THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0076 OF 2021

5

PRISM CONSTRUCTION COMPANY LIMITED ……………………… APPLICANT

VERSUS

THE ATTORNEY GENERAL ………………………………………… RESPONDENT

10 **Before: Hon Justice Stephen Mubiru.**

RULING

a. Background.

By a contract dated 27th January, 2020 the applicant agreed with the Ministry of education to
15 construct facilities at a number of selected technical institutes in Uganda, including the Uganda Technical College, Bushenyi. During the execution of that contract, differences arose between the parties regarding the slow progress of works and quality of materials used, whereupon on or about 25th October, 2021 the Ministry made a decision that the contract had expired and would not be renewed, which decision the applicant was dissatisfied with. The applicant then triggered the
20 dispute resolution mechanism under the contract by writing to the Uganda Institution of Professional Engineers requesting for the appointment of an adjudicator. The adjudicator delivered his findings on 19th October, 2021 but before they could be implemented, the Ministry sought to evict the applicant from the site. In the meantime, the applicant submitted its claim for shs, 2,620,090,102/= and a certificate for shs. 2,223,454,458/= for the works done that far. Instead, the
25 Ministry instructed the Resident District Commissioner to cause the applicants eviction from the site. The applicant protested this on account of the fact that an inventory of the works done and value of materials at the site was yet to be taken, and that the dispute submitted to adjudication had not been resolved yet. The Ministry indicated it would proceed to cash the advance and performance guarantees, and would claim liquidated damages as from 5th August, 2021. The
30 applicant then filed this application seeking interim protective measures.

b. The application.

The application is made under the provisions of section 6 of *The Arbitration and Conciliation Act,* section 98 of *The Civil Procedure Act* and Order 52 rule 1 of *The Civil Procedure Rules*. The applicant seeks an order restraining the Ministry of Education and Sports, its officials, agents and nay person acting on the Ministry's instructions from evicting the applicant and its employees from the construction site located at the Uganda Technical College, Bushenyi District, pending the determination of the dispute between them, by an arbitrator. The applicant contends that it was erroneous of the Ministry to call for payment under the advance guarantee in the sum of shs. 1,480,182,257/= and the performance guarantee in the sum of shs. 981,966,874/= without first undertaking a joint measurement of the works done by the applicant. The adjudicator delivered his findings on 19th October, 2021 but before they could be implemented, the Mistry sought to evict the applicant from the site. The adjudicator delivered his findings on 19th October, 2021 but before they could be implemented, the Ministry sought to evict the applicant from the site, yet the applicant had already written to the Uganda Institution of Professional Engineers requesting for the appointment of an arbitrator. On 28th October, 2021 attempts were made by the Resident District Commissioner to cause the applicants eviction from the site. If the eviction takes place, the applicant stands to suffer irreparable loss in the arbitration proceedings.

c. Affidavit in reply;

In the respondent's affidavit in reply sworn by the Assistant Commissioner, Construction Management Unit of the Ministry of Education and Sports, the respondent contends that the applicant was granted three extensions adding up to a total of nine months, but still was unable to complete its obligations under the contract. This was a time sensitive project financed by the World Bank. The agreed extension to the contract period eventually expired on 1st August, 2021. When the respondent made a call on the performance guarantee, the applicant initiated adjudication proceedings that resulted in the applicant being ordered to pay liquidated damages to the respondent. The respondent invited the applicant for undertaking a joint inventory but the applicant declined to honour the invitation. The application was overtaken by events since the applicants have long since been evicted from the site on 28th October, 2021.

d. Affidavit in rejoinder;

In the applicant's affidavit in rejoinder, it is averred that the respondent only made a failed attempt to evict the applicant from the site but the applicant is still in possession of the site. The applicant was never invited for a joint exercise of undertaking an inventory. In the vent that the applicant is evicted from the site and anew contractor takes over, it will be difficult to ascertain with precision the work accomplished by the applicant and this will jeopardise the arbitral process.

e. Submissions of counsel for the applicant.

M/s Ortus Advocates on behalf of the applicant submitted that if the applicant is evicted from the site the arbitration proceedings will be rendered nugatory and the applicant will suffer irreparable loss. Clause 24 of the contract constitutes the submission to arbitration. A party dissatisfied with the decision of an adjudicator has the right to refer it to an arbitrator. The applicant has already triggered that provision by writing to the Uganda Institution of Professional Engineers requesting for the appointment of an arbitrator. If the eviction takes place before the end of that process, the applicant will be unable to undertake a joint measurement exercise and it will be difficult to ascertain the value of works accomplished by the applicant, the value of the materials on site and to demobilise from the site in accordance with the contract. The applicant will as a result suffer irreparable loss of its compensatory claim of shs. 2,260,090,4102/= This will add to the injury already suffered by the applicant when the respondent made a call on the advance and the performance guarantee before undertaking a measurement of the works, yet the respondent is yet to pay the applicant's interim certificate worth shs. 2,223,454,458/= The balance of convenience favours the applicant to remain on site since it is yet to decommission its equipment on the site. On the other hand, the respondent is unlikely to suffer any injury since it has already received payment under the advance and performance guarantees.

f. Submissions of counsel for the respondent.

The Attorney General's Chambers on behalf of the respondent submitted that when the contract period expired without the applicant discharging its obligations fully, the respondent cashed both

the advance and performance guarantees. The respondent took steps to have the final account done and the applicant paid for the value of the work done. In the meantime the applicant commenced a process of adjudication that resulted in a finning that the applicant was liable to pay liquidated damages and that it should seek an extension of the contract. The Ministry rejected the application
5 for a further extension and engaged another contractor to complete the works. The applicant instead began another round of adjudication but the respondent evicted the applicant from the site on 28th October, 2021. The applicant refused to participate in a joint measurement / verification exercise. By this application, the applicant seeks to reverse the eviction. The Ministry will then be unable to cause the completion of the construction. In the arbitral proceedings, the applicant seeks
10 to have an extension of the contract, which claim is unlikely to succeed. While the applicant will be paid for the work done, the respondent reserves the right to ensure that the construction is completed by another contractor. The respondent has the capacity to meet any monetary award made in the applicant's favour.

15g. The decision.

According to section 6 (1) of *The Arbitration and Conciliation Act*, 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. Interim measures of protection provide
20 temporary relief to a party, aimed at protecting rights of that party pending final resolution of a dispute. They prevent the adverse party from destroying or removing assets thereby rendering the final arbitral award meaningless. The measures envisaged therefore may require a party to either; (a) maintain or restore the *status quo* pending the determination of the dispute; or (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm
25 or prejudice to the arbitral process itself; or (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) provide evidence that may be relevant and material to the resolution of the dispute. Courts have the discretion to direct the most suitable measures in the circumstances of each individual case though according to well established practice, such orders are issued only where there is an imminent risk of irreparable loss; when irreparable prejudice
30 could be caused to rights which are the subject of arbitral proceedings or when the alleged disregard of such rights may entail irreparable consequences.

When court is called upon to grant injunctive relief as an interim measure of protection pending arbitral proceedings, the court will generally have regard to the following: (a) the nature and strength of the applicant's case, i.e., whether there is a serious question to be arbitrated, in respect of which the applicant demonstrates a sufficient likelihood of success; (b) whether there is an imminent risk of irreparable loss, by considering whether damages are an adequate remedy to the perceived risk of harm; and (c) the course of action favoured on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the decision to grant the injunction is incorrect. To justify issuance of an injunction as an interim measure of protection, the contractor must make out a case showing that; (i) there is a serious question to be arbitrated, in respect of which the applicant demonstrates a sufficient likelihood of success; (ii) there is an imminent risk of irreparable loss; (iii) the risk of injustice is lower if the decision to grant the injunction is incorrect.

h. <u>The nature and strength of the applicant's case, i.e., whether there is a serious question to be arbitrated, in respect of which the applicant demonstrates a sufficient likelihood of success</u>.

Injunctive relief is ordinarily aimed at preserving the *status quo*. The order issued should be one that requires a party to take, or refrain from taking, specified actions that that are either likely to cause, current or imminent harm or prejudice to the arbitral process, or preserve assets out of which a subsequent award may be satisfied. Where the contractor disputes the employer's ability to call on the performance guarantee pending arbitral proceedings, the contractor must be able to establish that there is a serious question to be arbitrated as to the existence of the breach. Inversely, to justify the granting of an injunction, the applicant must demonstrate that the employer's call on the performance guarantee is founded on a claim that is specious, fanciful or untenable.

When considering whether or not to grant an injunction as an interim measure of protection, the court can only very rarely form a final view as to which of the parties is in breach of the contract (see *Kiyimba Kaggwa v. Katende Haji Abdu Nasser [1985] HCB 44*). The arbitrator will be able to determine the issue finally at the arbitration. For establishing a *prima facie* case, it is not necessary for the applicant to prove his or her case to the hilt and if a fair question is raised for

determination, it should be taken that a *prima facie* case is established. However, it is necessary for the court at this early stage to be satisfied that the applicant has a strong case to be presented for arbitration and that the order sought is necessary to prevent a current or imminent harm or prejudice to the arbitral process, or to preserve assets out of which a subsequent award may be satisfied.

The applicant seeks to have the respondent restrained from evicting it from the site, pending arbitration of disputes that have arisen between the applicant and the respondent, under their construction contract. The event from which the applicant seeks protection occurred on 28th October, 2021, two months before the filing of this application. A mandatory injunction (one mandating specific conduct), by which the applicant would receive some form of the ultimate relief sought as a final award, is granted only in unusual situations, where the grant of the relief is essential to maintain the status quo pending the arbitration. It was held by the English Court of Appeal in Leisure *Data v. Bell [1988] FSR 367* that the Cyanamid principles were not really relevant where a mandatory injunction was sought on an interlocutory application. In that case, Lord Justice Dillon said that guidelines for granting of interlocutory mandatory injunctions were laid down in *Shepherd Homes Ltd v. Sandham [1971] Ch 340*. In that case, Mr Justice Megarry stated at page 349B that, as mandatory injunctions tended to be more drastic in effect than prohibitory injunctions, the case would have to be "unusually strong and clear before a mandatory injunction would be granted. He went on to say at page 351G:

> In a normal case, the court must *inter alia* feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

It is well settled that the ordinary function of an injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits. On the facts, there ware serious issues to be arbitrated in relation to whether the respondent was justified in rejecting the applicant's application for further extension of the contract period. Further, there is a serious issue to be arbitrated with regard to whether the applicant's obligations under the contract were validly executed. It has not been shown that restoring the applicant to possession of the site is necessary for the duration of arbitration in order to resolve any of those issues.

In any event it is not highly probable that the applicant will succeed at the arbitration on any of these issues. Considering further that the applicant has already quantified its claim as compensatory damages of shs. 2,260,090,4102/= it has not been demonstrated that the order sought is necessary to prevent a current or imminent harm or prejudice to the arbitral process, or to preserve assets out of which a subsequent award may be satisfied.

i. Whether there is an imminent risk of irreparable loss, by considering whether damages are an adequate remedy to the perceived risk of harm.

The remedy is only available where compensatory damages would be inadequate. Irreparable damage, injury or loss has been defined as "loss that cannot be compensated for with money" (see *Kiyimba - Kagwa E.L.T. v. Haji Abdu Nasser Katende [1985] HCB 43*; *Mugenyi Yesero v. Wandera Philemon K. [1987] HCB 78* and *Uganda Moslem Supreme Council v. Kagimu Mulumba and Four others [1980] HCB 110*). It means injury which is substantial and could never be adequately remedied or atoned for by damages; injury which cannot possibly be repaired. It implies a substantial and continuous injury for which there does not exist any standard for ascertaining the actual damage likely to be caused.

An injunction should not be granted lightly. An injunction will not be granted where the applicant has a remedy by way of damages. In seeking it for the duration of the arbitration rather than for purpose of undertaking a joint measurement, is a veiled extension with the result that what in effect the applicant is seeking is specific performance of the contract, the performance of which requires a high degree of cooperation between the parties. The applicant cannot obtain such relief at the arbitration. I have formed the view that damages would be an adequate remedy since the applicant's claim in the prospective arbitration is one for breach of contract. The fact that it may be extremely difficult to assess the question of damages does not mean that an award of damages can be regarded as an inadequate remedy. Although termination of the contract gives rise to a real risk of damage to the commercial reputation, standing and creditworthiness of the applicant, it would not be very difficult to quantify such damage in the prospective arbitration. It has not been shown that the applicant would not be capable of discharging such an award.

j. The course of action favoured on a balance of convenience, i.e. the course of action that results in the lower risk of injustice if the decision to grant the injunction is incorrect.

Injunctions should not be granted mechanically without realising the harm likely to be caused to the opposite party. The principal dilemma about the grant of an injunction as an interim protective measure, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the wrong decision, in the sense of granting an injunction to a party who fails to establish his right at the arbitration or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at the arbitration (see *Films Rover International Ltd v. Cannon Film Sales Ltd [1987] 1 WLR 670*). The court should adopt whatever course would carry the lower risk of injustice if it turns out to be the "wrong" decision.

While considering grant of an injunction as an interim protective measure, in order to mitigate risk of injustice, the Court has also to weigh the corresponding need of the respondent to be protected against injury resulting from its being prevented from exercising its own legal rights, for which it could not be adequately compensated. The balance of convenience has to be evaluated on the said touchstone. The court must weigh one need against another and determine whether the balance of convenience lies. The court is required, to give full weight to the practical realities of the situation and weigh the respective risks that injustice may result from a decision one way or the other. The court has to keep firmly in mind the risk of injustice to either party (see *NWL Ltd v. Woods [1979] 3 All ER 614 at 625*). Lord Diplock suggested, in that case:

> Where....the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Save for the eviction which has already taken place, it has not been shown that the respondent threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of

the applicant's rights respecting the subject of the arbitral proceedings that would tend to render the award ineffectual; or that the applicant has demanded and would be entitled to an award restraining the respondent from the commission or continuance of an act, which, if committed or continued during the pendency of the arbitration, would produce injury to the applicant.

When deciding applications of this nature the court risks making the "wrong" decision, in the sense of granting an injunction to a party who fails to establish its case at the arbitration, or alternatively failing to grant an injunction to a party who succeeds at the arbitration. The court should therefore take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" at the interlocutory stage. In ascertaining where the lower risk of injustice lies, regard must be had to whether at the arbitration a permanent injunction would be granted. The court should also consider the difficulties which may arise it the parties are compelled to continue operating a relationship which requires a high degree of cooperation between them. It is usually impracticable and undesirable that two parties be compelled to continue relating with one another when one, for reasons which are perfectly rational, does not want to carry on such contractual relation. Where relations between the parties have become so fraught that the court cannot expect the parties to "live together" in an ongoing contractual relationship, without supervision, the balance of convenience will favour the refusal of an injunction.

In this regard, in the instant case, the very real difficulty in continuing to operate the contract is a relevant factor. In a pure contract money and damages claim, the applicant has no claim to some specific subject of the action; hence, no right to interfere in the use of the respondent's property; and no entitlement to injunctive relief *pendente lite*. On the other hand, the respondent once restrained will suffer great hardship since it will be unable to complete the construction of its buildings with the result that the discharge of its mandate at that institution would be seriously hampered. For all the foregoing reasons, the application fails and is hereby dismissed. The costs of this application are awarded to the respondent.

Delivered electronically this 25th day of April, 2022

……Stephen Mubiru…………..
Stephen Mubiru
Judge,
25th April, 2022.