THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - MA - 265- 2010

[Arising from CADER Arbitration Cause No. 21 of 2008]

MBALE RESORT HOTEL LTD :: APPLICANT

VERSUS

BABCON UGANDA LTD :: RESPONDENT

Civil law and procedure – setting aside arbitral award

Commercial law – arbitral award – setting aside arbitral award

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application by way of chamber summons under Sections 34 of The Arbitration and Conciliation Act (hereinafter referred to as the "ACA") and Rule 13 of The Arbitration Rules.

The application seeks orders that

a) The Arbitral award made by the Arbitrator (**Hon. Justice A. Karokora** [Retd]) on the 8 April 2008 in CADER Application (CAD/ARB) Cause No. 21 of 2008 (hereinafter called the "award") be set aside

b) That costs be provided for.

The application cites three grounds for setting aside the award that

1) The arbitral award is not in accordance with the Arbitration and Conciliation Act.
2) The Arbitrator award is perverse and bears errors on its face.
3) The Arbitrator is guilty of misconduct.

Mr. William Byaruhanga and Mr. Andrew Kasirye appeared for the Applicants while Dr. Joseph Byamugisha appeared for the Respondents.

The facts of this application are fairly straight forward. The Applicant entered into a construction contract with the Respondent on the 14th June, 2006 to erect and construct an annex building to the existing Mbale Resort Hotel in Mbale Town. The contract sum was agreed at Shs.666,337,984= and the date of practical completion was 30th October, 2007. However, on the 2nd October, 2007, the Applicant terminated the contract which led to the current dispute.

The dispute was then referred to arbitration and by the consent of the parties, The **Hon. Mr. Justice A. Karokora** (Rtd) was appointed as the Arbitrator. The Arbitrator then made an award in favour of the Respondent on the 8th April, 2010.
The financial implications of the award were that the Applicant had to pay

a) Claims for costs incurred in the modification of the original design….. 132,585,395.34

b) Claims arising out of wrongful termination of contract……. 1,272,700,857.00

c) Various other claims (for outstanding certificates, valuations, interest on delayed payments and retention monies) …… 207,593,901.00

d) General damages for unilateral breach of contract……..……. 100,000,000.00

1,712,880,153.34

The awards made under (a) and (b) above would attract interest at 10% p.a. from the dated of the breach while the general damages would attract interest at 8% p.a. from the date of the award.

As to the three grounds for setting aside, Counsel for the Applicants relied on the affidavits of Mr. James Wokadala the Managing Director of the Applicant company.

Referring to the first ground, Counsel for the Applicant submitted that the award was not made in accordance with the ACA as provided for in Section 34(2) (vii). In particular, Counsel for the Applicant submitted that the award was contrary to Section 28(5) of the ACA which provides

> *"… 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 …"*

It is the case for the Applicant that the award did not follow the provisions of the building contract in granting the awards. Counsel for the Applicant submitted that the arbitrator made awards of Shs.132,585,395.34= for modifications and delays caused by the Respondent but the Applicant did not apply under Clause 23 of the contract for extension of time (EOT) or compensation under Clause 24 of the same contract.

In this regard, Counsel for the Applicant made four distinct submissions.
First because the procedures under Clause 23 and 24 of the contract were not followed then the award was unsustainable and had no basis.

Secondly, the Arbitrator blatantly misconstrued the contractual terms resulting in a gross misdirection of the rights of the parties. Counsel for the Applicant referred to pages 12 and 14 of the award where the arbitrator found that EOT could only be made after the contract period which was not the case. Furthermore, the arbitrator went on further to award Shs.81,910,496= (plus interest of Shs.21,301,217= thereon) at page 58 of the award based on the contractor's valuation No. 12. Counsel for the Applicant submitted that this was contrary to Clause 30 of the contract that required all work to be assessed by the Architect or quantity surveyor which was not done in this particular instance.

Thirdly, the Arbitrator failed to appoint an Architect or Quantity Surveyor as an expert, to assess this part of the Respondent's claim which would have been in conformity with Clause 30 of the contract.

Counsel for the Applicant submitted that by the arbitrator disregarding the contract he had acted without jurisdiction. In this regard, he referred me to the case of

Associated Engineering Co. V Govt of Andara Pradesh [1991) 4 SCC 93 [AIR 1992 SC 233] Supreme Court where it was held

"An Arbitrator who acts in manifest disregard of the contract acts without jurisdiction … A deliberate departure from contract amounts to not only manifesto disregard of his authority or a misconduct on his part but it may tantamount to a mala fide action. A conscious disregard of the law or provisions of the contract from which he has derived his authority vitiates the awards …"

I was also referred to the case of

Oil & Natural Gas Ltd. V Saw Pipes Ltd [2003) (5) SCC 705 where it was held

"… In exercising jurisdiction, the tribunal cannot act in breach of some provision substantive law or the provisions of the Act. If the tribunal has not allowed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award is patently illegal which could be set aside under Section 34 …"

I was also referred to a decision of this court in

Chevron Kenya Ltd & Anor. V Dagare Transpoters Ltd M. A. 490 of 2008 which applied the principles in the above case.

Counsel for the Applicant in relation to the first ground also made an alternative submission that the Arbitrator failed and refused to decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. This is contrary to Section

28 (1) of the ACA. It is the case for the Applicants that the award of Shs.1,272,700,857= is a special damage which has to be strictly proved which was not done.

It is Counsel for the Applicant's contention that no independent evidence was adduced outside the affidavits of Mr. Zaribwende (the Managing Director of the Respondent) and Annexture G. Furthermore, this sum was not prayed for in the witness statement of Mr. Zaribwende. Counsel for the Applicant submitted that such an unproven claim could not stand. I was in this regard referred to the case of

> **Kilembe Mines Ltd. V B. M. Steels Ltd.** M. A. No. 002 of 2005 where **Justice Fred Egonda-Ntende** held
>
> *"… It is clear to me that the Arbitrator never attempted to assess the evidence in support of the claim for special damages by the Respondent. Instead, he offered himself as a conduit for unjust enrichment for Respondent through clearly duplicitous claims of colossal sums of money. In so doing, the Arbitrator exhibited evident partiality to the Respondents' case leading to a perverse award …"*

Counsel for the Respondent in response denied that the award was not in accordance with Section 34(2) (vii) of the ACA.
He submitted that there was nothing in the affidavit in support that showed where the award was not in accordance with the ACA. Counsel for submitted that all that was awarded to the claimant was claimed in the Statement of Claim. He referred me to the award at P.57 line 5 where the Arbitrator stated

> *"… I have carefully examined the evidence of both sides and more particularly the written statement of Godfrey Zaribwende who stated that the claimant had made (a) claim of Shs.102,747,432.150 … due to modification and delays*

caused by the Respondent … eventually, the original claim … had by the time of filing the Statement of Claim
increased to Shs.132,585,395.34 … because of interest as per Clause 30(1) (b) of the building contract which was proved and was never challenged …"

It is Counsel for the Respondent's contention that the sum was proved but not challenged by the Applicant. On the allegation that the Arbitrator did not follow the building contract and in particular Clause 23 (on EOT) and Clause 24 on compensation, Counsel for the Respondent disagrees with these allegations. Counsel referred me to pages 25 – 26 of the Award which reads

"… I wish to point out that the Respondent's actions of terminating the contract of the 3rd August, 2007, long before the date of practical completion of the work amounting to 79.66% of the total value of the contract work and before the claimant had exercised its option under Clause 23 of the contract document to apply for Extension of Time (EOT) and before the claimant had done anything towards the performance of the agreement reached by both parties dated 4th July, 2007 where the parties agreed to the reduction of the works on the project so that the claimant's completion of works could be accomplished in time, rendered Respondent's termination of the contract and the seizure of the claimant's equipment breach of contract on Respondent's part …"

Counsel for the Respondent therefore submitted that EOT was considered and deliberated upon by the Arbitrator.

I have addressed my mind to the summons before me and the affidavits for and against them. I have also considered the skeleton and oral arguments by Counsel for both parties.

Before I address my mind to the arguments, I shall start by restating the principles for setting aside an arbitral award made under ACA 2000 (Cap.4). These principles are now starting to get settled and thus are clearer to apply.

The first principle is that an arbitral award can only be set aside if the Applicant meets the grounds and tests set out under Section 34 of the ACA.

The second principle to my mind that is not well understood by Counsel when arguing an application is that; an application is not appeal in the ordinary sense from an award of an Arbitrator. This was made clear in the **Hon. Justice James Ogoola** in the case of

Total Uganda Ltd. V Buramba General Agencies [1997 – 2000] UCLR 412

A third principle that comes out of the authorities is that outlined by the learned author **M. A. Sujan** in his book **"The Law Relating to Arbitration and Conciliation** 2 ed Universal Law Publishing Company page 382 which interprets the Indian Arbitration and Conciliation Act which provisions are similar to those of Uganda) where he writes

> *"… The policy of the law is that the award of an Arbitrator is ordinarily final and conclusive and that court should approach the award with the desire to support it if it is reasonable rather than destroy it …"*

This proposition of law has been followed in several decided cases including the one of this court in

> **Contact Graphics Ltd. V .Vivilan Metal Products Ltd.** M. A. 520 of 2006 (unreported)

This of course does not mean that a court cannot set aside an arbitral for it can do so. The role of the court then as the learned author **Sujan** (supra) is to intervene where

> *"… the award is shown to be bad on the face of it or there has been something radically wrong or vicious in the proceedings amounting to a violation of natural justice …"*

Then the court will make a shifting investigation of the entire arbitration proceedings. This shifting investigation by the court is one of superintendence and not substitution of decision making. With the above general principles in mind, I shall now address the grounds in the summons. The first ground is that the award is not in accordance with the ACA and in particular S. 34(2) (vii) and 28 (5) of the said Act. This is because the Arbitrator did not apply his mind to the provisions of the building contract (Clauses 23, 24 and 30) when making his award. The Applicant raised four points under this ground. No all of them were responded to specifically by Counsel for the Respondent who took the view that there was no evidence to support the allegations.

A review of the award and proceedings shows that this building contract went bad when the Respondent contractor made for payment for variation of work that allegedly arose from changes in design, modifications and delay schedules. It appears to me that the variations were not denied by Respondent. Variations as I understand them are mostly extra work from what had been billed in the Bills of Quantities (BOQs).

Counsel for the Applicant submitted that; building contract in question was a labour contract under which the Applicant was to provide all the materials necessary for carrying out the works save for sundries which were provided by the Respondent. With the greatest of respect, the building contract that the parties signed on the 14th June, 2006 does not bear that out. It was contract with stated conditions and BOQs. A variation to the BOQs would also bring about a change in the cost of the project and that is what BOQs are supposed to guard against in the first place. What remained then was for the Arbitrator to apply his mind to the contract to arrive at how the variation should be computed. In this regard, a perusal of the award shows that the Arbitrator did just that. In this regard, I agree with Counsel for the Respondent that the Arbitrator applied his mind to the contract within the meaning of S.28(5) of the Act.

The Applicant furthermore submitted that the Arbitrator blatantly misconstrued the contractual terms as to when EOT would begin to run under Clause 23 of the contract. In other words the Arbitrator made a mistake of interpretation. Writing on the subject of mistake, the learned

author H. K. Saharay in his book **"Law of Arbitration and Conciliation"** Eastern Law House 2001 at page 435 states;

> *"… in case where the Arbitrator was made mistake of law or of fact and there is no Court of Appeal from the Arbitrator, the mistake cannot be remedied. The court cannot exercise its authority to set aside the award unless it can be shown that there was misconduct on the part of the Arbitrator …"*

The author **Saharay** further states at page 433 that; where there are several possible views, then the view taken by the Arbitrator would prevail. This is because where the Arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract then, it is not within the scope of the court to reappraise the matter as if it was an appeal. I agree with that position of the law. In this case, I am unable to see a blatant miscontrual of the contract clause; even then what the Applicant seeks this court to do is to reappraise the matter which is beyond what the court is supposed to do. I am unable to see misconduct of the Arbitrator on this point.

The third point raised by the Applicant is that; the Arbitrator awarded sum of Shs.81,910,496= under valuation report No. 12 of the contractor which was not certified by the architect contrary to Clause 30 of the contract. Save for faulting this procedural process no sound reason is given why the architect did not certify the amount. Counsel for the Applicant only submitted that, it was open to the Arbitrator to appoint a quantity surveyor as an expert witness to assess that part of the Respondent's claim. This is because the Arbitrator was not a competent person to do so under Clause 30 of the Contract.

Apart from generally refuting the main ground above, Counsel for the Respondent did not specifically respond to this allegation.

A review of the arbitral proceedings will show that sub ground was not treated in great detail but was largely lump up with the overall arguments relating to extension of time which I have already dealt with. Counsel for the Applicant however points out that the Arbitrator should have appointed an expert to do that. Whether or not to appoint an expert is a point of procedure Section 19 (1) of the ACA provides

> *"… subject to this Act, the parties are free to agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings …"*

Section 19 (2) further provides

> *"… if there is no agreement under subsection (1), the arbitral tribunal may, subject to this Act, conduct the arbitration in the manner it considers appropriate …"*

The record shows that the parties did not even consider the use of experts as part of their procedure during the proceedings.

Section 26 of the Act then comes in to plug that gap and provides

> *"…(1) unless the parties agree otherwise the arbitral tribunal <u>may</u>*
>
> *(a) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal … (emphasis mine) "*

Clearly, the appointment or not of an expert is in the discretion of the Arbitrator. Whereas I agree with Counsel for the Applicant that the appointment of an expert in these circumstances would have been desirable, the parties did not do so and the Arbitrator was equally not obliged to make such an appointment on their behalf. In reality the Applicants only have themselves to blame for not working on the valuation report and thus having no evidence to challenge it with. I find therefore that the Arbitrator did not offend Section 28 (5) of the Act as this has to be read together with Sections 19 and 26 of the same Act on experts.

The last point on the first ground is that; Arbitrator failed and refused to decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute contrary to Section 28(1) of the Act.

The point in contention here is that special damages worth Shs.1,272,700,857= were not strictly provide in evidence.

Counsel for the Respondent in response referred court to pages 57 throughout to 58 where the Arbitrator write

> *"… The claimant because of the above, (is) claiming Shs.1,272,799,857= … which claim is contained in annexure "G" to that claim and was never challenged by the Respondent …"*

Counsel for the Respondent submitted that the Applicant never challenged what was put before the Arbitrator and so puts it beyond the Applicant to complain.

I must say that this claim is not as straight forward as the others. It is not part of any valuation report and or certificate. The figures are only to be found in the first part of Annexture "G" without even a single supporting document. There is a bill of Shs.1,068,846,940= which is a claim for the use of plant and equipment. There is evidence that plant and equipment was detained by the Respondent but there is no evidence that this was billed for. Actually the witness statement of Mr. Zaribwende of 20th April, 2009 during the arbitration does not even refer to the said sum.

I agree therefore with Counsel for the Respondent on this particular head of special damages. It is simply not proved and with the greatest of respect to the learned Arbitrator, it is not enough to say that the head was not challenged. This was a colossal sum of money that needed to be investigated but was not, it looks like a figure dropped from the sky. This part of the award is unreasonable and unsafe and that cannot be supported. I according set aside the award of special damages for Shs.1,272,700,857=.

The second ground is that the Arbitrator exhibited evident partiality by the complying with the provisions of the ACA and applying settled rules of law and legal principles and this was evidence of misconduct. Counsel for the Applicant submitted that; partiality does not have to

be actuated by dishonesty, fraud or corruption. Counsel for the Applicant argued three sub grounds under this head of partiality which I shall deal with one by one.

The first sub ground listed four instances of partially. First is the blatant omission of the rules of evidence relation to special damages. Secondly, the way in which the counterclaim was dismissed showed partiality. Thirdly by the Arbitrator making a comparison on the amount that had been paid to the Respondent and the value of the contract (approx. 80%) is evidence of partiality; fourthly that the Arbitrator did not apply the same level of scrutiny to both parties especially when it came to special damages. To my mind this first leg largely goes to the Arbitrator's application of the law and legal principles.

Counsel for the Respondent on the issue of partiality submitted that the Arbitrator reviewed the witness statements filed and evidence received on oath by way of cross-examination. Furthermore, that the Arbitrator applied his mind to the substance of the dispute as required under S.28 (4) of the ACA. It is the case of the Respondent that there is no evidence of misconduct or partiality. The question of partiality of Arbitrators was reviewed in detail in case of **Total (Uganda) Ltd** (supra) by **Justice James Ogoola** (as he then was). He reviewed most of the authorities on the subject (and I agree with them) so I shall not repeat them here save for the learned Judge's findings. The learned Judge (at P. 419) states

> *"…the court is mindful of the cardinal principle expressed by various jurists and in court cases to the effect that an Arbitrator is not liable, under a charge of acting without impartiality, if he acts "honestly", or acts "not in bad faith" or otherwise acts "without fraud … an action against an Arbitrator for want of skill, or for negligence, or for the like cause will not i.e. provided he acts, honestly, without fraud or collusion …"*

The learned Judge also goes further to find that innocent mistake would not amount to partiality. I agree with this restatement of the law. In this case, no evidence has been brought as **Justice Ogoola** would have put it (P. 420) that the Arbitrator has acted with dishonest, bad faith, ill motive, fraud, collusion or corruption to bring it any where near the ambit of the traditional areas of misconduct.

An error or mistake in applying the law or legal principles without more can not amount to impartiality or misconduct and so, I do not uphold that sub ground.

The second sub ground is that the Arbitrator showed partiality by grounding his award by deciding it on the principle of waiver which was not an issue that was before him for determination.

It is the case for the Applicant that the Arbitrator found that the Applicant was not entitled to damages in the counterclaim because of the principle of waiver which was never raised no pleaded and no evidence was submitted on it.

Counsel for the Respondent in reply submitted that the Arbitrator rightly applied the principle of waiver because it arose from the agreement reached by the disputing parties on the 4th July, 2007 to reduce the scope of work on the project.

I have seen that the Arbitrator made an extensive finding of fact on this point. To my mind, the finding was extensive because ultimately it would provide the basis for rejecting the counterclaim. This was not in any way found in passing. I have already quoted from the learned author **H. K. Saharay** (supra) that such a finding in a proceeding such as this remains unassailable in the absence of misconduct. In this case, misconduct has not been proved. This sub ground cannot stand either. The last sub ground is that; Arbitrator awarded a relief not prayed for that is granting general damages for punitive purposes.

In this regard, the Arbitrator wrote

> *"… awards general damages of shillings 100 million, for the arrogant and vexatious conduct of Mbale Resort Hotel in unilaterally breaching the contract. This award of general damages is intended to act as a punitive measure …"*

Counsel for the Applicant submitted that this was a wrong application of a legal principle and a grave error that goes to the root of the matter.

Counsel for the Respondent submitted that; it was the Arbitrator's intention to grant general damages and that in any event, the claim before the Arbitrator contained a prayer for further alternative relief.

I must state that reason given by the Arbitrator for granting the general damages on the face of it is confusing even though that in itself does not amount to misconduct. The grant of general damages for punitive purposes as opposed to compensatory to my mind is an error of law on the face of the record. It would be unsafe to allow such a glaring error to remain on the record, and so, I set aside the award of Shs.100, 000,000= of general damages for punitive purposes.

The third last ground of summons relates to errors on the face of the record in support of the earlier grounds relating to the award not being in accordance with the Act and being tainted with impartiality. I have disposed of this ground while dealing with the award of general damages and find no further error on the face of the record.

All in all, the award raises some issues but which to my mind however are not strong enough to set aside the whole of it. Those portions relating to special damages of Shs.1, 272,700,857= and general damages of Shs.100,000, 000= are set aside. As this not an appeal, no figures are substituted for them. The rest of award remains intact.

As to costs, I award the Applicant one third of his taxed bill.

……..…….

Geoffrey Kiryabwire

JUDGE

Date: 03/05/2011

03/05/11

9:52 a.m.

Ruling read and signed in open court in the presence of;

- E. Rukidi for Applicant h/b for Mr. Byaruhanga
- A. Byamugisha for Respondent h/b for Dr. Byamugisha
- MD of Respondent
- MD of Applicant
- Rose Emeru – Court Clerk.

……

Geoffrey Kiryabwire

JUDGE

Date: 03/05/2011