THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO. 0009 OF 2022

THE AIDS SUPPORT ORGANISATION …..…..…… APPLICANT

VERSUS

TUBA: THE UGANDA BALTIMORE ALLIANCE ……..… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

On or about 18th April, 2016 the applicant executed a memorandum of understanding with the respondent by which the latter undertook to run a youth music education programme at Kyengera-Mugongo in Wakiso District. As part of the consideration for the agreement, the respondent transferred to the applicant, land comprised in Busiro Block 338 Plot 963 at Kyengera-Mugongo (at times referred to in the award as being located in Kiwatule), from which the respondent had hitherto operated its "Musana Music Centre." The applicant undertook to manage the music programme from that location, and using its own resources, to employ, retain and supervise a local music director secreed by both parties. Consequently, "Musana Music Centre" was reopened during the month of January, 2017 under the applicant's new management, with thirty (30) new youth members guided by a detailed plan approved by the applicant's senior management.

It was the respondent's contention that eight or so months after the said reopening, the respondent was concerned that "Musana Music Centre" was being run down due to neglect, mismanagement, and failure to implement the approved detailed plan. The applicant had failed to raise funds to support local funding expenditure needs, had failed to retain a music director as from 1st January, 2019 and to put a management structure in place. It is on that account that the respondent terminated the memorandum of understanding on 28th May, 2019. In accordance with the dispute resolution clause contained therein, the respondent initiated arbitral proceedings before the Centre for Arbitration and Dispute Resolution in Kampala (CADER), seeking a declaration that the

applicant had beached the memorandum of understanding, and recovery of US $ 60,000 with interest, general damages and costs.

In response to that claim, the applicant contended that the purpose of the memorandum of understanding was for the parties to jointly run a programme for the promotion of the economic and cultural development of youth in Uganda, through music. The applicant's obligations under the agreement were contingent upon the respondent's financial support, through resource mobilisation in the United States of America. In breach of that undertaking, the respondent did not extend to the applicant, any financial support. The implementation plan for the "Musana Music Centre" was not put in place until eight months after execution of the memorandum of understanding. In breach of its obligation, from April, 2016 to December, 2016 the respondent failed to send volunteers to supervise the start of the youth programme, to provide new music equipment and training. On its part, the applicant fulfilled all its obligations under the agreement by securing and maintaining the property, the music instruments, paid all bills, salaries and wages on time, and submitted regular accountability to the respondent. The applicant duly employed, retained and supervised a local music director approved by the respondent, who ran the programme successfully. It later transpired that the respondent had not regularised its stay and operations in Uganda and had no capacity to execute the memorandum of understanding. The applicant thereafter solely managed the programme using its own resources. The applicant counterclaimed for the respondent's breach of the agreement by its failure to mobilise resources from the United States of America, failure to provide continuous music training, and failure to meet the costs of maintenance and replacement of the music instruments. It sought specific performance or in the alternative general damages for breach of contract, with interest and costs.

b. <u>The Arbitral Award</u>;

In his award handed down on 18th February, 2022 the single arbitrator found that there was a valid, binding and enforceable agreement between the parties. The applicant's contention that the person who signed on behalf of the respondent did not have the capacity to do so since there was no resolution of the respondent's board authorising him to do so, was refuted by oral evidence to the contrary. Since both parties sought remedies under the agreement, they could not at the same time

challenge its validity. The applicant's responsibilities were outlined in clause 4.3 of the memorandum of understanding and they included; - securing the property and all musical programme inventory and supplies in good condition; granting access to the respondent's known personnel; submitting quarterly accountability reports to the respondent; employing, retaining and supervising a local music director screened by both parties; and indemnifying the respondent for any damage or loss of the music programme's inventory and supplies caused by wilful misconduct, negligent acts or omissions, or improper or insufficient oversight.

The respondent's responsibilities were outlined in clause 4.4 of the memorandum of understanding and they included; - providing all musical instruments and other musical supplies necessary to start and maintain the programme; mobilising resources in the United States of America to assist in funding the programme; to provide, facilitate and maintain in Uganda, experienced music volunteers to supervise the start of the programme at its initiation; provide continuous music training for the youth under the programme; provide ongoing support through volunteer visits and continuous communication; activity building in the United States of America for the applicant to provide effective public health messaging to the youth through music; meeting the costs of maintenance of the music instruments and replacement where necessary; and providing the applicant with a list of the respondent's personnel with a right of access to and utilisation of the property.

There respondent contended that the applicant failed in its duty to secure the property as the music director was physically attacked by one of the students while on the premises. The applicant adduced evidence to show the measures taken following that incident to secure the premises, including; erecting a perimeter wall fence, putting in place an inventory record of all instruments and supplies at the premises such that not a single item was ever lost, and strict security checks for strangers seeking to access the premises. The attack therefore, being a threat that came from a person duly authorised to be on the premises, was not a foreseeable event for which the applicant could be held liable. This aspect of the respondent's claim therefore failed.

As regards the recruitment of the music director, it was agreed between the two parties that both would be involved in screening the candidates. The applicant breached this part of the agreement

when it failed to involve the respondent in the process. As regards resource mobilisation, the applicant adduced evidence to show that it had spent a total of shs. 233,000,000/= on payment of bills and expected the respondent to make its own contribution. The financial needs of the programme exceeded by far the input of both parties. Each of the parties therefore breached its financial obligations towards the programme. The applicant did not adduce evidence of quarterly reports submitted before the year 2019 in accordance with its obligations under the contract. There was no accountability for earnings collected from performances by the band. The tribunal found that each of the parties had breached aspects of its obligations under the contract.

The Tribunal found that since the termination of the memorandum of understanding, the applicant had been running the programme unilaterally using property and instruments availed by the respondent. Clauses 5.3 and 5.5 of the memorandum of understanding provided that upon termination of the memorandum, the applicant was to pay the respondent a sum of US $ 60,000. That amount was the estimated value of the land comprised in Busiro Block 338 Plot 963 at Kyengera-Mugongo (at times referred to in the award as being located in Kiwatule). Clause 5.6 of the memorandum provided that upon termination, the applicant was to retain that property. The respondent was therefore entitled to recover that amount. There was no basis for awarding interest on that amount since both parties were charitable organisations engaged in charitable activities, as opposed to business for profit. Since each party was found to have breached aspects of its obligations, there was no award of general damages made and the Tribunal directed that each party was to bear its own costs. The respondent's right of access to the premises was to cease and it was free to carry away its musical instruments and supplies, or donate them to the applicant.

c. <u>The application</u>.

The application is made under the provisions of section 34 of *The Arbitration and Conciliation Act*, and rules 7 (1), 8 and 13 of *The Arbitration Rules,* seeking an order setting aside that arbitral award, on grounds that; it is not made in accordance with *The Arbitration and Conciliation Act*, to the extent that one of the parties to it is a non-existent entity in Uganda; it is not valid to the extent that the arbitration agreement was executed with a party who had no capacity to execute it in so far as it is a non-existent entity in Uganda; there was evident partiality on the part of the arbitrator

in favour of the respondent, by declining to visit the property comprised in Busiro Block 338 Plot 963 at Kyengera-Mugongo (at times referred to in the award as being located in Kiwatule) and relying instead on its estimated value and the status of its management from the respondent's perspective only, awarding the respondent the sum claimed in spite of evidence to the effect that the respondent had collected US $ 12,000 in purported intended donations to the applicant, whereas not, which is against public policy in Uganda; awarding the respondent the sum claimed yet the Tribunal found that both parties were in breach, which too is against public policy.

d. Affidavit in reply;

In its affidavit in reply, the respondent contends that the issue regarding the respondent's capacity was decided upon by the arbitrator and is now *res judicata*. The application is essentially an appeal disguised as an application for setting aside the arbitral award. The legal personality of the respondent and its registration in Uganda are not the same. The latter requirement applies only where the respondent intends to establish an office in Uganda, which is not the case on the facts of this dispute. The Tribunal came to the correct conclusion, otherwise the applicant would have obtained unjust enrichment. By mutual agreement, upon termination of the memorandum, the applicant was to retain the land but pay the respondent the mutually estimated value of the land. The Tribunal was fair to both parties throughout the proceedings and in its award, as is evident upon perusal of the record of proceedings. A locus visit was not necessary in light of the issues placed before the arbitrator. The application is brought in bad faith and ought to be dismissed.

e. Affidavit in rejoinder;

In its affidavit in rejoinder, the applicant contends that the Tribunal only determined the legal personality of the respondent, but not its existence in Uganda. The respondent was under the obligation to obtain registration in Uganda before it could execute any agreement or engage in any activity or gain benefit from Uganda. To operate as non-governmental organisation, the respondent had to be licenced first, as a mandatory requirement of the law. The respondent has been undertaking activities involving the creation of youth brass bands in Uganda, since the year 2007. When during the year 2014 the respondent acquired land in Kyengera-Mugongo, it attained a

physical presence in Uganda that obligated it to be registered and licensed. It is on that basis that the respondent executed the memorandum of understanding with the applicant. The respondent is unjustly enriched by the award in light of the fact that it collected donations of up to US $ 12,000 in the name of the applicant, which it neither declared to, nor remitted to the applicant. It is against public policy for the respondent to retain the money collected though fundraising and at the same time obtain the value of the land, yet it was not the registered proprietor of the land. In order to determine the true value of the land, the arbitrator ought to have conducted a *locus in quo* visit.

f. Submissions of counsel for the applicant.

M/s Nagawa Associated Advocates on behalf of the applicant submitted that the issue regarding the capacity of the applicant was put to the arbitrator. It was an issue of *locus standi*. It was found that the respondent is recognised in the USA. The submission to arbitration in the memorandum was not valid. It was present legally and should be registered and licenced to operate in Uganda. The award is in conflict with public policy. They were mobilising resources in the USA meant for the applicant yet they never forwarded it to the applicant. The tribunal found breach and yet it awarded the respondent US $ 60,000 on top of the US $ 12,000 it had collected and never declared. The tribunal erred in applying the law. It is a fundamental error to give benefit from a dispute resolution provided for by the law yet they are not registered here. There was bias in the arbitrator. The dispute was about management of the programme. The applicant requested a visit to the locus to see what was on the ground. The arbitrator declined since in his view it was not necessary. At page 13 of the award paragraph 7 is a reference to the value of the property which was a misdirection. It is a procedural error that caused an injustice. What was determined by the tribunal is not what is before the court. The validity is still in question. Departure immediately after signing does no create enforceability. There was a counterclaim. Public policy should override the award.

g. Submissions of counsel for respondent.

M/s KSMO Advocates on behalf of the respondent submitted that the legal capacity of the respondent was raised as a preliminary objection and the arbitrator made a ruling relating to the legal capacity and the capacity to sign the agreement. At the time of the contract the physical

presence exited. During and after the contract, the respondent did not have any physical presence in the country. At the time of signing the agreement they had a physical presence in Uganda. The capacity is based on its legal status. It is this very agreement that terminated their presence. The applicants had a counterclaim relying on the same document. They are now estopped from raising this issue. The issue of the award of US $ 60,000 cannot be revisited. It was based on evaluation of the evidence. The memorandum had that specific remedy. The applicant has taken benefit of the property and is utilising it. It was a conditional grant and they violated the conditions for the grant as found by the arbitrator, this justifies the US $ 60,000 award.

10h. <u>The decision</u>.

It is a fundamental notion that parties generally commission arbitrators to read their contract and interpret it for them. Arbitrators are thus contractually empowered to provide the parties with a definitive interpretation of their agreement. It follows that parties are bound by an arbitral award and are obliged to abide by and comply with it. The substantive issues which the arbitrator(s) determined cannot be the subject of review by the courts because arbitration, by its nature is final.

An award is not subject to appeal or to any other remedy except those provided for in *The Arbitration and Conciliation Act*. By stating that "except as provided in this Act, no court shall intervene in matters governed by this Act," section 9 of *The Arbitration and Conciliation Act* seeks to restrict the court's role in arbitration. The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. The provision epitomises the recognition of the policy of parties' autonomy which underlies the concept of arbitration. Consequently, there are only three categories of measures under the Act which involve courts in arbitration namely; (i) such measures as involve purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce, e.g. issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement; (ii) measures meant to maintain the *status quo* like granting of interim injunctions or orders for preservation of the subject matter of the arbitration (interim measures of protection); and (iii) such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same (see *Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465*).

In arbitration, the autonomy of the parties is kept at the highest pedestal. Therefore, any Court adjudicating upon the validity of an arbitral award is not to function as an appellate Court, but merely is to decide upon the legality of the validity of the arbitral award. When a court reviews an arbitration award, it should not concern itself with the merits of the determination. If the arbitrator has acted within his or her jurisdiction, has not been corrupt and has not denied the parties a fair hearing, then the court should accept his or her reading as the definitive interpretation of the contract even if the court might have read the contract differently. Save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law. Section 34 (2) of *The Arbitration and Conciliation Act* sets out the limited instances where a party can apply to set aside an arbitral award. The applicant in the instant case has raised three grounds in this application in respect of which the relevant provisions of the Act provide as follows;

> (2) An arbitral award may be set aside by the court only if—
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> (a) the party making the application furnishes proof that—
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> (vii) the arbitral award is not in accordance with the Act;
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> (b) the court finds that—
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> (ii) the award is in conflict with the public policy of Uganda.
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> (3) An application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral award.

An arbitral award is considered not to be in accordance with the Act when any of the following occurs, namely; (i) when the appointment of the arbitrator(s) and the arbitration proceedings were not done as per the agreement between the parties as well as the laws selected by the parties; (ii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case; (iii) the adversarial principle was not respected; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing any such agreement, was not in accordance with the Act; (v) the arbitral tribunal violated its mandate. Not every violation will lead to a refusal of enforcement or setting aside. The violation must have substance and not be *de minimis*.

i. Whether the respondent, as a party to the arbitration agreement pursuant to which the award was rendered, had the capacity to enter into the agreement.

There are various issues to consider when entering into a submissions to arbitration. Not only is the content of the contract important, but the ability (authority) of the parties to sign the contract is also relevant and could mean the difference between the contract being valid or not. Incapacity of a party or invalidity of the arbitration agreement is a ground commonly invoked when a party seeks to argue, *inter alia,* that an arbitration agreement was never concluded between the parties; where one party of arbitration agreement was under some incapacity This ground is founded on the principle that arbitration is based on the consent of the parties. Although an arbitration agreement will survive a contract that otherwise ceases to bind the parties, an arbitration agreement that never comes into effect will not be able to bind the parties.

It was contended by the applicant that the respondent did not have the capacity to enter into the agreement on account of not being registered and licenced to operate in Uganda. As regards the capacity to contract, an agreement to arbitrate is not in any way different in this respect from any other contract. It is trite that both parties entering into an agreement should have a legal capacity to do so, absent which the agreement will be void. Should an arbitral agreement be found void by reason of incapacity of either of the parties, either: the tribunal will decline jurisdiction to hear the case, if the incapacity was established before the commencement of an arbitration, or the courts will refuse to enforce the award if the incapacity was established after the award was rendered.

A party seeking to invalidate the arbitration agreement, as a ground for the annulment of an arbitration award, may allege that the signatory to the arbitration agreement was not authorised to agree to bind the company to arbitrate. It is trite that a contract may be made either by some duly authorised person acting on behalf of the company or by the company itself under its common seal. The authority to manage the affairs of a company is vested in its board of directors but the board usually delegates authority for particular matters to individual directors or officers. It is the board of directors to bind the company or authorise others to do so in favour of a person dealing with the company in good faith (see section 52 (1) of *The Companies Act, 2012* which alters the common law position that authority to bind a company must be conferred by a company's articles

of association). The delegation of authority may be express or implied. It can be implied by the director's position; for instance, a managing director will have implied actual authority to do all such things as fall within the usual scope of that office. There does not need to be any formal appointment process for a director to be vested with implied authority/.

On the other hand, a representation may create "apparent" authority in a variety of forms of which the commonest is representation by conduct i.e. by permitting an agent of the company to act in some way in the conduct of the company's business with other persons. By so doing the company represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the company into contracts with other persons of the kind which an agent so acting in the conduct of his principal business has usually "actual" authority to enter into. In a commercial context, absent dishonesty or irrationality, a person should be entitled to rely on what he or she is told (see *Freeman and Lockyer v, Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 at 503 ; [1964] 1 All ER 630; [1964] 2 WLR 618*). An "apparent" or "ostensible" authority is a legal relationship between the principal and a third party created by a representation, made by the principal to the third party, intended to be and in fact acted upon by the third party, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him or her by such contract.

On equitable grounds, once it is established that the party dealing with the company; (i) adopted an assumption as to the terms of its legal relationship with the company; (ii) that the company adopted the same assumption; (iii) that both parties conducted their relationship on the basis of that mutual assumption of an agreed or assumed state of facts; (iv) that each party knew or intended that the other act on that basis; and (v) (arguably) that departure from the assumption will occasion detriment to either party, then both will be estopped from denying that state of facts.

It is also well established that an arbitration agreement may only be made by a party having the capacity and competence to dispose of the disputed right. This is because the agreement to arbitrate amounts to a waiver of the right to institute a suit before the Courts. In this vein, a director of a limited liability company is the only person that has the capacity to bind the company to an

arbitration agreement (unless such company's articles of association dictate otherwise). Although a single director on a board of more than one or an officer of a company has, in reality, very limited "ostensible" authority, particularly if they are not the managing director, and particularly where the transaction is outside of the company's ordinary business, a person who has a contract signed by another party on behalf of a company in circumstances were the person is under a reasonable belief that the party signing on behalf of the company has actual authority, unless where such belief would have been dishonest or irrational, is not expected to know what authority the actual signatory has. His duty is take all proper care to see that no unauthorised person signs the agreement.

A contract may be made on behalf of a company by any person acting with the company's express or implied authority. According to section 52 (1) of *The Companies Act, 2012* where a person deals with a company in good faith the power of the directors to bind the company is deemed free of any limitation in the company's constitution. Accordingly it seems that a company can be bound to any transaction by a single director or officer who is acting with either actual authority given by the board, or the implied authority of the company. Where a reasonable person would understand that an agent has the authority to act, the principal will be bound by the agent's acts even if the agent in fact had no actual authority. Ostensible authority may also arise where a person holds a position within a company whereby it is expected that such a person would have authority to act on behalf of the company.

In the instant case, the memorandum of understanding was signed by a one Amy F. Klosterman as "The Director" of the respondent. Where the name of the company is stated at the beginning of an agreement, followed by the name and capacity of its representative at the signature page, and such agreement containing an arbitration clause was signed by a readable name of the representative of the company so named, a party may not argue the invalidity of the arbitration agreement due to the lack of capacity of the signatory to bind the company to arbitration. It is a conclusive legal presumption that such signature is attributed to the person who has the legal capacity to bind the company to an arbitration agreement and that he or she signed within the company's ordinary business and the ostensible authority so to sign.

This is because equity will not permit a party to manufacture evidence for itself against another. It is also in line with the indoor management rule to the effect that a person dealing with a company in good faith is entitled to assume that the corporate acts provided for in the company's documents have been properly and duly performed in compliance with articles and bylaws (see *Royal British Bank v. Turquand (1856) 119 ER 886* and *CTM Uganda Ltd v. Allmuss Properties Uganda Ltd and two others, H. C. Misc. Application No. 806 of 2015*). It would make business very difficult if persons dealing with the company in good faith would have to ascertain for themselves that the internal procedures of the company have been complied with before they conclude a transaction.

As rightly argued by counsel for the respondent, there is a difference between incorporation of a company and registration of a company for purpose of foreign presence. At common law, once a company is incorporated, it obtains legal personality as against the whole world. When a company is incorporated it becomes a juristic entity with rights and obligations of its own and is distinct from its shareholders and directors (see *Salomon v. A Salomon & Co Ltd [1897] AC 22*). The legal personality is not diminished by legal boundaries. Just like citizenship is to natural persons, registration is only one of the restrictions imposed on what a foreign company can do outside the geographical boundaries of the country of its incorporation.

In the case of Uganda, there is no legal requirement for a foreign company to register unless it intends to establish a place of business in Uganda (see sections 251 and 252 of *The Companies Act, No. 1 of 2012* and *Krone Uganda Limited v. Kerilee Investments Limited, H. C. Civil Misc. Application No. 306 of 2019*). Therefore a company incorporated outside Uganda can transact business in Uganda without having to go through any form of registration. Hence it is not correct to argue that because it was incorporated in the United States of America, the respondent is a non-existent entity that cannot execute an agreement to arbitrate. According to section 251 of *The Companies Act, No. 1 of 2012* the requirement for registration applies "to all foreign companies, being companies incorporated outside Uganda which, <u>establish a place of business in Uganda</u> and companies incorporated outside Uganda which have, <u>established a place of business in Uganda</u> and continue to <u>have a place of business in Uganda</u>" (emphasis added).

A company is deemed to have "established a place of business in Uganda" when it has a branch or management office; office for registration of transfer of shares; a factory, mine, a warehouse, distribution centre, a storefront or any other fixed place of business or some form of fixed establishment from which it supplies its goods and services or where any or all of its certified objectives may be conducted. Common law has generally established that for tax purposes, a company is resident in the country in which its central management and control is exercised, where it keeps all its books, papers and documents and receives its income (see *Calcutta Jute Mills Co Ltd v. Nicholson and Cesena Sulphur Co Ltd v Nicholson (1876) LR 1 Exch D 428; Unit Construction Co Ltd v. Bullock [1960] AC 351; Egyptian Delta Land & Investment Co Ltd v. Todd [1929] AC 1* and *De Beers Consolidated Mines Ltd v. Howe [1906] AC 455 at p. 458*). Cooperate residence is thus determined by the location of the place where direction and control of the business of the company is done. Residence in more than one country can be found if the supreme command, as it were, over the company's affairs, "the central control and management," is in truth divided so as to be equally, or substantially equally, present in both countries (see *Union Corporation, Ltd v. Inland Revenue; Johannesburg Consolidated Investment Co Ltd v. Inland Revenue; Trinidad Leaseholds, Ltd v. Inland Revenue, [1953] UKHL TC_34_207; 34 TC 207*).

Although a place of business is not necessarily one where the direction and control of the business of the company is done, establishing a place of business elsewhere, away from where the company has its central management and control, connotes having a place that is actually occupied either continuously or at regular periods by the company, where some of its books and records are kept and a significant share of its business is transacted, or where any or all of its certified objectives may be conducted. The indicia of having an established place of business includes; (i) establishing or using a share transfer or registration office; (ii) administering, managing, or dealing with property (as an agent, personal representative or trustee); and (iii) owning or purchasing any real estate. It should have the appearance of permanency as an extension of the head office which is abroad, and have a management that is materially equipped to negotiate business with third parties, so third parties do not have to deal directly with the head office, but may transact business at the place of business constituting the extension. It should present with operational autonomy but follow the guidelines of its head office, although without autonomy over its assets.

Conversely, a foreign company will not to be deemed to have established a place of business in Uganda solely on account of doing business through an agent. There is no established place of business where a foreign company only; (i) has an agent without contractual authority or regularly to file stock of merchandise; (ii) carries on business dealings through a broker or commission agent; and (iii) has a subsidiary that is incorporated, resident, or carrying on business. In the latter two instances, the office of a broker or commission agent and setting up a subsidiary of itself is not an established place of business of a foreign company.

Similarly, isolated and sporadic transactions of a foreign company selling products or services to customers in Uganda, but still conducting all business aspects outside Uganda, may not automatically be considered a foreign entity having a place of business in Uganda. A foreign company cannot be deemed to have a place of business in Uganda merely because it; (i) is or becomes a party to a legal proceeding or settles a legal proceeding or a claim or dispute in Uganda; (ii) holds in Uganda meetings of its directors or shareholders or carries on other activities concerning its internal affairs; (iii) maintains a bank account in Uganda; (iv) effects a sale of property through an independent contractor; (v) solicits or procures an order that becomes a binding contract only if the order is accepted in Uganda; (vi) creates evidence of a debt or creates a charge on property; (vii) secures or collects any of its debts or enforces its rights in relation to securities relating to those debts; (viii) conducts an isolated transaction, not being one of a number of similar transactions repeated from time to time; or (ix) invests its funds or holds chattels.

The question then is whether by establishing "Musana Music Centre" on Busiro Block 338 Plot 963 at Kyengera-Mugongo (at times referred to in the award as being located in Kiwatule) the respondent "established a place of business in Uganda" which rendered its registration and licencing mandatory. This is a pure question of fact, to be determined, not according to the construction of statutes, regulations or byelaws, but upon a scrutiny of the course of business of the respondent. Whether a company has established a place of business in Uganda is to be determined by reference to the facts as they exist, rather than according to any requirement of the law or of the company's regulations. Based on the facts before the tribunal, it had to be decided whether or not that place was actually occupied either continuously or at regular periods by the company; whether or not some of the books and records of the respondent were kept at that

location; whether or not the respondent's activities thereat constituted a significant share of its business transactions; and whether or not staff thereat had operational autonomy, but followed guidelines of the respondent's head office, without autonomy over the respondent's assets.

Save for serious deviations from constitutive or procedural aspects of the arbitration, it is only when there is a manifest disregard of the law by the arbitrator, as opposed to general errors of law, that the court will be justified to intervene on grounds of the award not being in accordance with the Act. In order to do this, the court should be satisfied firstly, that the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and secondly that the law ignored by the arbitrator is well defined, explicit, and clearly applicable to the case. It should be a fundamental error on the law applicable in Uganda. It requires more than a simple error in law or a failure by the arbitrator to understand or apply it; in other words, it must be more than an erroneous interpretation of the law.

Considering the evidence before him, the arbitrator found that Amy F. Klosterman had the capacity to bind the respondent. The question as to whether or not the respondent was required to be registered or licenced in Uganda was never placed before the arbitrator, yet the answer to it was factually intensive and, apparently, was never particularly canvassed in evidence by either party. It is trite that where the merits of the controversy are referred to an arbitrator selected by the parties, his or her determination, either as to the law or the facts, is final and conclusive (see *Lesotho Highlands Development Authority v. Impregilo Spa and others [2005] 3 WLR 129; [2006] AC 221; [2005] 3 All ER 789*). Courts give substantial deference to arbitrators. The court cannot substitute its own legal and factual judgments for those of the tribunal. By the Courts reviewing factual and legal determinations of arbitrators, as if on appeal, they discourage parties from choosing arbitration as a dispute resolution mechanism. Courts cannot assume the role of overseers to mould arbitral awards to conform to their sense of justice. A court cannot examine the merits of an arbitral award and substitute its judgment for that of the arbitrator, simply because it believes its interpretation would be the better one. Courts have no authority to disagree with an arbitrator's honest judgment on the matters of law of fact before him or her. Courts will vacate arbitral awards under only exceedingly rare circumstances. Thus, an arbitral decision must stand, regardless of a court's view of its (de)merits, except where there is a manifest fundamental error of law.

No every erroneous factual or legal determination is a ground for setting aside an arbitral award. The error of law must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. The courts are not at liberty to set aside an award because of an arguable difference regarding the meaning or applicability of the laws urged upon it. The governing law alleged to have been ignored by the arbitrator must be of fundamental importance, well defined, explicit, and clearly applicable. Absent a manifest disregard of the law, as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his or her authority, that the court is convinced he or she committed serious error does not suffice to overturn the decision. An arbitrator who incorrectly interprets the law has not manifestly disregarded it; he or she has simply made a legal mistake.

In the proceedings before the arbitrator, the point of law now at issue was not sufficiently well articulated to give rise to a manifest disregard claim. In an application of this nature, the parties cannot seek to re-open the controversy based on facts or arguments that were not placed or presented to the arbitrator. The sole question for the court is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he or she got its meaning right or wrong. It has not been demonstrated that the arbitrator knew of a fundamental, well defined, explicit, and clearly governing legal principle applicable to the case, yet refused to apply it or ignored it altogether. Whether or not that resolution was correct (a question on which this court expresses no opinion), does not meet the high standard required to establish manifest disregard of the law. This ground therefore fails.

ii. Whether the arbitrator proceeded with evident partiality.

Arbitrators are required to maintain neutrality and impartiality during an arbitration process. They should possess the judicial qualifications of fairness toward both parties while delivering a faithful, honest and disinterested opinion. "Bias" refers to the status of an arbitrator who is (either actually or apparently) not impartial and independent with respect to the parties as well as the subject matter of the dispute. It indicates predisposition or prejudice that may be made evident by direct or indirect means. While direct prejudice may be inferred from biased expressions or conduct inspired

with prejudice, indirect bias can be described as the procedural failure in administering justice equally for both the parties in the arbitral proceedings.

According to section 12 (2) of *The Arbitration and Conciliation Act*, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality and independence, or if he or she does not possess qualifications agreed to by the parties. An arbitrator is "impartial" when he or she is free of bias or prejudice in favour of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before him or her. The reasonable person expects an arbitrator to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them. The question of independence of an arbitrator usually arises when the arbitrator has a relationship with the party or with an entity linked to a party or with the counsel and the issue of impartiality arises when an arbitrator favours one of the parties, or he is prejudiced relating to the subject matter of the dispute.

During the proceedings, suspicion of bias may be inferred from an arbitrator's failure to fulfil certain formalities or inadvertent mistakes, or from the prediction that the award may be rendered against the party who brings the allegation. However, doubts are justifiable only when a reasonable and informed party would get the possible impression that arbitrator is influenced by factors other than the merit of the case while reaching his or her decision. The test is whether the circumstances were such that a fair-minded and informed observer might think there was a real possibility that the tribunal was biased (see *R v. Gough [1993] 2 ALL E.R. 724*; *A and others v. B and another, [2011] 2 Lloyd's Law Reports 59*; *Rustal Trading Ltd. v. Gill & Duffus S. A [2000] 1 Lloyd's Law Reports 1*; *AT&T Corporation and another v. Saudi Cable Co [2000] 2 Lloyd"s Law Reports 27; Shell (U) Ltd & 9 others v. Muwema & Mugerwa Advocates & Solicitors and another, S. C. Civil Appeal No. 2 of 2013* and *Porter and Weeks v. Magill [2002] 2 AC 357; [2002] 1 All ER 465*). The court does not look at the mind of the arbitrator himself or herself but looks at the impression which would be given to other people.

The reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the

background and appraised also of the fact that impartiality is one of the duties arbitrators. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case. A real likelihood or probability of bias must be demonstrated and a mere suspicion is not enough. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the arbitrator in question improperly used his or her perspective in the decision-making process. There has to be a proper and appropriate factual foundation for a reasonable apprehension of bias.

The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The existence of a factual foundation for such a reasonable apprehension of bias may be determined by referring to conduct, words spoken or written or even by gestures. Considering relevant facts and circumstances the court will then determine whether or not a fair-minded and informed observer would conclude that there was a real possibility of bias that would cause substantive injustice to the applicant who makes the allegation of bias. If the answer is in the affirmative, then it would be deemed that the tribunal was biased. Whether an arbitrator is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. The test of bias contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case.

It is argued in this case that the arbitrator exhibited bias when he chose not to visit the *locus in quo* and instead relied on the estimated value of the land as stipulated in the parties' memorandum of understanding. It is trite that a view of a *locus in quo* is intended to enable the tribunal check on the evidence already given and, where necessary, and possible, to have such evidence visually demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings (see *Mukasa v. Uganda [1964] EA 698 at 700*). It is not intended for the collection of new evidence. The decision to visit a *locus in quo* is discretional upon the arbitrator where he or she believes it is necessary for the full appreciation of the evidence adduced in the proceedings. He happens not to have been persuaded that it was necessary, since the value was mutually pre-determined by the parties in their agreement.

When exercise of such discretion does not violate the rule of natural justice, it is not reviewable by court. Not only is an apprehension of bias unreasonable in the circumstances of the case, but also a fair-minded and informed observer would not conclude that there was a real possibility of bias that would cause substantive injustice to the applicant based solely on this fact. This ground too fails.

iii. Whether the award is contrary to public policy

Tribunals must ensure that in the process or arbitration they do not abandon the public policy element while passing any award. Awards passed by arbitral tribunals which are contrary to or opposed to the public policy therefore, can be challenged before the judicial Courts and thereby also set aside. The realm of public policy includes an award which is patently illegal and contravenes the provisions of Ugandan law. Judicial interference on ground of public policy violation can be used to set aside an arbitral award only when it shocks the conscience of the Court to an extent that it renders the award unenforceable.

According to section 34 (2) (b) (ii) of the Act, a court can set aside an arbitral award if it finds that the award is in conflict with public policy since no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. Although the court should bow to the interpretation that the arbitrator has rendered, it is also the function of the court to make certain that the enforcement of the arbitral award will not constitute a violation of law. Public resources should not be employed for the execution of awards that are injurious to public morality or interest. Being a mandatory rule that trumps the parties' contractual agreement, an award that is against public policy it is not void, yet it is unenforceable; hence considerations of public policy could prevent a lawful award from yielding results insofar as the award violates the fundamental notions of justice and morality or contravenes important national interests.

Public policy relates to the most basic notions of morality and justice. Each state's fundamental economic, religious, social and political standards that define its legal system, inform its definition of public policy. It manifests the common sense and common conscience of the citizens as a whole; "the felt necessities of the time, the prevalent moral and political theories, intuitions…." (See

Oliver Wendell Holmes, Jr., *The Common Law* (1881) at p. 1). Public policy is "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed . . . the policy of law or public policy in relation to the administration of the law" (*see Egerton v. Earl of Brownlow [1853] Eng R 885, (1853) 10 ER 359*). Certain acts or contracts are said to be against public policy if they tend to promote breach of the law, of the policy behind a law or tend to harm the state or its citizens (see *Cooke v. Turner (1845) 60 Eng. Rep. 449 at 502*).

A court may vacate an arbitral award where strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit a particular matter from being decided or certain relief from being granted by an arbitrator. The public policy exception has its roots in common law, where it is well settled that a court will not enforce a contract that violates public policy. A court, however, may not vacate an award on public policy grounds when vague or attenuated considerations of a general public interest are at stake. Courts shed their cloak of non-interference where specific terms of the arbitration agreement or award violate a defined and discernible public policy.

Although public policy is a most broad concept incapable of precise definition, an award could be set aside under the Act as being inconsistent with the public policy if it is shown that either it was: (a) inconsistent with the Constitution or other laws of Uganda, whether written or unwritten; or (b) is inimical to the national interest of Uganda or; (c) is contrary to justice and morality. The first category is clear enough. In the second category would be included, without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Uganda. In the third category would be included, again without seeking to be exhaustive, such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals (see *Christ For All Nationals v. Apollo Insurance Co. Ltd [2002] 2 EA 366*). In some cases, the public interest in the finality of arbitration awards will outweigh an objection to enforcement on the grounds that the transaction was "tainted" by fraud (see for example *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd [2018] 2 Lloyd's Rep 133*), or is repugnant to fundamental notions of what is decent and just.

Consequently, an award will be considered to be in conflict with public policy if, *inter alia*; (i) the making of the award was induced or affected by fraud or corruption; or (ii) it is in contravention of the fundamental policy of the Constitution or other laws of Uganda; or (iii) it is in conflict with the most basic notions of morality or justice, including acts which would be generally detrimental or harmful to the citizens of the county (the general public), e.g. promotion of unlawful conduct and breach of law. In other words "public policy" covers only fundamental principles that are widely recognised and should underlie any system of law according to the prevailing conceptions in Uganda. The invoked principle of public policy does not need to be universally recognised, as the Courts in Uganda are willing to maintain, and defend if necessary, the fundamental values strongly embedded in the Ugandan legal tradition, even if such values are not necessarily shared in other (equally important) parts of the world.

Among the principles that can be considered as belonging to public policy within the meaning of section 34 (2) (b) (ii) of the Act, are; the prohibition against abuse of contractual or legal rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition against discrimination, the principle of proportionality and the protection of minors and other persons incapable of legal acts. An award will be set aside when it is incompatible with public policy not just because of its reasons, but also because of the result to which it gives rise. The generally accepted view though is that the public policy exception must be interpreted narrowly, only when the award violates positive law or requires unlawful conduct, or else it can be used opportunistically by award debtors as a gateway to review the merits of the award. The public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents, and not from general considerations of supposed public interests. The fact that common sense would support that conclusion is not sufficient. The award must be reviewed in reference to the core values of the legal system, the standards of morality, justice, and the public interest with a view to the preserving and safeguarding those fundamental values that fall under the scope of public policy. The Court must examine the substantive aspects of the award or the extent of its conformity with the law.

The public policy exception derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation

that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. It ought to be a procedure or substantive aspect of the award that is in the form of breach of mandatory rules, fundamental principles of law, actions contrary to good morals and national interest / foreign relations, etc.

It was submitted by counsel for the applicant that the respondent mobilised resources in the USA meant for the applicant which it never forwarded to the applicant. Furthermore, that despite the tribunal having found the respondent in breach, yet it awarded the respondent the sum of US $ 60,000 on top of the US $ 12,000 it had collected and never declared, thereby granting the respondent unjust enrichment. Finally that it is a fundamental error for the respondent to derive benefit from a dispute resolution mechanism provided for by the law, yet the respondent is not registered in Uganda. In counsel's view, all this is contrary to public policy. Considering that the impugned conduct occurred in the Unites States of America, in essence the applicant demands that the respondent ought to have been sanctioned for events that took place in another jurisdiction.

The geographical jurisdiction of this court is limited to persons and events occurring within the geographical territory of Uganda. Extraterritorial jurisdiction can be defined as a court's ability to adjudicate disputes involving individuals who are located and / or events that have taken place in another jurisdiction, including acts and omissions of foreign officials. Under the objective territoriality principle, a State may assert jurisdiction over acts done outside its territory, but which have or are intended to have direct, substantial and reasonably foreseeable effects within that State. The principle of objective territoriality confers jurisdiction over the acts done outside state territory only because the impugned conduct is deemed to be complete on its territory. It establishes the power of the court to exercise jurisdiction over harmful conduct commenced without the state but consummated within its territory. It is noteworthy though that applying forum law to foreign conduct operates within the international arena as a claim of regulatory authority vis-a-vis other sovereigns. Consequently, at some point the local interests may be too weak and the foreign harmony incentive for restraint too strong, for reasons of international comity and fairness, to justify an extraterritorial assertion of jurisdiction.

The evidence before the arbitrator showed that the respondent's impugned acts were commenced and consummated outside the territory of Uganda, by persons and against persons not in allegiance to the state of Uganda. There was no evidence led of any consummating act that occurred within the territory of Uganda. The respondent's impugned acts were never intended to nor did they have direct, substantial and reasonably foreseeable effects on Uganda's commercial activity. Even if the respondent's impugned acts would have been unlawful had they occurred within Uganda, in determining the existence or otherwise of public policy violations, we cannot look beyond our own law. Conduct occurring outside Uganda with no direct, substantial and reasonably foreseeable local effects would present no regulatory interest to spur the application of Ugandan law. I have therefore not found any aspect of the submitted facts that constitutes an explicit conflict with laws and legal precedents in Uganda as to violate public policy.

Given that public policy is understood to encompass the most fundamental norms from which no court can depart, I have not found in this case any aspect of the award that is contrary to public policy. The award does not require any of the parties to perform an act within Uganda that would constitute a violation of public policy and neither does any aspect of the award violate the positive laws of Uganda. In conclusion, since the applicant has not established any violation envisaged by section 34 of *The Arbitration and Conciliation Act,* the application fails and is dismissed with costs to the respondent.

Delivered electronically this 6th day of June, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
6th June, 2022.