior agreement of the parties to go to conciliation, which was in

progress at the time the arbitral proceedings were instituted. This ground was not argued by Mr. Nangwala. Under Section 62 of the ACA, if conciliation proceedings continue between the parties, no arbitral or judicial proceedings may be initiated in respect of the same dispute.

18. In the instant case, on the evidence of Bob Makoma, in his affidavit in support of the application, I am unable to find that conciliation proceedings had effectively commenced, as no conciliatior or conciliators had been appointed by the parties. The Minister of State for Finance, in charge of privatisation, had taken steps in investigating the matter with independent experts, but there is no evidence that the parties had appointed a conciliator. And before such an appointment could be made, I am unable to find that there were conciliation proceedings in progress, which barred the institution of arbitral proceedings. This ground therefore fails.
19. I now turn to the second ground, and that is that the learned arbitrator expressed evident partiality in the conduct of the arbitration proceedings. Mr. Nangwala for the applicant submitted that the arbitrator refused to accept the request of the applicant for appointment of an additional arbitrator. Secondly he rejected a report that had been agreed would be tendered into evidence, in spite of the parties having agreed that the Civil Procedures Rules will be applied with flexibility. Thirdly he refused the applicant to call two witnesses, an auditor and an electrical engineer, whose testimony was necessary for the case for the applicant. Fourthly that the arbitrator selectively relied on parts of the Electrical Engineer's report that supported the case for the respondent and ignored those parts that supported the case for the applicant. For instance the engineer examined the protection systems of either party on their installations. He found and stated in his report that the system for the respondent was not offered adequate protection against incoming disturbances. He also found that the two systems were basically incompatible, and that neither party appreciated this. Had the Arbitrator paid due regard to this evidence he may have found that the agreement between the parties was vitiated by a fundamental mistake of fact.
20. The electrical consultant in his report apportioned blame 70/30 as against the applicant something the arbitrator did not even consider at face value. The arbitrator failed to consider evidence which showed that respondent had accepted blame for the occurrence

of the damage to the respondent's transformer as contained in the letter of respondent to the applicant dated 13th February 2002 annexed to the applicant's affidavit in support of this application as Annexture K5 (See affidavit of Mr. Makoma dated 12th January 2005.)

21. Mr. Nangwala further attacked the arbitrator's award of special damages as evidence of partiality without evidential evaluation, relying on a report that did not disclose its source materials. The arbitrator did not address himself to the standard of proof. On the contrary when he came to the applicant's counter claim he engaged into deep anaylsis resulting in the rejection of the claim.
22. Mr. Oine, for the respondent, submitted that this court in entertaining this application does not act as an appellate court, and cannot re-examine and re-appraise the evidence in the case. The arbitrator did not refuse the engineer to testify and as such this cannot be used as proof of partiality. The arbitrator's assessment of evidence before him and attachment of weight does not display evident partiality. There is no evidence that the arbitrator was induced or acted fraudulently or acted in bad faith.The allegation of bias is a very grave one for which the burden of proof is quite high. Bias must be actual or imputed. There is no evidence before the court to support this charge. What is before the court are mere suspicions. He referred to the London Martime Arbitration by Clare Amborse and Karen Maxwell 1996, Yugasta Construction Ltd v Coffee Marketing Board, AC No. 1 of 1884, Total Uganda Ltd v v Buramba General Agencies, AC No. 3 of 1998 in support of his submissions under this head.
23. Section 18 of the ACA states, "The parties shall be treated with equality, and each party shall be given reasonable opportunity for presenting his or her case." The aribitrator is obliged to treat the parties before him or her equally. Evident partiality does not have to be actuated by dishonesty, fraud or corrruption. The motivation for the partiality is not brought into issue here. What is important is being even with all the parties before him or her in permitting the presentation of their cases, consideration of the same, and decision making by the arbitrator. What is required to be established is that there was evident partiality by the arbitrator(s). If it is demonstrated that the scales were not even, and this is evident on the record, or in the award, or by some other evidence, partiality will have been established.

24. Mr. Nangwala submitted that the arbitrator scrutinised proof of the applicant's counter-claim without subjecting the respondent's claim of special damages to the same level of scrutiny. To verify this allegation we need to turn to the award and examine how the arbitrator dealt with the said matters. I shall set out first how the arbitrator dealt with the respondent's special damages.

> "(b) The Claimant claimed special damages. The principle to follow in the circumstances is that special damages must be specifically pleaded and proved. We shall be guided by the same principle. The claimant pleaded and proved special damages mainly through evidence of CW1, Francis Mwebesa, and CW5 Acholio Evert William, a certified Public Accountant. Reliance was also made on the report (contained in pages 1 to 6 of claimants bundle No.1). It should be noted that this oral and documentary evidence was never challenged. It was specifically pleaded and proved. Therefore, BMS is entitled to special damages,which it pleaded and proved as follows: (i) Ug. Shs.821,957,546/= as lost income for 7 ½ hours per day due to unavailability of power from 1/6/2001-18/6/2003.
> (ii) Ug. Shs.503,059,846/= being loss income as a result of the Respondent's failure to supply scrap as agreed. (iii) Ug. Shs.292,803,396/= as lost income as a result of the claimant procuring scrap from other sources after the respodent had failed tosupply scrap as agreed.
> (iv) Ug. Shs.888,413,939/= lost income as a result of insufficient fluctuating and surging power from 1/6/2001 to 18/6/2003. (v) Ug. Shs.48,192,170/= being costs for the replacement and repairs of the damaged transformer of the furnace of the Claimant. (vi) Ug. Shs.671,769,231/= being costs for the relocation of the furnace from Kilembe to Mbarara and its associated expenses. (vii) Shs.32,341,961 being costs to the consultant to evaluate and prepare actual loss suffered by the Claimant as a result of breach of contract by the Respondent. (For ease of reference and how or why and when the figures were arrived at, refer to the Report in Claimant's bundle from page 2 to page 6 and evidence of CW5)."

25. The arbitrator examined in great detail the evidence in support of the applicant's counter-claim. In part, the award reads,

> "A number of questions arise at the stage. Apart from Shs175,134,502/= which was sufficiently explained, where did the rest of the figures on document "XX" come from? When did they arise (period)? How did they arise given the payment arrangments in the Agreement that required advance payment for particular items? Regarding the arrears account, (Shs.175,135,502/=) it would appear clearly that it was balances on obligations owing by BMS to KML arising from previous Agreements. This is derived from the fact that balances were closed in an arrears account as at 30/4/2000, even though reconciliation was done only in May 2002. The retrospective effect meant that the parties were acknowledging their obligations as before 13th November 2001 when the new agreement was signed. That being the case, the obligations under previous Agreements cannot be within the competence of the Tribunal to entertain, even if the parties may acknowledge them. This is the case with Letter Annexture "O" to the Response to the claim, in which BMS acknowledge the indebtness.
> It must be stated here clearly that jurisdiction of the Tribunal is limited to the mandate derived from the Agreement of the 13th November 2001, which had an arbitration clause in it. It does not refer to any previous engagements of parties

even if the parties themselves may wish to recognise those obligations. Therefore, the Tribunal is unable to pronounce itself on matter of Shs175,135,502/= that clearly arose out of previous arrangments over which it has no jurisdiction.
Regarding rent, electricity power, scrap and other services, reliance has to be made document "XX" attached to the Respondent's response to the claim. The essence of document "XX" has already been explained. These are what the Respondent claimed as special damages (see and relate this document to paragraph 25 of the Response to the claim).
However, the earlier questions still remain answered. It is not clear how were those figures were arrived at . For example, for what period is the power account of Shs.196,864,320/=? For how much power consumed? How does the figure accrue? Rent for space of Shs27,027,000/= for how many months and what period? How much was the rent in for Ch. 12, and how many months-rent totaled up to Shs.900,000/=? Scrap Account of Shs.5,282,695/=, how many tones supplied? When? Under what circumstances did this arise and gvien the arrangement of advance payment before supply as per Agreeement? How did it arise? (See Article 5.3) Other than summaries in document "XX" whose source is apparently unclear, where are the supporting documents, receipts, invoinces, vouchers and demand notes? The principle is that special damages must not only be spefically pleaded but also proved. It would have been expected for RW3 Ntungwa Louis to avail this information which he did not. In the circumstances, no other evidence remained to prove the claim of Shs.414,033,297/-. Therefore, the claim cannot stand even without the denial by the Claimant that it owes nothing."

26. The arbitrator went to great length to examine the claim for special damages of the applicant, asking the proper the questions to determine if it had been proved or not. This assessment is in sharp contrast with his treatment of the respondent's claim for special damages. No questions were asked. It was just accepted, line, hook and sinker! Had the arbitrator applied the same level of scrutiny to the respondent's claim for special damages, as he applied to the applicant's claim, it should have been apparent to the arbitrator the respondent's claim for special damages had several troubling aspects. For this to be clear one needs to look at Report of CW5 which was relied upon. I set it out in full.

"B.M. STEEL LTD.

Item 1 loss of income due to unavailability of electric power.

Under Article 4 of the Agreement between the Kilembe Mines Ltd and B.M. Steel Ltd. Kilembe Mines Ltd. had to supply at 33KV all Electric Power required by B.M. Steel Ltd. and consumed by their furnace and its auxiliaries.

All the required power was not supplied. The period in which Kilembe Mines Ltd. had to supply power is from 1st June 2001 to 18 June 2003.

i) The number of days from 1st June 2001 to 18th June 2003 are:-

2001 1st June 31 December	=	214 days
2002 1st January to 31st December	=	366 days
2003 1st January to 18th June	=	169 days
Total	**=**	**749 days**

The days available for production from 1st June 2001 to 18th June 2003 are 749 days less one day per week for maintenance.
The number of days for maintenance are: 749 days = 107 days
7 days
The number of production days are (749-107)days = 642 days.

ii) (a) Electric was not available on six days a week from 10:30p.m. to 06:00a.m.
(b) Electric Power was not also available on weekly scheduled maintenance days for twelve (12) hours.

iii) (a) The number of production hours lost per day on normal working days were therefore 7.5 hours.
(b) The number of production hours lost on scheduled maintenance days on production days were 7.5 hours.

iv) (a) The total number of production hours lost on normal working days were (749 days – 107) = 642 x 7.5 hours per day = 4,815 hours.
(b) The total number of hours lost on scheduled maintenance days were production days – 107 days x 12 hours = 1,284 hours.

v) The number of tons lost a s a result of unavailability of electric power supply is calculated as follows:
Number of heats of 2 hours are 4,815 hrs + 1,284 hrs
= 6,099 heats i.e. 3,049.5 heats. Each heat is a production of
2
3.2 tons.

The production lost was 3,049.5 x 3.2 tons = 9,758.4 tons.

vi) B.M. Steel Ltd was selling ingots produced to B.M. Technical Services Ltd. at Ushs.365,000 per ton. The selling price of Ushs.365,000 per ton was inclusive of a margin of 30%. The margin per ton was therefore Ushs.84,230.77. The total income lost due to unavailability of electric supply from 1st June 2001 to 18th June 2003 is 9,750.4 tons x Ushs.84,230.77 = **Ushs 821,957,546** (Eight hundred twenty one million nine hundred fifty seven thousand five hundred forty six only).

Item 2 Income lost as a result of failure by Kilembe Mines Ltd. to deliver 100 tons of scrap per week, from 1st June 2001 to 18th June 2004.

i) Number of production days as calculated in item 1 are 642.

ii) Number of weeks = 642 = 91.70 weeks
7

iii) The required tonnage of scrap =
weeks x 100 tons = 9,200 tons.

iv) The actual tonnage of scrap supplied
by KLM = 668 tons

v) Quantity of scrap not delivered is
(9,200 –668) tons = 8,532 tons

vi) Number of tons that would have been
Produced are 8,532 at a recovery
rate of 70% = 5,972.40

vii) Revenue lost (5,972.40 x 365,000) =2,179,926,000

viii) Profit margin was 30% of revenue

ix) Income lost is Ushs.2,179,926,000 x 30 =**503,059,846**
130
(Ushs.Five hundred three million fifty nine thousand eight hundred forty six only)

Item 3 Income lost as a result of insufficient power, fluctuating power and surging

Through out the period from 1st June 2001 to 18th June 2003 Kilembe Mines Ltd. never supplied adequate power continuously. On a daily basis power was either too low to the extent that machines could not be operated or the power would surge causing interruption of production process. As a result of this, the company never produced at the required capacity of 600 tons per month. This production level takes into account maintenance time and minor brake downs. If the power had been available as required the company would have produced 600 tons x 24.5 months i.e. 14,700 tons.

But the company produced 4152.62 tons due to irregular supply of power. The shortfall in production was (14,152.62) tons = 10,547.38 tons.

The margin per ton as already stated in 1 above is Ushs.84,230.77, therefore the Income lost is Ushs.(10,547.38 tons x Ushs84,230.77 = Ushs.888,413,939. (Ushs. Eight hundred eighty eight million four hundred thirteen thousand nine hundred thirty nine only).

Item 4 Revenue lost due to procurement of scrap by B.M. Steel Ltd. from other sources instead of from Kilembe Mines Ltd.

a) The total tonnage of scrap procured and delivered by B.M. Steel Ltd from other sources instead of from Kilembe Mines Ltd. from 1st June 2001 to 18th June 2003 was 5,264,311 tons.

b) Kilembe Mines Ltd delivered during the period mentioned above 668.000 tons. The shortfall was therefore 4,596.311 tons

c) Kilembe Mines Ltd was to deliver the scrap at Ushs. 86,296 per ton as per agreement. However, B.M. Steel Ltd. procured the scrap at an average price of Ushs.150,000 per ton.

There was therefore loss of revenue of Ushs.63,704 per ton due to Kilembe Mines Ltd. failure to supply the scrap.

d) The total revenue lost was 4,596,311 tons (see b above) x Ushs.63,704 per ton = Ushs.292,803,396.

Item 5 Costs of repairs and replacement of damaged equipment

Under the Agreement KLM under took to supplly 33KV electric power to B.M. Steel Ltd. On 23rd December 2001 KLM powere supplly surged far beyond 33KV voltage which resulted into the destruction of B.M. Steel's Induction Furnace and equipment. The cost of replacement and repairs to the Induction Furnace amount to Ushs.48,192,170(Forty eight million thousand one hundred ninety two thousand one hundred seventy only).

The details are as follows:-

Date	Description	US$ Amount	Ushs.
02.11.01	Spare parts	830	1,460,000
08.11.01	Spare parts	362	637,120
27.11.01	Spare parts	609	1,059,660
12.12.01	Spare parts	1,310	2,296,800
12.12.01	Air Tickets	5,004	8,808,746
25.12.01	Air Tickets	1,379	2,427,744
25.12.01	Air Tickets	2,125	3,739,700
11.02.02	Air Tickets	815	1,434,400
11.02.02	Air Tickets	1,600	2,816,000
11.02.02	Spare parts	4,425	7,788,000

11.02.02.	Spare parts	3,180	5,724,000
	Total		**38,192,170**
Local incidental expenditure.			10,000,000
			Ushs.48,192,170

Item 6 Costs of Relocation from Kilembe Mines Ltd Kasese to Mbarara town.

Following the termination of the Agreement for lease of Areas of Operation and Provision of Service for an Induction Furnace at Kilembe Mines Ltd on 18th June 2003, B.M. Steel had to relocate the Induction Furnace, Plaint and Equipment to Mbarara. The company did not produce for seven months as a result of relocating to Mbarara. The costs of relocation are:-

		Ushs.
i)	Construction of structure	107,000,000
ii)	Furnace installation costs	137,000,000
iii)	Crane installation costs	15,000,000
iv)	Power connection	25,000,000
v)	Loss of income due to stoppage for 7 months:	
a)	Loss of income	
b)	Production lost – 600 tons x 7 months = 4,200 tons	
c)	Selling price per ton was Ushs.365,000	
d)	Profit margin was 30% of revenue	
e)	Income lost was 4200 tons x Ushs.365,000 x 30 / 130	
f)	Administrative overhead for 7 months @ Ushs.6,000,000 per month	42,000,000
	Total	**Ushs.679,769,231** (Six hundred seventy nine million seven hundred sixty nine thousand two hundred thirty one only)."

27. If one started by looking at item 3, loss of income for insufficient, fluctuating and surging power, it is calculated based on a monthly production figure of 600 tons of steel per month. This would represent a 24 hour production given the unsupported claim of CW1 that the capacity of the furnace was 650 tons per month. The report calculated the lost production for the period between 1/6/2001 to 18/6/2003 by obtaining the difference between the alleged actual production in that period, and the anticipated production of 600 tons per month. This was multiplied with the net profit on each ton the company

earned, and a figure of Shs.888,413,939/= was claimed as loss of Income. (No proof was offered to support this claim of a monthly production of 600 tons per month, rendering unproven any claim based thereupon.)

28. In spite of this claim, there are separate claims for loss of income or loss of profits for the same period 1/6/2001 to 18/6/2003 on the same production line and same product. In item 1 there is a claim for loss of income for 7.5 hours per day during the period power was allegedly not available for the same dates. This is so, in spite of the fact that there is a claim for the short fall in the production for each day, during the same period, rendering this claim in item 1 a repeat of the claim in item 3, a duplictous claim of Shs.821,957,546/=.
29. The respondent in item 2 claims for loss of income on scrap not supplied for the same period for which item 3 claims loss of income on the steel not produced, between 1/6/2001 to 18/6/2003. The report calculates the shortfall on scrap supplied, and works out the loss of income derived therefrom. This ignores the fact that loss of income on the final product had been calculated in item 3, which made the claim for loss of income under item 2, a claim over the same product, from the the same production line, for the same period, as the claim in item 3. This claim in item 2 is a claim already included in the claim under item 3, rendering it a duplictous claim of Shs.503,059,846/=.
30. The arbitrator did not consider whether or not the claim for relocation of the furnace to Mbarara, including all the itemised components therein, was a specie of damages reasonably forseeable or not too remote, as a consequence of the alleged breach, and therefore, liability for the same, should be borne by the applicant. Construction of a new production facility for instance for which over Shs.100 million is claimed, may well be too remote, considering that in any case the agreement between the parties was only for five years, and the respondent would have had to relocate in time, or otherwise remove itself from the applicant's premises in Kasese. The arbitrator ought to have made specific findings on whether these different heads of claims were justified in law, and if so, then assess the evidence to determine if they had been proved.
31. It is clear to me that the arbitrator never attempted to assess the evidence in support of the claim for the special damages by the respondent. Instead he offered himself as conduit for unjust enrichment of the respondent through clearly duplictous claims of colossal sums of

money. He failed to consider the claim for special damages of the respondent with the care he exhibited when dealing with the applicant's claim. In so doing the arbitrator exhibited evident partiality to the respondent's case leading to a peverse award.

32. I agree with Mr. Nangwala that the arbitrator ignored, in his assessment of the evidence before him, evidence favourable to the applicant's case, especially with regard to the issue of the damage to the respondent's transformer. This includes the Report of the Electrical Engineer, Samuel S Sentongo. The arbitrator ignored Annexture K5, in which the respondent managing director had accepted responsibility for the damage to the transformer.
33. Mr. Nangwala argued that had the arbitrator properly considered the report of the electrical engineer, he ought to have reached the conclusion that there was a fundamental mistake of fact on the side of both parties, which made this contract void. This point was not taken before the arbitrator, though looking at the Report of Engineer Sentongo and actually the testimony of CW7, Tobias Kamu Karehako, it is possible to conclude that this contract was incapable of being performed, at the location of its intended performance, due to a misaprehension or mistake of certain facts, connected to supply of electricity and load characteristics of the furnace. However, as the point was not taken by the parties before the arbitrator, it cannot be used at this stage to support partiality against the arbitrator.
34. I now turn to the third ground. That the applicant was disabled from properly presenting all its evidence to support its case by the arbitrator which caused it undue prejudice. From the record of proceedings, on the 2nd November 2004, the applicant notifed the arbitral proceeding that he intended to call three witnesses, including an auditor and an electrical engineer.
35. The respondent objected to calling as witnesses an auditor and electrical engineer who had been hired by the Privatization Unit of the Ministry of Finance. In his ruling, the arbitrator rejected the calling of the auditor, because he was the author of a report that he had refused to accept in evidence because it had been authored after the start of the arbitral proceedings and that it contravened the law relating to annextures because the applicant sought to put it in after the claimant had closed his case.

36. As far as I am aware there is no law that provides that documents authored after the start of a proceeding are inadmissible on that account.The arbitrator does not cite the exact provisions of the law he relied upon to reject both the Report of the Auditor, and for the auditor to testify as a witness. The arbitrator just mentions rules or law without citing the particular provisions he relied upon. Obviously both those decisions, without convincing reasons, had the effect of preventing the applicant to put its case before the arbitrator.
37. The arbitrator rejected calling of the electrical engineer in a round about way. This is what he said.

> "On the Engineer's Report, there is need to study the final copies before it is determined whether or not to call him as a witness—tomorrow. Obviously, his being called or got will largely depend on the contents of the final Report vis a vis what was tendered in and whether actually he is a necessary witness in light of the fact that the Report would be treated as neutral evidence to be relied upon by either parties."

He directed the proceedings to continue with other witnesses.

38. There is no decision as was promised the following day or thereafter. In effect the arbitrator refused the applicant to call this witness to testify in the arbitral proceedings. In so doing I am satisfied that the arbitrator prevented the applicant from calling the electrical engineer as a witness before him without justification.
39. Under Section 34 (2) (iii) of the ACA one of the grounds for setting aside an award is if the applicant was unable to present his or her case. In my view, where an applicant is prevented from fully presenting his or her case, he or she is unable to present his or her case. This could be achieved by denying or refusing witnesses relevant to his or her case from testifying or affording them reasonable possibility to testify. In the instant case the arbitrator refused two of the witnesses called by the applicant from testifying for less than clear reasons. I find that the arbitrator thus prevented the applicant from fully presenting its case to the obvious prejudice of the applicant.
40. In light of my discussion of the issue of special damages as handled by the arbitrator hereinabove, it is no longer necessary to consider ground 4.
41. The applicant has established two grounds. Firstly that the arbitrator acted with evident partiality to the respondent and against the applicant. Secondly that the arbitrator prevented the applicant from presenting its case fully before the arbitrator. Any of these grounds is sufficient to order setting aside this award, and I so order,with costs here and before the arbitral tribunal, to the applicant.

42. Mr. Oine invited me, to remit to the Arbitrator, were I to find that there are areas of non-compliance in the award, such specific areas, for the arbitrator to deal with. As far as I can trace, this would only be possible under Section 34 (4) of the ACA, where proceedings for setting aside could be suspended, and the matter remited back to the arbitral tribunal to take such action as may be necessary to eliminate the grounds for setting aside the arbitral award. Those circumstances do not obtain here as hearing of the setting aside proceedings is complete, just as much as arbitral proceedings were duly completed and an award made.
43. This, though, does raise a dilema for the parties. Do they commence new arbitral proceedings before another arbitrator? Or do they commence an action in a court of law? The ACA is silent on consequential orders to be made by the court after setting aside an award. I leave it to the parties to determine their next course of action.

Dated at Kampala this 14th day of July 2005

FMS Egonda-Ntende
Judge