THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
HCT - 00 - CC - CA - 128 - 2011

SEYANI BROTHERS & CO LTD ……APPLICANT

VERSUS

CASSIA LTD ……..… DEFENDANT

Before The Hon Justice Geoffrey Kiryabwire

Judgment

This application is by Chamber summons under Sections 34 (1) & 2 (a), (iv), (vi) and (vii) of the Arbitration and Conciliation Act Cap 4 (hereinafter referred to as "the ACA") and Rules 7 and 13 of the Arbitration and Conciliation Rules, for orders that the arbitral award in HCCS No. 60 of 2008 be set aside and costs.

The background to the arbitration is that the parties executed a construction agreement on the 18th August 2007 for the applicant to construct a resort facility at Buziga hill in Kampala for the respondent. The contract ended in a dispute and the applicant filed HCCS No. 60 of 2008 (CASSIA LTD V. SEYANI BROTHERS & Co. LTD) against the respondent. By a consent order dated 30th April 2010, the suit was referred to arbitration and Hon. Justice Mulenga was appointed arbitrator. On the 11th February 2011 the Arbitrator made an Award in which the present applicant was awarded the unpaid balance of the building of USD 109,080 with interest at 8%pa on USD 77,416 from 31st October 2007 and on the rest from 24th February 2008 until payment in full. He also awarded the current respondent on their counter claim the sum of USD 100,000 in un liquidated damages for lost income with interest at 8%pa plus USD 193,758 in special damages with interest at 8%pa from the 12th May 2008 until payment in full and UGX 10,000,000/= in general damages with interest from the 11th February 2011 at 18%pa until payment in full. Costs were awarded to the respondent at 2/3.

The grounds for setting aside the application are that;

1. **The arbitrator exhibited partiality and unfairness in making the award.**
2. **The arbitral award deals with a dispute not falling within the terms of reference to the arbitration.**
3. **The arbitrator exceeded the scope of his mandate.**
4. **The award is not in accordance with the Act.**

At the hearing of this application, the applicant was represented by Mr. Kiggundu Mugerwa while Mr. Alan Rwakakoko represented the respondent.

GROUND ONE: That the arbitrator exhibited evident partiality and unfairness in making the award.

In relation to this ground, counsel for the applicant submitted that partiality and unfairness is a ground for setting aside an arbitral award under Section 34 (vi) of the ACA. Counsel for the applicant further submitted that the test to be applied in determining bias is ***"whether a reasonable person in possession of relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way".*** He referred to the author **PC MARKANDA** in the book, "**LAW RELATING TO ARBITRATION AND CONCILIATION"** at pg 615 for this submission, and stated that the applicant has satisfactorily proved the above test. Counsel for the applicant submitted that the arbitrator manifested bias when;

i. **He made a finding that both parties were culpable for the delay for client supplied materials but only penalized the applicant.**

ii. **He made a finding that there was insufficient evidence on which he could conclusively determine where the blame lay for the delay of *"client supplied materials"* yet this was the contractual responsibility of the respondent and by the definition of the said term, the sole responsibility for their delivery was on the respondent who was the client under the contract.**

iii. **He made a finding that the testimony on the amounts lost by the respondent because of the delayed completion was not supported by any form of verification such as comparable statistics from similar enterprises or from its own subsequent operations but nevertheless awarded the respondent un liquidated damages of USD 100,000 for the same.**

iv. **He found the respondent in breach of the construction agreement and did not award general damages to the applicant whereas on the other hand, he awarded general damages to the respondent when he found the applicant in breach.**

v. **He made a finding based on his belief that the claimant had received the report containing the snags and defects within the defects liability period as envisaged even when no evidence was adduced by the respondent to that effect.**

vi. **He made an award of interest at 8% per annum on the unverified loss of business of USD 100,000 from 8th May which assumes that the above sum had been earned by the respondent on that date whereas not.**

vii. **The evidence of the architect who is the agent of the respondent in the contract and the consultant of the project is/was ignored and/or not given any weight.**

viii. **Heavy reliance was made on the technical audit report without taking into account the fact that it was not tendered in by the author nor was it analyzed by the arbitrator.**

In relation to the ground of bias/impartiality, counsel for the respondent submitted that the allegations of bias against the arbitrator are unfounded, and that the arbitrator gave the parties a reasonable opportunity to present their case. Counsel for the respondent submitted that there were several instances when the arbitrator made rulings in favor of the applicant while overlooking their procedural defects. Such instances included when the arbitrator overruled the respondent's objections and allowed the project architect to give evidence for the applicant, allowing the applicant to adduce new documents relating to client supplied items despite the respondent's objections, and allowing the applicant to make amendments without following proper procedure.

Counsel for the respondent submitted that the applicant instead of referring to the proceedings of the arbitration to prove the ground of bias is instead simply attempting to have the court re-evaluate the evidence, which this court is not permitted to do. Counsel relied on the case of **SIMBAMANYO ESTATES V. SEYANI BROTHERS & CO. (HCMA 555 of 2002)** for this submission.

Counsel for the respondent further submitted that the applicant, in proving the allegations of bias focuses solely on the findings of the arbitrator in relation to client supplied materials, however there were other causes of the applicant' failure to complete the works within the stipulated time which the arbitrator duly considered. Counsel for the respondent further submitted that the arbitrator considered all the documents presented by the applicant and correctly found that not withstanding the lack of clarity as to who was actually responsible for the procurement of client supplied items, the applicant had breached its obligation to complete the works within the stipulated time.

Counsel for the respondent further submitted that the award of USD 100,000 as un liquidated damages with interest to the respondent by the arbitrator was as a result of the overwhelming evidence of breach of contract and that the award was justified by the arbitrator hence this does not manifest any bias. Counsel for the respondent submitted that the applicant has not discharged the burden of proving the bias to the required standard.

I have considered the submissions and the authorities referred to by both counsels, for which am grateful.

I have set out the instances that the applicant raised to impute bias/impartiality against the arbitrator above. In relation to an allegation of bias/impartiality section 34 (2) (vi**)** of the ACA, provides that an arbitral award may be set aside if,

*"…**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**"*

There are also quite a number of authorities both academic and case law on the subject of bias/impartiality. The authors **Sir Michael J. Mustill and Stewart C. Boyd** in their book, **"COMMERCIAL ARBITRATION" 2nd Edition at pg 232**, write that an arbitrator is not liable, if he acts honestly, not in bad faith and without fraud.

In the case of **SIMBAMANYO ESTATES V SEYANI BROTHERS COMPANY (U) LTD (HCMA NO. 555 OF 2002) Hon Lady Justice Stella Arach-Amoko** (as she then was) found that the allegation of bias/impartiality is a very strong statement and it is trite law that he who alleges must prove those allegations against the arbitrator.

Furthermore according to **PC MARKANDA** in his book **"The law relating to arbitration and conciliation (Supra at pages 613 to 614)** it is written that

*"**With regard to bias in relation to a Judicial tribunal the test that is applied is not whether in fact a bias has affected the Judgment but whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. The test of likelihood of bias is whether a person in possession of relevant information would have thought that bias was likely and whether the person concerned was likely to be disposed to decide the matter only in a particular way."***

He goes on to write (**Supra at page 537)** that,

"The Arbitrator is the final arbitrator of disputes between the parties and the award is not open to challenge on the grounds that the Arbitrator has drawn his own conclusions or has failed to appreciate the facts. Where reasons have been given by the arbitrator in making the award, the Court cannot examine the reasonableness of the reasons. If the parties have selected their forum, the deciding forum selected must be conceded the power of appraisement of the evidence."

It is now fairly settled law that an application to set aside an arbitral award is not an appeal. Arbitration is final unless it can be shown that the award was procured contrary to the law as provided for under section 34 of the ACA.

Tsekooko J (as he then was), in the case of **NIC v ARCONSULTS ARCHITECTS (1984) 1 KALR at 112,** held that,

"As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous eye endeavoring to pick holes, inconsistencies and faults in awards and with the objectives of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it."

With the above authorities in mind I have examined the grounds of objection to the award, and perused the award of the arbitrator. There is no complaint by the applicant that the arbitrator did not give the parties a fair hearing. Indeed there is specific evidence to show that the arbitrator did not act honestly, or acted in bad faith and with fraud. The onus is on the applicant to prove these ingredients. On the contrary, I find that the arbitrator considered the evidence and the submissions of both parties and extensively reviewed the same, giving reasons for the findings in the award.

Furthermore, the author **PC Markanda** (Supra at page 526) writes that,

*"**The Court will not take it upon itself the task of being a Judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion than the one arrived at by the arbitrator, but that itself is no ground for setting aside the award…"***

I find therefore that the applicants are merely aggrieved by the findings of the arbitrator, and are therefore inferring bias on the basis of the same.

The arbitrator gave reasons for his findings and therefore, even if the findings are unreasonable in the eyes of the applicant, or the court would have reached a different conclusion from that of the arbitrator, the court can not interfere with the award. The mere fact that the arbitrator found against the applicant is not a ground for imputing bias. The arbitrator reviewed all the evidence and the submissions, and gave reasons for his findings in the award and therefore, I find that the allegations of bias by the applicant are merely speculative and unfounded.

To my mind the applicant having been dissatisfied with the award of the arbitrator is merely attempting to have the court revisit the dispute, and re-evaluate the evidence, which the court can not do in an application of this nature. Ground one of the application therefore fails.

I will consider ground two and three of the application together, because they are similar.

Ground two and three: The arbitral award dealt with a dispute not falling within the terms of reference to the arbitration and that the arbitrator exceeded the scope of his mandate.

Counsel for the applicant submitted that the duty of the arbitrator is to decide the dispute submitted to him in accordance with the terms of reference. For this proposition Counsel relied on the case of **NUCC & TE V. UGANDA BOOKSHOP [1965] EA 539.** He submitted that, the parties agreed on the issues to be determined by the arbitrator, and did these did not include the issue of *"Who was responsible for the client supplied materials"*. Counsel for the applicant submitted that this issue was introduced by the arbitrator and objected to by the applicant, but the arbitrator decided the same, thereby exceeding his mandate. Furthermore, that the arbitrator exceeded his mandate when he awarded general damages of Ushs 10,000,000/= and USD 100,000 as un liquidated damages, which were outside the scope of remedies provided under the contract. Counsel for the applicant submitted that no extraneous matters falling outside the scope of the agreement can be referred to arbitration. He referred to the cases of **STATE OF UP V. RAM NATH INTERNATIONAL CONST PCT LTD AIR 1996 and SIMBAMANYO** for this submission.

On the other hand, counsel for the respondent submitted that the issue of client supplied items was introduced by the applicant through Mr. Arvin Verkaria the applicant's 1st witness in his witness statement, and further raised by the applicant's counsel in cross examination. Furthermore, that it is the applicant who adduced documents relating to client supplied materials and therefore, the arbitrator properly addressed the issue. Counsel for the respondent further submitted that the remedies granted in the award were prayed for by the respondent and therefore, the grant was within the mandate of the arbitrator.

I have considered the submissions and the authorities cited by both counsels in relation to this issue and I find as follows;

Section 34 (2) (a) (iv) of the Act provides that an arbitral award may be set aside by the Court only if;

"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"

In the case of **SIMBAMANYO ESTATES V SEYANI BROTHERS COMPANY (U) LTD (HCMA NO. 555 OF 2002),** Hon Justice Arach (as she then was) defines the term "dispute" with reference to the learned author **MARKANDA (supra)** as follows;

"…Under the law of arbitration a dispute means one party has a claim and the other party says, for some specific reasons that this is not the correct claim. This is a dispute. A dispute of this type requires that there should be a statement or proposition made by one side and there should be a denial or repudiation of that proposition by the other side."

The Judge further quotes the author at page 435 of **Markanda's** book where the learned author further writes 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"

The learned judge in the case of **SIMBAMANYO** (supra) held that the Court looks at the award first in order to define the dispute and the Jurisdiction of the arbitrator. If the award is not clear, then the Court may look at other sources as well including pleadings, and the agreement itself. The learned Judge took the view that since it is the award that is being challenged, it naturally should be the first point of reference. The pleadings and arbitration agreement can then be referred to in case of clarification. This also settles an argument by the respondent as to the admissibility of the record of proceedings attached the affidavit of rejoinder. This record is always a relevant document for a court when dealing with an application to set aside an Arbitral Award and I cannot see what prejudice it would have to a party who participated in the arbitration.

I have reviewed the claim of the claimant as set out in the award by the arbitrator. The claimant's claim is for the loss arising from breach of contract. Furthermore, the claimant in its claim prayed for the sum of USD 304,832 as special damages, general damages, and compensation for direct and indirect losses, interest and costs. The respondent on the other hand denied breach of contract and prayed for the dismissal of the suit and various remedies.

I have also perused the statement of claim and the respondent's reply to the claim and counterclaim. The facts giving rise to the claimant's cause of action, and the respondent's reply and counterclaim are as set out by the arbitrator in the award.

The applicant's argument is that the issue of responsibility for client supplied materials was never raised before the arbitrator by the parties. I have perused the award, and proceedings and I find that there were eight issues framed for determination by the arbitrator as follows;

1. **Whether pursuant to the building contract, the claimant executed and completed the works in time, and to the prescribed or reasonable standard, and handed over the project to the respondent.**
2. **Whether the respondent, in breach of the terms of the building contract refused or failed to pay and/or certify any amounts due and payable to the claimant.**
3. **Whether the claimant suffered any direct or indirect loss as a result of any breach of terms of the contract by the respondent**
4. **Whether the claimant carried out any unauthorized works and/or variations without the respondent's approval and if so whether the same resulted in unjustifiable contract overrun.**
5. **Whether the claimant was liable for delay in completion of the works and if so whether the respondent suffered loss by reason thereof.**
6. **Whether the claimant, in breach of the terms of the contract refused or failed to rectify defective and sub-standard work and if so whether the respondent suffered loss or incurred expenses by reason thereof.**
7. **Whether the parties conducted a joint measurement exercise.**
8. **What are the remedies available to the parties or either of them?**

These were the issues considered by the arbitrator in his award. The issue of client supplied materials was introduced by Geoffrey Ogwang CW2 in his testimony as a reason for the delay by the respondent. This to my mind was therefore addressed by the arbitrator in determining issue one and five relating to the delay in the completion of works, but not as a separate issue.

Clause 36 (1) of the contract provided that,

"any dispute or difference between the Employer or the Architect on his behalf and the contractor either during the progress or after the completion or abandonment of the works, as to the construction of his contract or as to any matter or thing of whatever nature arising there under or in connection therewith (including any matter left by this contract to the discretion of the Architect or withholding by the architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5) (a0 of these conditions or the rights and liabilities of the parties under clauses 25,26,33 or 34 of these conditions, then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties…"

To my mind the issue of delay and breach of contract was a dispute arising out of the contract; to be settled by arbitration under clause 36 (1) of the contract. The issue of client supplied materials was raised as a cause for the breach by the applicant. It therefore follows that this issue, having

arisen out of the contract, was within the mandate of the arbitrator to consider and therefore, the arbitrator did not exceed his mandate.

Furthermore, the reliefs granted by the arbitrator which included special and general damages, interest and costs were prayed for by the claimant/respondent in the pleadings and can not be said to be outside the scope of reference of the arbitrator.

In the premises, ground two and three of the application fail.

GROUND FOUR: The award is not in accordance with the Act.

Counsel for the applicant submitted that the award was not in accordance with the particular terms of the contract and ought to be set aside under the provisions of Section 28(5) of the ACA. Counsel for the applicant submitted that in the award, the arbitrator substituted the architect who was in charge of the project for a consultant (Quantity Surveyor) and the Schedule of defects for a technical audit, contrary to the terms of the contract and usages of the construction industry.

Counsel for the applicant submitted that Section 28 of the ACA requires the arbitrator to apply the rules of law applicable to the dispute and the terms of the contract, and the failure to do so vitiates the award.

On the other hand, counsel for the respondent submitted that the applicant did not in the application or in the affidavits provide any particulars to show the usage of trade applicable to the construction industry in Uganda or show how the arbitrator deviated from the same and this amounts to deviation from the pleadings. Counsel in this regard referred to the case of **NATHAN KAREMA V. AG (HCCS 1019 of 2004).** Counsel for the respondent submitted that the reference to the Quantity Surveyor was justified because the technical report contained the snag list which the quantity surveyor was qualified to certify since the Architect had already issued a certificate of practical completion and the works had substantially been completed.

On the issue of the trade usages Section **28 (5) of the ACA 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."

In the case of **CHEVRON KENYA LTD & ANOR V DAGARE TRANSPOTERS LTD (HCMA 490 of 2008),** I held that

*"**Trade usage is a term used in contract law to interpret ambiguous terms according to common business practices the parties should reasonably be able to rely upon."***

In that case I relied on the definition in BLACK'S LAW DICTIONARY 7th edition 1999 at pg 1539, which defines trade usage

"… as a practice or method of dealing having such regularity of observance in a region, vocation, or trade that it justifies an expectation that it will be observed in a given transaction; a customary practice or set of practices relied on by persons conversant in or connected with a trade or business."

In the further case of in **HARILAL V. STANDARD BANK [1967] EA 512 at 516 Sir Charles Newbold P** held that,

"As a trade usage may be described as a particular course of dealing between parties who are in a business relationship, which of course the dealing is generally known to all persons who normally enter into that relationship that they must be presumed to have intended to adopt that course of dealing and to have incorporated it into their contractual relationship unless by agreement it is expressly or impliedly excluded. Before a course of dealing can acquire the character of a trade usage it must first be so well known to the persons who be affected by it that any such person when entering into a contract of a nature affected by the usage must be taken to have intended to be bound by it; secondly be certain in the sense that the position of each of the parties affected by it is capable of ascertainment and does not depend on the whim of the other party; thirdly, be reasonable that is, that course of dealing is such that reasonable men adopt it in the circumstances of the case; and finally, be such as is not contrary to legislation or to some principle of law…A trade usage must be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well known and has been acted on generally by persons affected by it."

In this case however, no such evidence was adduced by the applicant, before the arbitrator to prove as a trade usage the roles of an 'Architect' and or 'Quantity Surveyor' in the construction industry. More importantly there was no evidence to show that a quantity surveyor could not make the Technical Audit Report. In my finding therefore, the applicant can not argue that the arbitrator failed to apply the terms according to the trade usage in the construction industry. This ground therefore also fails.

Final Result

Having found as above on all grounds the applicant's application to set aside the arbitral award fails and is accordingly dismissed with costs

Geoffrey Kiryabwire

Judge

Date: 20/02/13

20/02/13

9: 23 a.m.

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

- A. Rwakakoko for the Respondent
- H. Kigundu for the Appellant

In Court

- Director of Respondent – Yohan Van Hech
- Rose Emeru – Court Clerk

……..……
Geoffrey Kiryabwire
JUDGE

Date: 20/02/2013