THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

MISCELLANEUS CAUSE NO. 184 OF 2013

(*Arising from Arbitration Award No. 2 of 2013*)

1. AIC PROGETTI
2. TECHNICAL SPA
3. SABA ENGINEERING PLC::::::::::::::::::::::::::::::::APPLICANTS

VERSUS

DATA SYSTEMS ENGINEERING AND RESEARCH CORPORATION::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE HELLEN OBURA

RULING

The applicants brought this application under section 34 of the Arbitration and Conciliation Act Cap. 4 and rule 13 of the First Schedule thereto, Section 98 of the Civil Procedure Act (CPA) and Order 52 rule 1 of the Civil Procedure Rules (CPR) seeking for orders that the arbitral award in which the applicants were ordered to pay the respondent a total sum of £ 71,536.38 be set aside in part and costs of this application be provided for.

The background to this application is that the parties entered into a Memorandum of Agreement (MOA) pursuant to which the respondent supplied the applicants with experts on the terms and conditions set out therein. Subsequently, the applicants terminated the MOA but the respondent rejected it and referred the dispute to arbitration. The parties executed a Notice of Appointment of Arbitrator. Arbitration proceedings ensued and an award was

made. The applicants now seek to quash in part that award so that the special damages award of £ 50,425.006 is severed from the award.

The application is supported by the affidavit of Mr. Bwogi Kalibbala, an advocate of the High Court practicing out at MMAKS Advocates, the firm instructed by the applicants in this matter. The grounds on which the application is premised are that the applicants terminated the MOA entered into by the parties hereto, pursuant to Clause 6 of the MOA and the matter was referred to arbitration. The second ground is that the dispute which was referred to arbitration was clearly stated in the Notice of Appointment of Arbitrator dated 7th June 2011 and the issues to be resolved by the arbitrator were clearly indicated in the joint scheduling memorandum signed by counsel for the parties hereto. The third ground is that in deciding the dispute, the arbitrator dealt with a dispute not contemplated by or falling within the terms of the reference to arbitration, and as such his decision in that regard was beyond the scope of the reference to arbitration. Lastly, that it is just, equitable and in the interest of justice that the award as relating to matters not falling within the terms of reference to the arbitration be set aside.

The respondent opposed the application on the grounds stated in the affidavit in reply deposed by Jovan Latincic, the respondent's Regional Director East Africa. The gist of that reply is that the pleadings and the evidence of the respective parties in the arbitration dwelt on the issue of replacement of experts. Therefore even if it was not framed as an issue, it was in issue and the arbitrator was seized with jurisdiction to consider it and make monetary awards. The applicants also filed an affidavit in rejoinder in which it was averred that the evidence led in the arbitration was only in the context of the termination of the MOA and for purposes of consideration of general damages upon the finding of an unlawful termination.

At the hearing of this application, Mr. Sembatya Ernest represented the applicants while Mr. Byamugisha Albert represented the respondent. Both counsel filed written submissions which are considered herein. At this point, I wish to first deal with the points of law raised by counsel for the respondent who challenged the affidavit in support of the application for two reasons. Firstly, that the affidavit in support offends Order 3 rule 1 of the CPR because

the three applicants are corporate entities and the authority for Mr. Bwogi Kalibbala to swear the affidavit by each of the applicants was not attached to the affidavit. He relied on ***Mugoya Construction and Engineering Ltd vs Central Electricals Ltd H.C.M.A No. 699 of 2011*** and contended the application is defective.

On the other hand counsel for the applicants argued that the preliminary point of law is devoid of merit because under Order 3 rule 1 of the CPR and the case of ***Kaingana vs Daboubou (1986) HCB*** an advocate is permitted to act on behalf of a party to an action and such act includes deposing of an affidavit on behalf of a party to an action. He argued that the case of ***Mugoya Construction and Engineering Limited vs Central Electrical Limited (supra)*** is distinguishable from the facts in this case.

I have looked at the affidavit in support of the application deposed by Mr. Bwogi Kalibbala an advocate practising with MMAKS Advocates the firm instructed by the applicants in the matter. Order 3 rule 1 of the CPR provides:

> *"Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his or her recognized agent, or by an advocate duly appointed to act on his or her behalf; except that any such appearance shall, if the court so directs, be made by the party in person".*

In the case of ***Kaingana vs Daboubou (supra)*** it was held that a person should not swear an affidavit in a representative capacity unless advocate or holder of power of attorney or duly authorized. On the basis of the above provision and authority, it is my firm view that an advocate is permitted to act on behalf of a party to an action and in so doing may depose an affidavit on facts which have come to his knowledge in the course of representing that party. It is also my considered opinion that an advocate is only barred from deposing an affidavit on facts in contentious matters and not on points of law. To my mind the rationale for doing so is to prevent an advocate whose duty is to provide professional services to his client from descending into the arena of proving

facts on behalf of his client who is best suited to do so based on first hand information.

I have also considered the case of ***Mugoya Construction and Engineering Limited vs Central Electrical Limited (supra)*** and I do find that the facts of the instant case is different from the ones which formed the basis of the decision in that case. This is because in that case the advocate who deposed the affidavit averred that he was an authorized agent of the applicant yet he did not show that he was duly appointed to act on behalf of the client. The advocate deposed the affidavit in the capacity of the party and not that of an advocate unlike in the instant case where the advocate deposed the affidavit in his capacity as advocate practicing in the firm of advocates instructed to represent the applicants in these proceedings. I do not therefore agree with the respondent that Mr. Bwogi had to attach authority to validate his affidavit in support of the application. I find that as an advocate in the firm handling the applicant's case he is competent to do so since he deposed to points of law that arise from the arbitral proceedings and the award made. In the premises, I do not find any merit in the first objection raised by the respondent and it is accordingly overruled.

The second objection raised by the respondent's counsel is that the affidavit in support offends Order 19 rule 3 (1) of the CPR since Mr. Kalibbala did not disclose the means of knowledge, and did not distinguish between matters based on information as well as those sworn from his knowledge yet he did not participate in the arbitration proceedings. The respondent's counsel cited the case of ***Banco Arabe Espanol vs Bank of Uganda [1992] 2 EA 22 at 35*** where an affidavit sworn by counsel for a party was found to be defective because it did not disclose the deponent's means of knowledge or the ground of his belief in the matters set out in the affidavit nor did it distinguish between matters stated on information and belief and matters to which the deponent swore from his own knowledge.

Counsel for the applicants in response argued that the facts Mr. Kalibbala deposed to are out of his knowledge derived from documents attached to his affidavit in support and so as an Advocate practicing out of MMAKS Advocates he did not have to attend the arbitral proceedings to have knowledge

of the contents of the documents referred to which were either prepared by MMAKS Advocates or to which MMAKS Advocates was privy. As such the applicants argued that the facts of this case are distinguishable from the case of ***Banco Arabe Espanol vs Bank of Uganda (supra)***.

Order 19 rule 3(1) of the CPR provides:

> *"Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated."*

The respondent's counsel singled out paragraphs 6 and 13 of the affidavit in support as well as paragraph 3 of the affidavit in rejoinder to show that the deponent did not state the source of his information.

To begin with, in paragraph 6 of the affidavit in support, the deponent based his source of information on his discernment of the Notice of Appointment of Arbitrator, which is annexture "A" to the affidavit in support of the application. The notice was signed by the firm representing the respondent and MMAKS Advocates for the applicants. According to the deponent paragraph 13 of the affidavit in support is based on paragraph 74 of the award at page 15. I find that the deponent disclosed his source of information in those two paragraphs and so Order 19 rule 3 (1) of the CPR was never violated. I therefore do not find any merit in the objection in so far as it relates to paragraphs 6 and 13 of the affidavit in support and it is accordingly overruled.

As regards paragraph 3 of the affidavit in rejoinder in which the deponent alluded to the evidence adduced in the arbitration proceedings, I do agree that he did not disclose the means of knowledge, nor distinguish between matters based on information and those sworn from his knowledge yet he did not state that he participated in the arbitration proceedings. This offends Order 19 rule 3(1) of the CPR.

Be that as it may, in the case of ***Col. (Rtd) Besigye Kizza vs Museveni Yoweri Kagutta & Electoral Commission (Election Petition No. 1 of 2001) [2001] UGSC 3,*** B.J. Odoki (C.J) observed that there is a general trend towards taking a liberal approach in dealing with defective affidavits. It was held that the offending paragraphs of an affidavit can be severed and the rest of the paragraphs considered. This is in line with the constitutional directives enacted in Article 126 of the Constitution that the courts should administer substantive justice without undue regard to technicalities. Based on that decision, I uphold the objection in so far as it relates to paragraph 3 of the affidavit in rejoinder and accordingly sever it but the rest of the paragraphs shall be considered.

With the objections disposed of, I now turn to consider the merits of this application. The only issue for determination by this Court is whether the issue of replacement of experts was referred to arbitration, and if not whether an arbitrator can frame, determine and make an award on an issue not referred to arbitration. Counsel for the applicants submitted that the arbitrator can only determine differences referred to him for arbitration and nothing else. He relied on ***Halsbury's Laws of England Volume 2 Fourth Edition Paragraph 610 at page 323*** for the position that an award is bad and unenforceable if it purports to determine matters not comprised in the agreement of reference, unless the part of the award which was beyond the scope of the agreement can be severed from that which deals with the matters comprised within it. The applicants' counsel also relied on ***Halsbury's Laws of England Volume 2 Fourth Edition Paragraph 626 at page 337*** to support his argument that an award may be impeached if the arbitrator exceeded his jurisdiction by purporting to decide a dispute not submitted.

Additionally, counsel for the applicants cited the case of ***Wamugongo vs Total (K) Ltd (1995-1998) 1 EA 332*** for the application of section 35 (1) (a) (iv) of the Arbitration and Conciliation Act. Counsel for the applicants also cited the case of ***National Union of Clerical, Commercial and Technical Employees vs Uganda Bookshop [1915] EA 533*** on the duty of an arbitrator to decide neither more nor less than the dispute submitted to him and to comply strictly with his terms of reference. In reaching that decision the Court relied on the case of ***Williams Brothers vs ED T. Agius Ltd*** wherein it was held by the House of

Lords that an arbitrator has no jurisdiction to deal with matters outside the contract, and that the Court has jurisdiction under common law to set aside an award which purports o determine matters not comprised in the agreement of reference.

In relation to the above authorities, counsel for the applicants contended that in framing and determining an issue which did not form part of the reference to arbitration, the arbitrator exceeded his jurisdiction. As to the respondent's argument that evidence was led by the applicants on the issue of replacement of experts and that it is too late for the issue to be contested, it was submitted for the applicants that the evidence it led was in relation to the alleged employment of the respondents experts and not in relation to the denial of their replacement. It was the applicants' submission that this evidence was relevant in the context of consideration of the general damages award, upon the finding of an unlawful termination and not in relation to the replacement of the experts as this issue was never referred to arbitration.

On the other hand, the respondent's counsel in addressing the question of whether the arbitrator dealt with a dispute not contemplated by or falling within the terms of reference to arbitration argued that the applicants are wrong to say that the jurisdiction of an arbitrator is derived out of the Notice of Appointment of Arbitrator because that is only a notice. The respondent's counsel argued that the dispute which was referred to arbitration was in the pleadings and the evidence led in the tribunal. He referred to Clause 6 of the MOA and submitted that the parties agreed that all disputes which would arise would first be resolved amicably, failing which they would be referred to arbitration. It was contended for the respondent that the agreement did not circumscribe the dispute which could be referred.

In that regard, counsel for the respondent submitted that it cannot be said that the arbitral award deals with a dispute not contemplated by the parties to arbitration within the meaning of section 34(2) (a)(iv) of the Act since replacement of experts was the subject of discussion before the commencement of the arbitration. It is the respondent's contention that when the parties failed to amicably settle their dispute, they jointly appointed an arbitrator under clause

6 to resolve their disputes. The respondent's counsel also drew Court's attention to paragraph 7 of the Statement of Claim where the respondent averred that the applicants did not give them an opportunity to replace the experts and by email dated March 3, 2011 and instead unlawfully terminated the MOA and submitted that the issue of replacement of experts was pleaded.

The respondent's counsel contended that the applicants did not raise the objection as to jurisdiction of the arbitral tribunal when they filed their defence and did not even raise it during the hearing or in their written submissions as required by section 16(2) of the Act. Counsel for the respondent also referred to annexture "JL6" to the affidavit in reply and submitted that the applicants knew the case they were going to meet and did not raise any objection since under the facts at variance in the scheduling memorandum the claimant contended that it was not given an opportunity to replace experts. He further submitted that this Court must look at the award first in order to define the dispute and the jurisdiction of the arbitrator since he found that the issue was canvassed by both parties during arbitration and was borne out of the MOA. For that position the respondent cited the case of ***Seyani Brother & Co. Ltd vs Cassia Ltd H.C.C.A No. 128 of 2011.***

In rejoinder, the applicant's counsel reiterated his earlier submissions and argued that the ***Seyani*** case relied on by the respondents is distinguishable form the facts of the application before this Court. He also submitted that the power under order 15 rule 1 only allows a Court on its volition to frame and determine an issue but that power does not extend to arbitrators.

I have carefully analyzed the affidavit evidence as well as the annextures thereto and considered the submissions of both counsel on the issue before this Court. This application was brought under section 34 (2) (a) (iv) of the Arbitration and Conciliation Act which empowers this Court to set aside an arbitral award if it 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. Clause 6 of the MOA which was Exhibit "C1" in the arbitration proceedings required the parties to the MOA to first agree to preliminary reconciliation proceedings for all disputes that may

arise in relation to the performance of the MOA and if that reconciliation fails, the parties undertook to settle their disputes in accordance with arbitration law.

Having failed to settle their dispute amicably, the parties agreed to refer the matter to arbitration by appointing an arbitrator as per annexture "A" to the affidavit in support of the application and that process resulted into the arbitration award which is annexture "E" to the affidavit in support of the application. Paragraph 74 of the award states as follows:

> *"The tribunal has held in the preceding paragraphs that the Claimant is entitled to damages for denying the Claimant the right to replace experts who has resigned or been terminated. Although no issue was framed on it, the Tribunal is satisfied that the matter was sufficiently canvassed by both sides through the evidence adduced and submissions made."*

The arbitrator then went ahead and made a monetary award in relation to damages for denying the claimant the right to replace experts who had resigned or had their services terminated.

It is pertinent that the dispute that was submitted to the arbitrator is understood and in so doing it is necessary to determine if the respondent complied with section 23 of the Arbitration and Conciliation Act in stating the facts in support of its case. In the case of ***Gandy vs Caspair (1956) 23 E.A.C.A. 139*** it was stated that pleadings operated to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate.

Indeed the respondent pleaded special damages, general damages and aggravated damages for breach of contract in paragraph 3 of the Statement of Claim, annexed as "JL3" to the affidavit in reply. It also pleaded in paragraph 7 of the Statement of Claim that the applicants did not give it an opportunity to replace the experts and claimed damages in paragraph 8. On the other hand, in their Written Statement of Defence the applicants denied the respondent's

contention that it was never given the opportunity to replace the experts and averred in paragraph 3 (xi) that the MOA having been legally terminated there was no basis in law for the respondents to request for the replacement of experts.

It is essential to refer to Clause 3 of the MOA which gave the respondent the responsibility to provide expert and to replace them. In the applicant's witness statement, annexture "JL8" to the affidavit in reply, in paragraphs 4 the applicants acknowledged that it was the respondent's duty under the MOA to provide experts to the applicants. Also it is clear from Exhibit "R85" that the respondent was expected to replace any staff member who had resigned or had announced an intention to do so. The dispute between the parties appears to have stemmed from the applicants' refusal of the respondent's request to replace the experts as per Exhibit "C34" annexed to the affidavit in reply and as testified upon by the respondent's witness. When the applicant did not allow the respondent to replace the experts but instead terminated the MOA by email dated March, 3 2011 a disagreement took shape between the parties.

In ***Simbamanyo Estates vs Seyani Brothers Company (U) Ltd H.C.MA No. 555 of 2002*** Arach-Amoko, J (as she then was) defined the term dispute, *"as one party having a claim and the other party says for some specific reason that this is not the correct claim"*. As such there should be a proposition made by one side and there should be a denial or repudiation of that proposition by the other side.

In the instant case I do find that there was a dispute between the parties regarding the replacement of the experts. This conclusion is based on the pleadings filed and the evidence adduced during the arbitration proceedings. I have also looked at the joint scheduling memorandum annexed to the affidavit in reply as "JL6" and the first fact at variance is the claimant (respondent's) contention that it was not given an opportunity to replace experts. The applicants' response to that contention was that the issue of directly engaging the other experts had already been determined in an earlier arbitration as such the issue is resjudicata.

In ***Seyani Brothers & Co. Ltd vs Cassia Ltd (supra)*** Kiryabwire J. while quoting the learned author, Markanda at page 435 held that:

> *"In order to see what the jurisdiction of the arbitrator is, it is open to the Court to see what dispute was submitted to him. If that is not clear from the award it is open to Court to have recourse to outside sources, the Court can look at the affidavits and pleadings of the parties; the Court can look at the agreement itself."*

It was also held in ***Simbamanyo Estates vs Seyani Brothers Company (U) Ltd (supra)*** that the Court looks at the award first in order to define the dispute and the jurisdiction of the arbitrator. In looking at the award in this case, I find that the award made by the arbitrator as relates to the alleged denying the claimant the right to replace experts who had resigned or had their services terminated were pleaded in the Statement of Claim and the Written Statement of Defence. It was also stated in the joint scheduling memorandum as facts at variance, testified on in the witness statements of both parties and submitted upon by both parties. Much as there was an omission to frame an independent issue on the matter, this Court is convinced that it was part and parcel of the dispute referred to arbitration and therefore it cannot be said to be outside the scope of reference of the arbitrator. The award arose out of the dispute relating to the replacement of experts and it is so closely connected to the issue of the respondent employing those very experts that they were considered concurrently.

It is also clear from paragraph 7 of the Statement of Claim that this dispute formed the crux of the claimant/respondent's grievance and in paragraph 8 of the Statement of Claim the respondent claimed for damages for the breach as well as the one explained in paragraph 6 thereof. This is also confirmed by the arbitrator's evaluation of evidence of both parties and their submissions from paragraph 63 all the way to paragraph 74 of the award where he came to the impugned conclusion. In the premises, I do find that the arbitrator acted within the scope of his mandate to consider the dispute and this Court cannot fault him for making the award he made.

In the circumstances, the case of ***Wamugongo vs Total (K) Ltd (supra)*** is not applicable to the facts of this case because there is nothing to be severed from the award as the arbitrator did not exceed his jurisdiction. In any event, section 16(3) of the Arbitration and Conciliation Act requires a party to raise a plea that the tribunal is exceeding the scope of his authority as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. If indeed it was the case of the applicant that the alleged denying the respondent the right to replace the experts exceeded the scope of the arbitrator's authority then they should have raised it upon the Statement of Claim being filed. They also had other opportunities to raise it at the time of preparing the joint scheduling memorandum as well as when the witness statements were filed and the same matter was raised. The applicants did not raise the issue at any of those stages but chose to respond to the respondent's case based on that very plea and opted to raise it when the arbitral award is made against them. To my mind that is applying double standard!

For the above reasons, I find no merit in this application and it is accordingly dismissed with costs.

I so order.

Dated this 29th day of November 2013.

Hellen Obura
JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Andrew Bwengye Ankunda who was holding brief for Mr. Ernest Sembatya for the applicants and Mr. Albert Byamugisha for the respondent.

JUDGE
29/11/13