THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISC. CAUSE No.17 of 2021

APPLICATION FOR INTERIM MEASURES OF PROTECTION UNDER THE ARBITRATION AND CONCILIATION ACT CAP 4

GREAT LAKES ENERGY COMPANY NV:::::::::::::::: APPLICANT

VERSUS

1. **MSS XSABO POWER LIMITED**
2. **BRYAN XSABO STRATEGY CONSULTANTS (U) LTD**
3. **MOLA SOLAR SYSTEMS (U) LTD**
4. **CONSICARA GLOBAL INVESTORS LTD**
5. **DR. DAVID ALOBO::RESPONDENTS**

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

[1] This is a ruling on an application brought under Section 6 of the Arbitration and Conciliation Act Cap 4 and Rule 13 of the Arbitration Rules, and Section 33 of the Judicature Act for orders that;

1. Interim measures of protection be issued against the respondents for orders that;

(a) a mandatory injunction doth issue compelling the respondents to provide the applicant with bank statements for all bank accounts held by the 1st and 2nd respondents and any other bank account into which any sums from Uganda

Electricity Transmission Company Limited (UETCL) payable to the 1st respondent have been paid:

i. from 30th December 2018 to the date of the order, within 14 days, and

ii. from the date of the order, within 7days of any such statement being received and in any event within 7 days of the end of each calendar month;

(b) a mandatory injunction doth issue compelling the respondents to account for all funds which the 1st respondent has received from UETCL from 30 December 2018 due to date within 14 days of the order;

(c) a mandatory injunction doth issue compelling the respondents to procure that UETCL make all payments to the 1st respondent only to, or through, UGX Account No. 01063626448460 in the name of MSS Xsabo Power Limited held at DFCU Bank Ltd, Acacia Avenue (Mall) Branch, Kololo until final determination of LCIA consolidated arbitration No. 204602 at the London Court of International Arbitration;

(d) a temporary injunction doth issue to restrain the respondents either by themselves or through their authorized officers and agents from accessing and utilizing funds remitted by UETCL into any bank account of the 1st respondent including but not limited to Ugx Account No.01063626448460 and USD Account No. 02063616455284 both in the name of MSS Xsabo Power Limited held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo without the consent of the applicant until final determination of LCIA Consolidated Arbitration No. 204602 at the London Court of International Arbitration provided that the 1st respondent may access and or utilize an amount not exceeding US Dollars 30,000 only in each calendar month to meet its necessary operational expenses as certified by the 1st respondent and consented to by the applicant;

2. Costs of this application be provided for.

[2] The background to this matter is that the respondent entered into a contract of generation and sale of solar power with Uganda Electricity Transmission Company (UETCL) and in order to finance the power

project, the 1st respondent scouted for a partner to provide liquidity for the project. The 1st respondent was then introduced to the applicant, by a one Humphrey Ndegwa Kariuki and subsequently the applicant and respondents entered into an investment agreement on 30/04/2017, amended by two addenda dated 16/11/2017 and 22/03/2018. According to the investment agreement, the applicant was to carry out the engineering procurement and construction work and then invoice the 1st respondent for the same. That contrary to the said investment agreement, the applicant sourced another company IMMODO Power Africa Ltd, to do the said work and invoiced the 1st respondent for USD 24,500,000 which according to the 1st respondent later found out was later found to be false. That IMMODO Power Africa Ltd was supposed to do the work for 18,050,000 USD. Further, that the 1st respondent also found out that the applicant through one of its directors Humphrey Ndegwa Kariuki had instructed IMMODO Power Africa Ltd to misrepresent the price to the 1st respondent in order to defraud the 1st respondent.

[3] That as a result of the said alleged fraudulent actions of the applicant, USD 3,089,235 was wired to Long Red Technology Company Limited a company in which Humphrey Ndegwa Kariuki and his daughter Nyawira Wangari Kariuki were beneficial owners. The respondents contend that this had prompted the suspension and eventual revocation of the investment agreement in order to compel the applicant to come clean. Following the above actions by the 1st respondent, the applicant filed arbitration claims No. 204602, 204603, 204604, 204605, 204606, 204607, 204608 and 204609 which were later consolidated into LCIA Consolidated Arbitration No. 204602

before the London Court of International Arbitration challenging the suspension and revocation of the investment agreement as well as violation of its rights as a shareholder. It is worth noting that having been concluded in 2018, regular payments have since been made to the project / 1st respondent by UETCL. However, the applicant contends that it has been denied access to, visibility and control of the bank accounts yet this was supposed to be done by a change of bank mandate of the 1st and 2nd respondents by the 2nd to the 5th respondents. The respondent opposed the application and raised a number of preliminary objections.

[4] I find it imperative to bring into purview some of the relevant provisions of the law to this dispute. Section 6 of the Arbitration and Conciliation Act, Cap 4 under which this application is brought is to the effect that;

> ***Interim measures by the court.***
>
> *(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.*
>
> *(2) Where a party applies to the court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.*

[5] While Rule 13 of the Arbitration Rules states thus;

> *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.*

[6] Section 33 of the Judicature Act Cap 13 is couched in the following terms;

33. General provision as to remedies.

The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.

[7] Before entertaining the main application I shall first deal with the preliminary objections raised by the respondent.

(a) That the applicant lacks locus to bring this application. Counsel submitted that the applicant has no *locus standi* to sustain an action before this court because it is not a legally recognized entity in Uganda i.e not registered and incorporated in Uganda as per Sections 251, 252, 253 and 260 of the Companies Act 2012. Counsel cited the case of **Abdulrahman Elamin Vs Dhabi Group and Others C.A.C.A No.215 of 2013** to support that position; specifically pages 8 and 9 and it reads thus;

"Regarding the legal personality of the 1st respondent, the trial Judge held that Dhabi Group which is described as a United Arab Emirates based conglomerate lies outside the territorial jurisdiction of the Uganda High Court. The Judge further held that Dhabi Group is not registered under the laws of Uganda and so it will be difficult to find it in the event of the case being decided against it. The law is that if a company is not incorporated in Uganda, as it is alleged to be, then, that means that it does not exist in Uganda as a body corporate. In the persuasive Kenyan

*case of the **Fort Hall Bakery Supply Co. Vs Frederick Muigai Wangoe [1959] 1 EA 474 (SCK)**, it was held that a non-existent plaintiff is incapable of maintaining an action and therefore the Court would not allow the action to proceed thus striking it out. The question of whether the 1st respondent exists can be considered from the pleadings and its annexures. However, the 1st respondent's legal existence in Uganda is not shown. We accordingly uphold the trial Judge's finding that the 1st respondent does not exist within the Court's jurisdiction.*

[8] Section 251 of the Companies Act No.1 2012 states thus;

251. Applications of Section 252 to Section 260.

"Sections 252 to 260 shall apply to all foreign companies, being companies incorporated outside Uganda which, establish a place of business in Uganda and companies incorporated outside Uganda which have, established a place of business in Uganda and continue to have a place of business in Uganda."

The subsequent sections then talk about the pre-requisites for such a company to maintain a place of business in Uganda. Essentially, what is required is for the company to present and register documents pertinent to its operations and not a fresh registration of the company since the same is already legally incorporated.

[9] Wamala,J in **Krone Investments (U) Ltd Vs Kerilee Investments Limited, M.A No. 306 of 2019** stated thus;

"Section 252 of the Act provides for documents to be delivered to the Registrar for purpose of registration by a foreign company that establishes or wishes to establish a place of business in Uganda. Under Section 253(1) of the Act, upon registration of the documents specified in Section 252, the Registrar shall issue a certificate signed by him or her that the company has complied with that section, and that certificate shall be conclusive

evidence that the company registered as a foreign company under this Act. It is clear from the above provisions that the registration envisaged under the cited provisions of the Companies Act is not for purpose of creating legal personality but for purpose of establishing a place of business in Uganda. The Companies Act acknowledge that the company in issue is already incorporated but because it wishes to establish a place of business in Uganda, it has to be registered as a foreign company. Most importantly, the cited provisions do not say, either expressly or by necessary implication, that every company that wishes to transact in Uganda must undertake the said registration; all it says is, if the company wishes to establish a place of business, then it must register. As such, non-registration under the said provisions does not disempower a duly incorporated company from transacting business in Uganda and from bringing or maintaining a court action in Uganda. Finding otherwise would be most absurd in light of the demands of international trade."

[10] The respondents had cited the case of **Abdulrahman Elamin Vs Dhabi Group & 2Ors** (supra) to support their objection. However, it is noteworthy to state that the Court in **Krone Investments** (supra) distinguished the above case and position as relied on by the respondents. The court had this to say;

*"To my mind, the reason for the finding on absence of liability on the part of **Dhabi Group** had more to do with privity of contract than its legal existence or capacity to sue and be sued. This can be ascertained from the finding of the court that Warid Telecom International LLC was the correct party to be sued. Warid Telecom International LLC was not a registered company in Uganda but it could be sued in the matter because it was the*

correct party according to the contract. Secondly, there is no finding by the Court of Appeal in the cited decision to the effect that legal existence of a company incorporated elsewhere depends upon its being registered under Part VI of the Companies Act or that the registration under Part VI of the Companies Act bestows legal personality upon a company. In my view, therefore, the decision in ***Abdulrahman Elamin Vs Dhabi Group & 2 Others (supra)*** *cannot be a basis for misconceiving the clear provisions of Part VI of the Companies Act or for reading into the said provisions incidence that is not created by that part of the law."*

[11] I cannot agree more with this reasoning which is applicable on all fours with the question at hand. Clearly, the facts in the **Dhabi Group** case cited by the respondents are not similar to those in this case. Therefore applicant herein is not without *locus standi* to bring or institute this application. The preliminary objection was misconceived. It is accordingly overruled.

[12] **(b) Lack of jurisdiction to entertain applications for interim reliefs that can be granted by the LCIA.** Another preliminary objection has been raised to the effect that this court lacks jurisdiction to entertain this application for interim reliefs that can be granted by the London Court of International Arbitration (LCIA) – Art. 25.1 Clause (ii) and (iii). See paragraphs 5, 24, 25, 26, and 27 of the affidavit in reply of Mr.Makada Fred. It is indeed true that under Art. 22.2 of the LCIA Rules once the parties agreed to arbitration under the pertinent arbitration agreement(s) they shall be treated as having agreed not to apply to any state court or other legal authority for any order available from the arbitral tribunal when formed under Art. 22.1, ***save with written***

agreement of the parties. Art. 25.3 provides the other two exceptions where a party can go to the local courts for remedies that are available at the LCIA arbitral tribunal as:

(i) where the arbitral tribunal has not yet been set up, and

(ii) where the arbitral tribunal has been formed but the LCIA tribunal due to exceptional circumstances has authorized the parties to run to the local courts.

[13] **Art 25.1 (i), (ii) and (iii) of the London Court of International Arbitration Rules state thus:**

> *25.1 The Arbitral Tribunal shall have the power upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances:*
>
> *(i) to order any respondent party to a claim, counterclaim or cross-claim to provide security for all or part of the amount in dispute, by way of deposit or bank guarantee or in any other manner;*
>
> *(ii) to order the preservation, storage, sale or other disposal of any monies, documents, goods, samples, property, site or thing under the control of any party and relating to the subject- matter of the arbitration; and*
>
> *(iii) to order on a provisional basis, subject to a final decision in an award, any relief which the Arbitral Tribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties.*

[14] Art 25.3 also reads;

25.3 A party may apply to a competent state court or other legal authority for interim or conservatory measures that the Arbitral Tribunal would have power to order under Article 25.1: (i) before the formation of the Arbitral Tribunal; and (ii) After the formation of the Arbitral Tribunal, in exceptional cases and with the Arbitral Tribunal's authorization, until the final award. After the Commencement Date, any application and any order for such measures before the formation of the Arbitral Tribunal shall be communicated promptly in writing by the applicant party to the Registrar; after its formation, also to the Arbitral Tribunal; and in both cases also to all other parties.

[15] I have once again diligently perused the pleadings filed before me and most especially the remedies sought by the applicant before the LCIA. I am indeed in agreement with the respondents' submissions that prayers 1(a), (b) and (c) sought in this application are live issues before the tribunal. Of importance to note here is that the respondent does not contest the prayer under 1(d). This is clearly exhibited in paragraph 9 and 10 of the respondent's submissions where they confirm the list of issues pending determination before the tribunal as those in prayers 1(a), (b) and (c) of the application. For clarity, prayer 1(d) is none of them. Basically, the prayer is for an order that all the monies remitted into the first respondent's accounts (**Ugx Account No. 01063626448460 and USD Account No. 02063616455284 in the names of MSS Xsabo Power Limited**) at DFCU bank Ltd by UETCL continue to be paid on the same accounts as is the case but only be spent with the consent of the applicant or until the final determination of the consolidated arbitration No. 204602 at LCIA and provided the first respondent is allowed to access and utilize an amount not

exceeding 30,000 USD each calendar month for purposes of meeting the necessary operational costs. It is worth noting that this order sought is not a payment to any of the parties to the arbitral proceedings but payment of project funds into an already nominated account. The prayer does not also fall into the category spelt out in Article 25.1 (i), (ii) and or (iii). It is also true, as submitted by Counsel Wabwire, that the interim remedy of injunction sought under prayer 1(d) of the application is not 'to similar effect' as those prayers listed under Art. 25.1. This being the case then the above cited provisions spelling out the requirements or exceptions under Arts 22.2 and 25.3 of the LCIA Rules wouldn't be applicable to this particular prayer 1(d). In short, the applicant didn't need to satisfy any of those exceptional circumstances in order to be able to access the local courts for a remedy such as the one under prayer 1(d).

[16] It should perhaps be added that since the subject matter (money), the business and parties are in Uganda where the contracts were executed and continue to be implemented under Ugandan law, it would be more prudent and convenient for interim or preservatory remedies to be sought and obtained from the local courts which can also easily monitor and implement the orders issued by court. Only the main questions in the case would then be left to be handled by the International Tribunal seated abroad. The court in the English case of **U & M Mining Zambia Limited Vs Konkola Copper Mines Plc [2013] EWHC 260 (Comm)** seemed to support this view when it examined the question whether English courts have exclusive jurisdiction over the grant of interim measures in support of an arbitration seated in England. The court found that all English courts would have primary

jurisdiction to hear applications in support of arbitral proceedings, parties may never the less seek interim relief or conservatory measures from other national courts, where, for practical reasons, the application can only sensibly be made. On the whole and following the above discourse, I reject and overrule the above preliminary objections. I find this court to be clothed with the requisite jurisdiction to entertain the application

[17] **(c) This application is barred by the law on *lis pendis*.** The respondent submitted that the application offends the *lis pendis* rule since the matters herein are substantially in issue with matters in **Bryan Xsabo Strategy Systems Uganda Limited and ors Vs Great Lakes Company NV, Company Cause No. 13 of 2020** filed before the Civil Division of the High Court and are also already before the London Court of International Arbitration. Counsel relied on Section 5 and 6 of the CPA. Section 5 states thus:

> ***5. Courts to try all civil suits unless barred***
>
> *Any* court *shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognisance is either expressly or impliedly barred.*

[18] Section 6 of the CPA states thus;

> **6. Stay of Suit**
>
> *No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed. Furthermore,*

the explanation of the above position of the law as stated in the CPA is that The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in that suit in the foreign court.

[19] The *lis pendis* rule which Counsel is relying on basically means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or previously instituted suit or proceeding is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed. A perusal of the record clearly shows that **Bryan Xsabo Strategy Systems Uganda Limited and ors Vs Great Lakes Company NV, Company Cause No. 13 of 2020** sought two orders vide setting aside a decision of the Registrar General and a declaration of invalidity of an investment agreement. In addition, the grounds stated therein relate to shareholding and investment agreements. On the contrary, this application relates to interim protective measures of project funds pending conclusion of a consolidated arbitral proceeding in the LCIA. As such the two are not directly or substantially linked.

[20] A reading of the application in **Company cause No. 13 of 2020** (supra) is proof that there is nothing substantially similar to what is being handled herein. The above strictly relates to rectification of the company register and the process of hearings before a Registrar. As such this preliminary objection must also fail. Even the ongoing arbitration proceedings in the London Court of International Arbitration, as already discussed herein above, cannot be said to be substantially

similar to the proceedings at hand as envisaged in Section 5 and Section 6 of the CPA. See **Springs International Hotel Vs. Hotel Diplomate Ltd and Anor, Civil Suit No.227/2011**. Consequently, this preliminary objection must also fail. It is accordingly overruled.

[21] **(d) The affidavit in support by Michael Jon Kearns offends Order 19 rule 3 of the Civil Procedure Rules which bars averments based on beliefs save in interlocutory applications.** Counsel for the respondent submitted that this being a Miscellaneous Cause and not a miscellaneous Application in furtherance of a suit already filed in court, paragraphs like 18 in the applicant's affidavit in support, based on beliefs invalidate the whole affidavit and render it inadmissible. In reply thereto Counsel for the applicant stated that the deponent's beliefs were not a matter of fact but that the deponent believes the advice of Counsel to be true and correct.

[22] Order 19(3) of the Civil Procedure Rules states thus;

> ***Matters to which affidavits shall be confined***
>
> *(1) 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.*
>
> *(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents shall, unless the court otherwise directs, be paid by the party filing the affidavit.*

[23] The matters that Counsel for the respondent refers to as falsehoods cannot be determined as such at this point in time since they are still

in issue in the London Court of International Arbitration. Until the arbitrating tribunal concludes its task we are unable to tell whether the impugned paragraphs are falsehoods or not. In the same vein, the alternative proposal by the respondents to severe those paragraphs from the affidavits would not be prudent. This preliminary objection too is rejected.

General Analysis of the Application

[24] Generally, what filters through from these pleadings is that a dispute has arisen and it originates from the suspension and eventual revocation of the investment agreement between the parties by the 5th respondent. The undeniable fact which is moreover at the center of this transaction is that the applicant passed on money to the respondent of which nothing has been recovered yet. At this point in time it is immaterial whether the funds in question were an investment as contended by the applicant or a loan as submitted by the respondent. The determination of the purpose for which the money was given is one of the main issues before the Arbitration Tribunal in London and it seems to be filtering through the different disputes filed before the national courts e.g **Bryan Xsabo Strategy Systems Uganda Limited and ors Vs Great Lakes Company NV, Company Cause No. 13 of 2020** filed before the Civil Division of the High Court; criminal investigations and charges instituted and later withdrawn by the DPP as well as the current application.

[25] It clearly appears to this Court that the issues being dealt with and the preliminary objections raised lie at the periphery of the main question in this dispute. In my view, most of the questions raised are going to be dealt with by the Arbitration Court in London but the justice of the

case would dictate that the parties are assisted to find some workable solution before the conclusion of the Arbitration in London. I say this bearing in mind also that it would not make business and or financial sense to interrupt the operations of the project of generating solar and wind power by the respondent. This is what generates income for the company.

[26] I have in addition studied the pleadings and also listened to counsel and taken note of the fact that the arbitration proceedings are progressing on schedule with the main hearing slated for 15th to 23rd of November 2021, meaning that within a few months from now a final decision is going to be reached. As such, I am prepared to render a decision in this matter which will give justice at the same time without jeopardizing or interrupting the operations of the project. That being the case, I do not find it imperative to discuss in detail the other prayers and or issues and orders sought by the applicant under 1(a), (b) and (c) given that the same are about to be finally and conclusively dealt with in the next few months but in any case, as already ruled, this court has no jurisdiction to deal with prayers 1(a), (b) and (c) in the application.

[27] From the submission of both Counsel it became clear that the business was doing well and UETCL buys the generated power from the 1st respondent and continues to pay about USD 300,000 for it on a monthly basis. The respondent's Counsel assured court that those funds were available and in safe custody and that the said information had been transmitted to the applicants and it is therefore within their knowledge. The assertion regarding knowledge of existence of the money was however denied by the applicant. So, the applicant's

contention is that they have been denied visibility and control of the accounts on which those funds are deposited. This also means that going by the respondent's submission, the money is available but only awaiting the results of the arbitration process on how to deal with the funds. It is also beyond the ground of contention that the arbitration in London is majorly concerning the USD 6,450,000 which Counsel for the respondents contends it was never received by his client. In other words, and contrary to the applicant's contention, the respondent's admission is only in respect of the USD 18,050,000.

[28] Be that as it may, it is immaterial at this point in time to make other determinations in this application since that question has been left to the Tribunal which has not yet concluded it. Therefore, even if we are to go by the USD 18,050,000 which is not disputed, the said money was used to capitalize the business which is a going concern and from which power sales have been effected and monies continue to be realized by the respondents. I further note that both parties, save for the operational expenses, don't intend to expend the money until their relationship as guided by the investment agreement has been restored. The restoration of the said relationship will largely be brought about by the award to be made by the Arbitration Tribunal. In such circumstances therefore, dealing with all the issues raised in this application by the parties would be of no help. Only one issue, in my view would be beneficial and make more sense to the parties as its resolution would go direct to the root of the main question in their current dispute. The rest of the questions are yet to be answered or resolved by the Tribunal. For engaging in unnecessary litigation especially in matters on the periphery of the heart of the dispute, which

has now been properly identified, would cost the parties a lot of resources especially in terms of time and money and also affect the business negatively.

[29] The respondent's Counsel also submitted in respect of the orders sought in paragraph 1(d) that the 1st respondent spends USD 25,000 monthly on operations and maintenance of the plant, USD 6,000 on the salary of the 5th respondent monthly and an undisclosed sum on salaries of staff, legal and administrative costs.

[30] The pertinent clauses of the Operation and Maintanance Agreement Pilot Solar Power Generation Complex at Kabulasoke (Gomba District), Uganda between MSS Xsabo Power Limited and IMMODO Power Africa Ltd states thus;

> ***Clause 15.4 Indexation***
>
> ***(a)****The fixed fee and any other amount due to this agreement is stated to be escalated in accordance with this clause 15.4(together, the "Adjusted Payments") and shall be indexed annually on the first day of each contract year throughout the term of this agreement and any extensions thereof in accordance with this clause 15.4, starting on and from the date of this Agreement.*
>
> *(b) On each such date referred to in clause 15.4(a), the Adjusted Payments shall be subject to adjustment on each anniversary of the Agreement, commencing with the first anniversary of the Agreement, on the basis of the indexation according to the consumer price index for the U.S. Bureau Labor Statistics; provided that in no event shall the fixed fee, as adjusted, be less than the immediately preceding initial fixed fee.*
>
> ***Clause 1.1***

Fixed fee means Three Hundred and Sixty Thousand USD ($360,000) per contract year (but exclusive of VAT), and which amount shall be pro-rated in respect of any Contract Year which is for less than 12 months. Such fixed fee may be annually escalated in accordance with clause 15.4 (Indexation).

[31] It has been submitted by the respondents that given the expenses involved in the operations yet the fixed fee was prescribed way back in a document signed on 29/12/2018 a sum of 30,000 USD per month i.e. *(USD 360,000 divide by 12months months=30,000USD)* was no longer sufficient to pay for all the expenses involved in running the business. It is in the same vein that the applicant while relying on the above provisions (Clauses 1.1 and 15.4) proposed an increment from 30,000 to USD 50,000 per month, to be able to cater for all the expenses until the decision of the Arbitration Court is rendered. The respondents did not contest this proposal. Bearing in mind the above submissions I am of a considered view that since the figure was determined way back in 2018 yet the expenses, although estimated and not necessarily ascertained, seem to be escalating as explained by the respondent and yet it is crucial that the operations of the business must continue running, whatever the circumstances, a sum of USD 60,000 per month would be appropriate. Needless to state however, that the said sums should be accounted for at the end of it all.

[32] In addition, it should be emphasized that the fixed fee is not cast in stone. For the respondents are still at liberty to put up a case for adjustment of the fixed fee in case there is a good cause for instance as the Electricity Regulatory Authority (ERA) has instructed the 1st respondent to build a control center for the plant which is to cost USD

30,000. This is a one off expenditure for which a special request could be made and the money released from the proceeds of sale of the power by the company. In the circumstances therefore, it will be prudent and indeed in the interest of both parties to have all the other un-utilized funds (payment from UETCL), now standing on the accounts in the names of the 1st and 2nd respondents and related future payments, to be kept on the nominated bank accounts until the arbitration in London is concluded and orders regarding the utilization of the said funds issued.

[33] It is highly believed that the above action will not prejudice any party since none of the parties at the moment is utilizing that money which is only kept in the bank but will instead give confidence to all the concerned parties as they patiently await the arbitral award. All these are temporary or interim protective measures which I feel would in all fairness serve the justice of the case in the meantime. The maintenance and safety of the funds on such a neutral account will also ensure transparency especially regarding the inflow and outflow and general management of the proceeds of the sale of power by the respondents to avoid any suspicion. Needless to emphasize that each one of the parties has an interest in those funds.

[34] The applicant is seeking the remedy of temporary injunction or interim measures of protection. According to the case of **Rashida Abdul Hanali & Anor Vs Suleiman Adirisi M.A No.0011 of 2017**

> *"The purpose of granting a temporary injunction is for preservation of the parties' legal rights pending litigation. The Court does not determine the legal rights to the property (in this*

case money) but merely preserves it in its current condition until the legal title or ownership can be established or declared (in this case by the arbitral tribunal)."Emphasis mine.

[35] With the foregoing discussion I find the balance of convenience for the issuance of a temporary injunctive order to be in favour of the applicant. **See American Cyanamid Vs Ethicon Limited [1975] AC 396.** In case the applicant loses the arbitration it can easily compensate the respondents in damages without fail because it is not in dispute that the applicant capitalized the respondent's business with 18,050,000 USD which has not been refunded. See **Zam Nambi Vs Bujingo Ayub &32 Ors M.A No.1013 of 2015**. It is also highly believed that if the temporary injunction is not issued at this point in time and the status quo maintained (monies paid by UETCL preserved) the applicant might run a risk of winning the award which will be rendered nugatory by reason of the funds not being available. So, the imminent danger here is that there is a high likelihood of the respondents who are fully in charge of the funds paid by UETCL withdrawing all the money from the accounts before the Tribunal award is rendered. In that case the applicant will have suffered irreparable loss given that it is the applicant's money that was used to capitalize the business. I should also add that apart from Counsel stating that the respondents were affluent and would therefore be in a position to adequately compensate the applicant in damages in case it emerged successful in the arbitration, he did not demonstrate to court how wealthy and capable the respondents are. See **Kiyimba Kaggwa Vs Hajji Abdul Nasser Katende (1985) HCB** and **Noor Mohamed Janmohamed Vs Karamali Virji Madhani (1953) 20 EACA 8.**

[36] It is contended by the applicant that costs of this application should be provided for while the respondent prays for a dismissal of the application with costs. According to Section 26 CPA unless there are good reasons or justifications to decide otherwise, the successful party should be awarded costs. See **Kiska Ltd Vs De Angelias [1969] EA 6**. The award of costs is generally in the discretion court. The respondent was successful on some of the issues/questions. For this reason and considering the unique facts and circumstances of this case, the interest of justice would dictate that each party bears its own costs.

[37] In conclusion therefore, I find this application meritorious and save for prayers/orders 1 (a), (b) and (c), **prayer 1(d)** ***(for temporary injunction or conservatory measures or interim measures of protection)*** is hereby granted pursuant to Section 98 CPA, Section 33 of the Judicature Act and Section 6 of the Arbitration and Conciliation Act in the following terms:

a. **that the respondent and or their respective agents either by themselves or through their authorized officers and agents be restrained from accessing and utilizing funds remitted by UETCL into any bank account of the first respondent including but not limited to *Ugx Account No.01063626448460 and USD Account No. 02063616455284 both in the name of MSS Xsabo Power Limited held at DFCU Bank Limited, Acacia Avenue (Mall) Branch, Kololo* without the consent of the applicant until the final determination of the London Court of International Arbitration LCIA Consolidated Arbitration No. 204602.**

b. that the 1st respondent may access and or utilize an amount not exceeding USD 60,000 only (of the funds in 'a' above) in each calendar month to meet its necessary operational expenses.

c. that each party shall bear its own costs

I so order

Dated, signed and delivered at Kampala this 16th day of August, 2021

Duncan Gaswaga

JUDGE