THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-AB-0002-2006

SDV Transami Ltd Applicant/Objector

Versus

Agrimag Limited Respondents
Jubilee Insurance Co of Uganda Ltd

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant by a written agreement dated 1st February 1997 with the Respondent No.1 undertook to act as a carrier for the goods of the respondent no.1. The terms to govern their relationship were set out in that agreement. In the performance of this contract a container, containing the goods of the respondent no.1 that had been left in the hands of the applicant for onward transmission to Mombasa disappeared and did not arrive at the destination in Mombasa. The container was containing tea for export. The disappearance of the container took place on or about 28th to 29th 2000 between Kisumu and Eldoret in the Republic of Kenya.
2. The tea had been insured by the respondent no.2. The respondent no.1 called on the insurers to make good the loss, and the insurers did so by paying the respondent no.1 Shs.56,817,600.00 as the assessed loss.
3. By a subrogation deed the respondent no.1 conferred upon the respondent no.2 its rights and remedies under the carrier agreement with authority to institute proceedings in the name of the respondent no.1 to recover redress for the wrong the respondent no.1 had suffered, and which had been compensated by respondent no.2.
4. In pursuance of that deed of subrogation the respondent no.2 commenced arbitration proceedings under the carrier agreement against the applicant. These arbitration

proceedings culminated into an award dated 29th March 2006 in which the applicant was ordered to pay the respondent no.2 the following:

> '(a)Uganda Shillings 57,914,550.00 as special damages for breach of contract; (b) Nominal Damages of Uganda Shillings 1,000 for negligence; (c) Interest on both (a) and (b) at court rates from the date of the award till payment in full and (d) the costs of this arbitration.'

5. It is against that award that the current proceedings are directed. The applicant is seeking that the said award be set aside and that costs of this application be provided for. The grounds of the application are that firstly a party to the arbitration was under some incapacity and secondly that the arbitral award was not in accordance with the Act. It is stated that these grounds are more specifically set out in the affidavit lodged with the application.

6. The deponent, Mary Male, expressed herself thus:

> '8. That on the 11th May 2006, the Hon. Arbitrator handed over his award to our external lawyers, F. Mukasa & Co. Advocates and upon perusal, I established the following:
>
> a) At pages 4 and 5 of the Award, the Hon. Arbitrator stated that the issue of liquidator of the 1st Claimant not participating in the proceedings and non-disclosure of the fact of liquidation were not pleaded and as such could not be raised in the closing submissions without amending the pleadings. This as stated in paragraph 4 above was pleaded, as 'the 1st Claimant was not a legal entity'.
>
> b) The usages of trade were not taken into account as shown at page 4 of the Award where the Hon. Arbitrator disregarded the Standard Terms and Conditions of SDV Transami (U) Ltd and the exclusion of the carrier's liability upon the goods owner taking out insurance.
>
> c) The award was not in accordance with clause 3.1 of the Carrier agreement because gross negligence was not established.
>
> d) At page 4, the Hon. Arbitrator admitted that no negligence had been proved and more so gross negligence had not been proved and that he could not make up his mind on whether it existed. It is however surprising that the same arbitrator based on the resolution of other issues to find the respondent guilty of gross negligence at page 6.
>
> e) The Hon. Arbitrator awarded Ushs.57,914,550 to the 2nd Claimant as special damages for breach of contract. This amount was awarded without justification and no

consideration was given to challenges made to the quantum hence making it contrary to principles of law, fairness and justice.

7. Mr. Noah Mwesigwa on behalf of the respondent swore an affidavit in reply in which it was stated that this application is misconceived with no valid ground for setting aside an award under the Arbitration Act. He deponed that the arbitrator rightly found that the applicant was grossly negligent. On the issue of whether the respondent no.1 was a legal entity counsel for the applicant conceded this issue before the arbitrator as noted in the award. On the issue of standard terms the arbitrator rightly found that these had not been brought to the notice of the respondent no.1.
8. On the issue of whether the respondent no.1 was in liquidation, Mr. Mwesigwa stated that this had not been pleaded. No evidence of usages of trade was adduced before the arbitrator. The special damages awarded by the arbitrator had been proved.
9. Mr. Mukasa learned counsel for the applicant submitted that the award challenged was contrary to the Act. Firstly that the arbitrator made a fresh contract for the parties as he went against the terms of the contract, and in particular clause 3.1. The applicant could only be liable in event of gross negligence. There was no gross negligence proved. Secondly that the teas were to be carried FOT, and charges beyond Kampala were for respondent no.1. The award was contrary to Section 28(5) of the Arbitration and Conciliation Act.
10. Secondly Mr. Mukasa submitted that this award is invalid and bad on the face of it. It is contrary to law. The arbitrator re wrote the contract for the parties by reframing issue no.3 from whether the loss of the tea was due to breach of contract by respondent to whether the loss of the tea amounted to breach of contract. The arbitrator acted in excess of jurisdiction. This is contrary to Section 34(2) (a) (iv) of the Act.
11. The award on its face is inconsistent. The arbitrator found that he could not determine how the tea was lost and then found gross negligence on the part of the applicant. One finding is inconsistent with the other. In addition the arbitrator refused to decide on the issue of whether the respondent no.1 could maintain a claim when in liquidation on the ground that it was not pleaded and yet went ahead to decide the issue of gross negligence that had not been pleaded.

12. Mr. Mukasa further submitted that the arbitrator was inconsistent in so far as he held that the applicant could not challenge the validity of the insurance policy while the issue was whether there was proper contract of subrogation, which hinged on the existence of a valid insurance contract.
13. Mr. Mukasa continued to attack the award on the ground that it was void for uncertainty. The issue of gross negligence was not decided. The issue of the validity of subrogation was not determined.
14. Thirdly that this award is contrary to the entrenched legal positions under the common law and Ugandan law. Special damages that were awarded had not been specifically pleaded as no particulars were provided in the pleadings. Secondly it was clear from the testimony of the respondent's witness, Mr. Bhattacharya, that the replacement value of the tea was US$1,000.00 only. US$33,660.00 was only an estimate of the value of the tea. There was no basis for the award of the quantum that he did award.
15. Mr. Tuma, learned counsel for the respondents opposed this application. He submitted that intervention by this court with an arbitral award is limited by Sections 9, 34 and 38 of the Act. The only to set aside an award is as authorised by Section 34(2) and (3). Under Section 38 of the Act, it is clear that parties can only come to the court where they have agreed to raise or appeal points of the law to the court. Otherwise, it is not open for the parties to come and argue points of law as if they were arguing an appeal, as has been done by the applicant in this case.
16. The parties in this case agreed that the decision of the arbitrator shall be final under clause 5.2 of their agreement, and no provision was made for appeals on points of law.
17. Mr. Tuma then submitted, in line with the affidavit sworn by Mr. Noah Mwesigwa that no ground had been made out upon which this award should be set aside. The Arbitrator had considered the evidence before him and arrived at the right conclusion in the award he made. The applicant had admitted on the pleadings that the respondent no.1 was a legal entity. The fact of a company being in liquidation does not mean it has ceased to exist until it is struck off the register of companies.
18. Mr. Tuma further submitted that the arbitrator found on the doctrine of res ipsa loquiter that the applicant was guilty of gross negligence. He submitted that this court rejects the erroneous reading of the award that the applicant is putting forward. There was enough

proof to support the award made for special damages on the evidence put forth by the respondents. He supported the award.

19. I shall now turn to consideration of the grounds upon which this application is made. However, I will consider initially what is the duty of this court, when as in this case, parties have decided on the means and process of resolution of their dispute. It is the duty of this court, to honour and enforce the agreement of the parties, with regard not only to dispute resolution, but to other terms of the agreement as well. In this case we shall confine ourselves to dispute resolution.

20. Recourse against an arbitral award is governed by Section 34 of the Act. I shall set it out in full.

> ‘ **34. Application for setting aside arbitral award.**
>
> (1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). (2) An arbitral award may be set aside by the court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party to the arbitration agreement was under some incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;
>
> (vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or

(vii) the arbitral award is not in accordance with the Act;

(b) the court finds that—

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

(ii) the award is in conflict with the public policy of Uganda.'

21. The foregoing provisions provide the instances in which an arbitral award may be set aside, and it is upon only those grounds that this court is authorised to set aside the award.

22. As was pointed out by Mr. Tuma, Section 38 allows the parties in their agreement to provide for an appeal on questions of law arising out of the award to be made to this court, and in fact for a further appeal to the court of appeal. It would follow that where the parties have chosen not to provide for appeals on questions of law arising out of the award, or have decided, as the parties in this case decided, under clause 5.1 of their agreement, that the award shall be final, then no appeal can be made on questions of law, arising out of the award.

23. The only recourse the parties have is to the provisions of Section 34(2) of the Act. The first ground set out in the chamber summons was that a party to the arbitration agreement was under some incapacity. I presume this would fall under Section 34(2) (a) (i) of the Act. This provision in my view relates to the capacity or incapacity of a party to the agreement entering into that agreement on a plain reading of this provision.

24. It has not been suggested that either party to the arbitration agreement was labouring under some incapacity at the time the agreement was made. The questions that the applicant attempted to raise during the proceedings before the arbitrator had nothing do with capacity or incapacity of either the applicant or respondent no.1 to enter into the agreement. The first question that was raised was that the respondent no.1 was not a legal entity. On the award this was abandoned by the applicant who conceded that the respondent no.1 was a legal entity.

25. The other matter remotely connected to this may be the reference to liquidation of the respondent no.1 which the applicant wished to raise at the level of final addresses to the arbitrator. The arbitrator dealt with this matter as follows in the award:

> 'A point was raised by Mr. Mukasa, learned counsel for the Respondent, that the 1st Claimant is under liquidation that the pleadings did reveal this fact and that the liquidator is not

> participating in these proceedings and that on those two grounds these proceedings cannot continue. I agree with Mr. Tuma, learned counsel for the Claimants that this matter was not pleaded and cannot be raised now without amending the pleadings. I resolve this issue under consideration in favour of the Claimant.'

26. I am unable to fault the arbitrator in his approach to this issue. In any case in my view it has nothing to do with the capacity or incapacity of the parties to enter into the agreement now under enforcement. Reading the applicant's defence before the tribunal it is clear that there was no positive averment on the question of liquidation. What the applicant set out to do on the defence filed before the arbitrator was to prove the respondent no.1 not to be a legal entity, which he did not succeed in doing.
27. The other only ground for this application, as set forth in the chamber summons, was that the arbitral award was not in accordance with the Act, which I presume is a reference to the Arbitration and Conciliation Act. Mr. Mukasa was able to mention twice what parts of the Act, the arbitrator had not complied with.
28. Firstly Mr. Mukasa submitted the arbitrator did not act as he was mandated to by Section 28(5) of the Act, when he found gross negligence when there was no proof of any kind of any negligence.
29. Secondly, Mr. Mukasa, submitted that under Section 34 (2) (a) (iv) of the Act, this court should set aside an award if the arbitrator decided a dispute not contemplated by the parties; where the award does not fall within the terms of the contract; or if the decision contains matters beyond the scope of arbitration.
30. Mr. Mukasa submitted, if I understood him correctly, that the arbitrator re wrote a new contract for the parties, in so far as the contract, presumably under clause 3.1 provided that the goods were carried at owners risk and liability of the applicant would be limited to only a case of gross negligence. As there was no proof of negligence before the arbitrator the award made was void. Reframing the claimants issue as to whether the loss of tea was due to a breach of contract by the applicant to whether the loss of the tea amounted to a breach of contract by the applicant was attacked on the ground that it amounted to re-writing the contract for the parties and or the terms of reference for arbitration.
31. Section 28 (5) of the Act states,

> ‘In all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction.’

32. On a reading of the award it is clear that the arbitrator found that the applicant, on account of the doctrine of ***res ipsa loquiter***, to have been guilty of gross negligence. In doing so the arbitrator did not re write the contract for the parties but merely made findings consistent with the contract to found liability against the applicant. It has not been suggested that he applied this doctrine wrongly in law. Reframing the issue was inconsequential, given the finding that the loss of the tea was the result of gross negligence on the part of the applicant.
33. I wish to add that framing issues is to focus the parties and decision maker and clearly define what is in dispute between the parties and what they have to prove or disprove in order to succeed. Put differently issues clearly define the matters on which a decision is necessary to determine the dispute between the parties. The substance of what had to be presented to answer the issue as reframed is what was necessary to be presented on the issue as previously worded. The result of either wording is the same. It is to determine whether the contract was complied with or not. Was the contract breached or was it not?
34. I find that the arbitrator decided a dispute that was contemplated by the parties on their agreement. To that extent the award was within the terms of the contract and not beyond the scope of arbitration.
35. With regard to issue of the applicant’s standard trading terms and conditions applying, and whether the arbitrator declined to apply trade usage and customs applicable to the trade of the applicants, the arbitrator dealt with the matter as follows:

> ‘The third agreed issue is whether the Respondent’s standard terms and conditions applied to this loss. On this issue I find that the parties had a written contract between them setting out the terms of the contract. It is not indicated in the written document that there were other terms to apply to the transaction. There is no evidence that the Claimants had notice of the Standard Terms and Conditions of the Respondent. Accordingly I resolve this issue in favour of the claimants.’

36. I am unable to fault the arbitrator in his approach to this issue. Indeed, in my view, it would not be possible to take any other position, given the evidence before him. The applicant has not been able to point to any custom or trade usage that was proved before the arbitrator and was ignored.

37. Mr. Mukasa attacked the award in so far as it allowed a claim for special damages which he claimed had not been specifically pleaded and proved contrary to the common law, and therefore to the law of Uganda. In putting forth this ground he did not point to any particular portion of the Act that the arbitrator infringed. What he is raising is an appeal on a point of law arising out of the award. This is not permitted.
38. If the parties wish to provide for appeals of this kind in their agreement, they can do so, as Mr. Tuma pointed out. This is mandated by Section 38. The applicant and the respondent no.1 did not do so in their agreement. It is therefore not open to one party to challenge the award on the ground that the arbitrator did not apply the law correctly. In this regard Section 28 (4) of the Act may be apt:

> 'The arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, except if the parties have expressly authorised it to do so.'

39. Perhaps the apt question with regard to the issue of special damages awarded is whether the award conforms to considerations of justice and fairness. The claim sets out a claim for special damages. It was in these terms:

> '**Particulars of special damages**:
> a) Ushs56,817,600 (as evidenced by annextures J1-J3),
> b) Ushs1,096,950 being survey report fees, see annexture M hereto.'

40. In the relief part of the claim these two items were added together and stated as: 'a) Ushs 57,914,550 being the value of the assessed loss and survey fees;' This pleading, perhaps inartistic, is sufficient to provide notice of the special damages claimed.
41. The actual value of the lost tea was found by an assessor to be US$33,600. The assessor recommended payment of US$31,920.00 as the quantum of assessed loss. The respondent no.1 paid the respondent no.2 Ushs.56,817,600.00 using the exchange rate at the time of Uganda Shs.1,780 to one US dollar.
42. Going through the testimony of the witnesses and the documentary evidence that the parties made available to the arbitrator, it is clear to me that special damages claimed and awarded by the arbitrator were pleaded and proved in the proceedings before him, and that the award he made was consistent with the considerations of justice and fairness.
43. I have read and re read the award. I do not agree with Mr. Mukasa that the ward is either inconsistent or uncertain on its face. The award decided the issues the parties put to the

arbitrator for a decision. The award may be brief and concise which is not to its discredit. The award deals with all issues put to the arbitrator for a decision giving the decision of the arbitrator, and the reason there for.

44. I am satisfied that this application has no merit. It is dismissed accordingly with costs.

Signed, dated and delivered at Kampala this 19th day of June 2008

F M S Egonda-Ntende
Judge