THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT MISCELLANEOUS CAUSE NO. 20 OF 2014

(ARISING FROM ARBITRAL AWARD SERIAL 2 OF 2014)

IN THE MATTER OF THE ARBITRATION AND CONCILIATION ACT (CAP. 4)

VICTORIA SEEDS LIMITED ::::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

DECCAN LIMITED:::RESPONDENT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:

RULING

1. **Background:**

This application was brought under Sections 34(2) and 71(2) of the Arbitration and Conciliation Act (Cap. 4) and Rules 7(1), 8 and 13 of the Arbitration Rules (First Schedule to the Arbitration and Conciliation Act and it seeks one substantive order which is that the Arbitral award registered in this Court as Serial 2 of 2014 be set aside. The Applicant avers that it is entitled in law to a grant of the order.

2. **The Law:**

The question which is before this Honourable Court for consideration is whether pursuant to and as a matter of law contained in the afore cited provisions of the law upon which this application is brought the order sought can be granted by this court. The three (3) relevant statutory provisions under **The Arbitration and Conciliation Act, Chapter 4 of the Laws of Uganda** provide as follows:

Section 34(2):

"An arbitral award may be set aside by the court only if—

(a) The party making the application furnishes proof that—

(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;

(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."

Section 71(2):

"Until the rules committee makes rules of court to replace them, the rules specified in the First Schedule to this Act shall apply to arbitration in Uganda".

The following are provisions of the relevant rules under **The Arbitration Rules (First Schedule to the Arbitration and Conciliation Act.**

Rule 7. (1):

"Any party who objects to an award filed or registered in the court may, within ninety days after notice of the filing of the award has been served upon

that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested.

Rule 8:

The objections to the award and the cross objections (if any) shall thereafter be set down for hearing, and the original objector shall occupy the position of plaintiff and the other parties that of the defendants

Rule 13:

All applications for the appointment of or challenge to arbitrators, and all other applications under the Act, other than those directed by these Rules to be otherwise made, shall be made by way of chamber summons supported by affidavit.

The contentions leading to this application were argued substantially by counsels representing both the Applicant and the Respondent in their written submissions which are on record.

3. Applicant's inability to present its case:

It is contended on behalf of the Applicant that the Applicant was unable to present its case for it was closed out of the arbitration process. This is as contended to in paragraphs 10 and 11 of the Affidavit in ssupport of this application particulars of which state that the Arbitrator, Architect Robert Kiggundu conducted the arbitration proceedings in the absence of the Applicant in spite of the Applicant's numerous efforts to attend the such proceedings as by the Applicant's letters of 17th January 2014, 6th February 2014 and 3rd March 2014 which are attached to this Application and marked as **"A(i)"**, **"A(ii)"** and **"A(iii)"** respectively. Therefore it is contended that since the arbitrator prevented the Applicant from presenting its case to the Arbitrator, the arbitrator proceeded to make his award which must have been as a result of the arbitrator only getting information presented to him by the Respondent without any input from the applicant this action should be seen to be against the cardinal principle of the right to a fair hearing enshrined in Articles 28 and 44(c) of the Constitution of the Republic of Uganda. On this contention, the proceedings of the arbitration indeed show that this contention is

not without basis true for the perusal of the arbitration report at pages 4 and 5 show the process which was adopted by the arbitrator and it would appear that whereas there were several reminders to the Arbitrator that that the Applicant had not received any claim from the Respondent, the Arbitrator ignored the reminders and proceeded to adjudicate upon the issue at stake merely based on the information availed to him and which was on the file before him without the actual hearing the parties themselves. This procedure was strange for not only does the law require that a claim be ascertained but that parties have the right to be heard before an arbitrator and indeed no substantial reason was cited as to parties were denied audience before the arbitrator to present the side of the story. It is aapparent that the arbitrator was in a hurry to conclude the matter yet in his hurry he had not taken into account that not only was there not substantial claim before him but that even the period provided for by the law for him to handle the arbitration had since elapsed but proceeded as if no legal framework guided his work and thus eventually closed the Applicant out of the whole opportunity to present its part of the story yet equity requires that each party

must be heard thus violated the principle *alterem audi parte* in addition to breaking the enshrined constitutional tenets which guaranteeing parties the right to be heard.

Thus having considered the manner with which the arbitration process was conducted, I would find that the Applicant was denied the right to a fair hearing which right is a non derogable as enshrined in the Constitution of the Republic of Uganda making the eventual findings of the arbitrator to be one arrived at without due process thus illegal.

4. Evidence partiality of the arbitrator:

The second matter raised in this application by the Applicant was that there was evident partiality on the part of the Arbitrator in that the arbitration proceedings was marred with irregularities and illegalities for neither did any of the parties file their statement of claim or defence as required under **Section 23(1) of the Arbitration and Conciliation Act** yet the arbitrator proceeded to handle the matter as these were true. **Section 23(1) of the Arbitration and Conciliation Act** provides that;

> **"(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the**

claimant shall state the facts supporting his or her claim, the points at issue and the relief or remedy sought, and the respondent shall state his or her defence in respect of these particulars, unless the parties have agreed as to the required particulars of such statements."

It is apparent to me that it is a mandatory requirement that parties must file in the claim or defence and any non-compliance would affect the legitimacy of the resultant award. Additionally, **Section 25(a) of the Arbitration and Conciliation Act** provides that;

"Unless agreed by the parties, if, without showing sufficient cause—

(a) the claimant fails to communicate his or her statement of claim in accordance with section 23(1), the arbitral tribunal shall terminate the arbitral proceedings"

This section mandatorily requires that where a statement of claim was not filed then the arbitration proceedings must end. The usage of the word "shall" indicates that there can be no

alternative other than to obey the legal requirement. The fact is that this anomaly was drawn consistently to the attention of the Arbitrator by the Applicant but the Arbitrator consistently ignored this requirements as can be seen from the letter of the Applicant of 3rd of February 2014 attached to this application and marked ***"B"***. This belied the very essence of arbitration as a dispute resolution mechanism which cannot be resolute unless parties to it participate to enable the presiding Arbitrator reach a meaningful conclusion to the dispute placed before such an arbitrator for **Halsbury's Laws of England 4th Edition, Vol. 2, Para. 501** cited in H. K. Saharay**, "Law of Arbitration and Conciliation",** Eastern Law House, New Delhi: 2001 page 3, defines arbitration as;

> **"…the reference of dispute or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a Court of competent jurisdiction."**

Therefore for the Arbitrator to ignore and thus fail to conduct the proceedings in an impartial and fair went to the root of the matter and thus did defeat the purpose for which arbitration as a

mechanism for dispute resolution was legislated making the overall behavior of the arbitrator to be suspect since no justifiable reason at all was given for ignoring the clear provisions of the law. I do not find in the instant matter that the parties before the arbitrator opted not to participate by themselves or through any of their negligent acts and thus I would find that the Applicant has proved that the Arbitrator's conduct was not impartial as required as his conduct of the process was illegal and therefore did unnecessarily lock out the Applicant from the proceedings which it was entitled to by law.

5. <u>The arbitral award not being in accordance with the act:</u>

The other contention raised by the Applicant was that the Arbitral award made on the 10th March 2014 was not done in accordance with the law for not only was the arbitral award made out of a flawed and an illegal proceedings but was made nine (9) months after the Arbitrator was appointed contrary to the provisions of Section 31(1) of the Arbitration and Conciliation Act which provides that;

"The arbitrators shall make their award in writing within two months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission…"

This provision of the law is couched in mandatory terms. From the proceedings of the arbitration process, it is evident that Architect Robert Kiggundu, the Arbitrator in this matter was appointed by the President of the Uganda Society of Architects Dr. Kenneth Ssemwogerere on 24th June 2013. He went on to make his award on the 10th March 2014 which was a period of nine (9) months after his appointment to act as arbitrator in the matter. The fact that he made an award nine (9) months after his appointment was not only latently a delay in conducting and completing the arbitration process but was clearly outside the very provisions of the law which requires such proceedings to be concluded within two months after the entering of the reference and thus would make it not only illegal but untenable and unenforceable.

Thus that being so this court would proceed to set aside the award on that basis that it was made well outside the legal period

provided for by the Arbitration and Conciliation Act which I do would accordingly do so.

6. Orders:

In the final analysis , as a result of the apparent illegality on the face of the record having come to my attention , I find that there was never a competent arbitration process before the Arbitrator for which the arbitrator could proceed and subsequently make his award as he did and thus this application for setting aside the Arbitral Award registered in this Court as Serial 2 of 2014 would succeed in total is granted for the reasons given above with orders that the President of Uganda Society of Architects being directed to appoint afresh an arbitrator who will handle the dispute herein between the parties in accordance with the provisions of the Arbitration and Conciliation Act , Chapter 4 of the Laws of Uganda.

The parties herein would also bear own costs of these proceedings.

I do so order accordingly.

Henry Peter Adonyo

Judge

21st day of April, 2015