IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Arbitration Cause No. 0012 of 2023

In the matter between

AIRTEL UGANDA LIMITED **APPLICANT**

And

OPPORTUNITY BANK UGANDA LIMITED **RESPONDENT**

Heard: 17 August, 2023.
Delivered: 08 January, 2024.

Civil Procedure *— Arbitration — Doubts as to independence or impartiality of the arbitrator have to be determined as a matter of fact, in the facts before the particular arbitrator — A party may only challenge an arbitrator's appointment of within fifteen (15) days after becoming aware of any reason to do so — If a challenge is unsuccessful, and the arbitrator decides that there is no reasonable apprehension of bias or other justifiable grounds to doubt the independence or impartiality of the arbitrator, he or she must then continue the arbitral proceedings and make an award — It is only after such award is made, that the party challenging the arbitrator's appointment on grounds of partiality, may make an application for setting aside the arbitral award on the aforesaid ground.*

Arbitration *— Setting Aside an Arbitral Award — Setting aside an arbitral requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award — Because arbitrators are often experts within their respective fields, they have many more potential conflicts of interest than judicial officers and should not therefore, be held to the same standards of judicial decorum as that applicable to judicial officers — An arbitrator's "trivial", indirect, tenuous and non-substantial relationships with a party or counsel should not foreclose the arbitrator from being considered neutral — Disclosure by an Arbitrator is only required for those*

relationships that could preclude the arbitrator from rendering an objective and impartial determination in the proceedings or which might create an appearance of bias — An award may be remitted or set aside on the ground that the arbitrator, in making it, had exceeded his jurisdiction, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced — An arbitral award is liable to be set aside if it deals with or does not fall within the terms of the submission of a dispute not contemplated by the reference, or if it includes a decision on matters outside that submission.

RULING

STEPHEN MUBIRU, J.

Background:

[1] On or about 11th April, 2013, the applicant executed a Facilitated Electronic Fund Transfer Platform Agreement (FEFT) with the respondent. The parties intended that the agreement would facilitate the integration of the respondent's electronic Fund Transfer systems with the applicant's network to enable "push transactions" i.e. transfer of money from the applicant's client's accounts to applicant's customer's accounts. As agreed in the FEFT agreement, the respondent held a collection account with the applicant to wit; account number 100001160 which was to facilitate the deposit of real money that was to be used for processing transactions between the applicant and the respondent. From the point of execution of the said FEFT agreement to date, the applicant engaged the services of an aggregator whose role was to integrate transactions between the parties from the year 2013 to date. The parties agreed in Clause 8.3 of the FEFT agreement, that no duty, commission or any other sum would be deducted from the respondent's aforesaid collection account. Consequently, no charge, duty or commission was deducted from the respondent's collection account between April, 2013 and September 2019. However, from October 2019, the applicant started levying a 1 % transaction charge from the respondent's collection account.

[2] On 22nd August 2022, the respondent filed an Arbitration claim against the applicant on grounds that the latter breached the (FEFT) agreement which the parties entered into in April, 2013. It was the respondent's case that the said deduction was in contravention of Clause 24 and Clause 8.3 and a host of other provisions of the FEFT agreement, faulting the applicant for having unilaterally varied, modified and altered the terms and conditions of the agreement when it started charging a 1 % fee per transaction without the consent of the respondent and without any amendment of the said FEFT agreement. The respondent sought orders that; a) a declaration that the applicant breached the "FEFT" agreement when it started to charge a 1% fee for every transaction contrary to the FEFT agreement; b) an order for a refund of the said deductions amounting to shs. 368,580,811/= as from October, 2019 to August 2021; c) an order to pay general damages for the inconvenience and economic loss suffered by the applicant due to the breach of the contract by the applicant; d) an order that the applicant pays interest on (b) and (c) above at the rate of 30% per annum from the date of filing the claim till full payment of the awarded sums; and e) an order against the applicant to pay the costs of the Arbitration.

[3] On 31st August, 2022, the applicant filed a Statement of Defence to the Claim in which it contended, among others, that while the FEFT agreement required the respondent to open a Collection Account as part of a full and complete integration of the parties' respective systems as required under the Agreement, it did not. It admittedly transacted through a third party (an Aggregator). The respondent filed a rejoinder to the Statement of Defence. The Claim was heard by a single Arbitrator, Ms. Rachel Kabala, between October and December, 2022 at the Centre for Arbitration and Dispute Resolution, Commercial Court premises, Kampala. On 12th April, 2023, the Arbitrator delivered her Award in which she held that the applicant breached the FEFT Agreement when it started to charge 1% for every transaction contrary to the Agreement and thus directed the applicant; - (a) to refund the said deductions/charges amounting to shs. 368,580,811/= with interest of 23% from the date of filing the claim until payment

in full; (b) to pay to the respondent general damages of shs. 30,000,000/= with interest of 8% from the date of the award until payment in full; (c) declined to award costs to the respondent for breach of contract, the breach being the failure to open a Collection Account but instead operated a collection account attached to an Aggregator.

The Application:

[4] The application by Chamber Summons is made under the provisions of section 98 of *The Civil Procedure Act,* section 34 of *The Arbitration and Conciliation Act,* and Rule 13 of *The Arbitration Rules.* The applicant seeks an order setting aside the Arbitral award issued by Ms. Rachel Kabala in CAD/ARB. N0.18 OF 2022 on 12th April 2023.

[5] It is the applicant's case that the Arbitral award deals with a dispute not contemplated by the parties and contains decisions on matters beyond the scope of the reference to the Arbitration in that the Arbitrator came up with issues outside those agreed upon by the parties and purported to resolve them with inconclusive determinations due to the departure from the evidence which was adduced. The departure of the Arbitrator from the issues agreed to by the Parties and the evidence adduced places the Arbitral award outside *The Arbitration and Conciliation Act*. The Arbitrator failed to give the evidence adduced a thorough scrutiny and full evaluation and thus fell short of meeting her duties as per the arbitration clause. The Arbitral Award is not in accordance with *The Arbitration and Conciliation Act*. It is in the interest of justice that this Court be pleased to set aside the arbitral award for noncompliance with the law. The Award made by the Arbitrator was not made in accordance with the terms of the FEFT agreement and the usages of trade applicable to Aggregators in the Telecommunication industry.

[6] It is contended further that the Arbitrator did not disclose and provide her Curriculum Vitae to the parties despite a specific and repeated request by Counsel for the applicant, before and during the hearing, which failure denied the applicant and it is Counsel the opportunity to assess her background and thus her impartiality and independence. The applicant learnt later from the records of the Uganda Law Society of her past educational and likely comradeship with the Managing Partner (Mr. Richard Okalang) of the law firm which represented the respondent in the Arbitral proceedings. They enrolled as Advocates on the same date of 8th November, 1988 having, apparently, complied with the requirements during the same period. The Arbitrator was accordingly evidently partial in light of the foregoing. The award was made devoid of justice and fairness in that while the Arbitrator found the respondent liable for breach of the FEFT agreement and accordingly denied it costs, she yet again contradicted herself and departed from the issues and evidence thus unfairly holding that the applicant was liable for breach of the agreement and condemned it to a refund of a colossal sum of money with interest and yet again damages with interest in an unfair manner.

The respondent's affidavit in reply:

[7] In his affidavit in reply of the respondent's Acting Company Secretary, it is averred that the learned Arbitrator made the award in conformity with *The Arbitration and conciliation Act*, and that this application is a disguised appeal that should be dismissed. the arbitral award that was issued on 12th April, 2023 was in regards to the applicant's illegal charge of 1% on the transactions derived from the FEFT agreement and was thus within the scope of the reference to the Arbitration and the evidence that was led during the arbitration proceedings. The issues that were agreed and which were part of the reference of the Arbitral proceedings concerned the applicant's illegitimate imposition of the l% charge on transactions arising from the FEFT agreement entered into between the applicant and the respondent and was therefore within the scope of the Arbitration. The arbitrator made a thorough scrutiny and full evaluation of the evidence and did

not depart from issues as alleged. The arbitrator did not contradict herself in the award and gave reasons why she made the orders she did.

[8] The Arbitrator in the matter was appointed by the executive Director of CADER, there was no objection by the applicant at the time of the appointment and during the hearing of the matter and the applicant is therefore estopped from making any objections after the award as the same is an afterthought. During the proceedings, the applicants did not formerly request for the curriculum Vitae and there is no evidence on the record to support this allegation. There is no record of any request for the Arbitrator's CV on the record. The applicant continued with the proceedings, paid the arbitration fees and led evidence without any objection to the arbitrator and therefore the allegation is an afterthought aimed to frustrate the respondent. Mr. Robert Okalang, the Managing partner of Okalang Law chambers studied with the Ms Racheal Kabala; the Arbitrator but they have never been in contact since then.

[9] In his affidavit in reply of the Managing Partner of M/s Okalang Law Chambers, it is averred that the Managing partner of the firm is Mr. Robert Okalang and not Mr. Richard Okalang as alleged by the applicant. The Law firm has two offices, to wit; one in Jinja and another in Kampala and its Managing Partner is based at the Jinja office. The respondent gave instructions to the Kampala office to handle the subject dispute on its behalf. The same was entirely handled by the Kampala office advocates without any involvement whatsoever of the Managing Partner is based at the Jinja office. The firm's Managing Partner was not in any way involved in the process of selection of the arbitrator and neither did he participate in the arbitration proceedings in any way whatsoever. The firm's Managing Partner was enrolled on the 8th November, 1988 at the High Court in Kampala but since then been fully based in Jinja and he has not been in touch or communication with the Arbitrator, Rachel Kabala. He does not know much about her, i.e. her residence, her office, marital status, her social life or her contacts, physical or electronic and it is not true that there is any nature of comradeship

between himself and the said Arbitrator. He has never had any friendship or comradeship before, during or after the date of our respective enrolment as advocates and neither did they have any friendship or comradeship when she handled the impugned arbitration process. He never had any influence on the said Arbitrator, Ms. Rachel Kabala, in the course of the impugned arbitration proceedings.

Affidavit in rejoinder:

[10] In the affidavit in rejoinder, the applicant contends that the intention was to name Mr. Robert Okalang. Reference to Richard instead of Robert was an error. The said Robert Okalang confirms to be the Managing Partner of the law firm representing the respondent, who indeed studied with the Arbitrator and enrolled with the Arbitrator on 8th November, 1988 at the High Court in Kampala. Such factual information in respect to the Arbitrator's credentials would have been pertinent in informing the Applicant's acquiescence with appointment of the Arbitrator, had it been provided as was requested. Notwithstanding that the Arbitrator did not record the request for her credentials in her notes, the said credentials were actually requested for in the presence of Mr. Ahumuza Julius who was also in attendance during the arbitral proceedings. In the Arbitrator's Declaration of Acceptance and Statement of impartiality made on 9th August 2022, she indicated that she had no past or present relationship with any party's counsel, whether professional or of any kind which turns out to be false. A declaration of impartiality such as the one made by the Arbitrator is so sacrosanct in Arbitral proceedings and ought to be entirely truthful as to leave no doubt in the minds of the parties about the Arbitrator's actual impartiality. The declaration including sharing of credentials should in any event be voluntary.

Submissions of Counsel for the Applicant:

[11] Counsel for the applicant submitted that the Arbitrator came up with issues outside those agreed to by the parties and purported to resolve them with inconclusive determination due to lack of evidence as well as departure from the evidence which had been adduced. By so doing, she went outside the scope of the reference to arbitration. The issue agreed to by the parties was whether the respondent breached the FEFT agreement when it collected a 1% charge on transactions. Clear evidence was led by the applicant to show that it did not breach the agreement particularly because the charge complained about was levied on an Aggregator, a third party through whom the respondent conducted business and not on the respondent itself. That the respondent used an Aggregator was not contested. In fact, the Arbitrator declined to award the respondent costs on ground that it used an Aggregator contrary to the FEFT Agreement. The Arbitrator instead chose to come up with what she called sub-issues.

[12] Sub-issue one was whether Account No.100001161 belonged to the Claimant. Purporting to resolve the sub issue, the Arbitrator stated that the evidence of ownership, an email submitted by the Applicant's technical witness, was not conclusive on ground that the said email, that is, josephine@yo.co.ug was not sufficient to prove that the account belonged to an Aggregator, M/s Yo Uganda and later on M/s True African Ltd. She further held that the burden rested on the applicant to furnish evidence that the account shifted to M/s True African, another Aggregator and yet it only supplied an email. Evidence of ownership was a simple email, a technical aspect which the Arbitrator could not reject without contrary evidence of another technical witness. She just admitted that there was no evidence to guide her. Secondly, the respondent should have then in the circumstances been required to prove that the account actually belonged to it by supplying the relevant information/credentials it supplied for opening the account in the first place. After all, the applicant's witness testified that the respondent

had to show documents for opening an account if at all it had one in its own name. This error by the Arbitrator is confirmed by the Arbitrator's own finding at the end of the award that the account was indeed an Aggregator's account when she declined to award the respondent costs for wrongly using an Aggregator account.

[13] Sub-issue two was whether Collection Account opened and operated by the Claimant was in compliance with the FEFT Agreement. This sub issue was a contradiction to the extent that it presupposed that the respondent (then Claimant) had actually opened a Collection Account, whereas not. Indeed, the award shows that the sub-issue was not answered either affirmatively or negatively. Instead, the Arbitrator delved into the legal aspect of estoppel. It is trite law that estoppel is a rule of evidence which precludes a party from asserting a position that is contrary to what they have previously made another to believe. The Arbitrator held that by dealing with the respondent from 2013 to 2019 whilst it engaged through an Aggregator, the applicant had acquiesced the arrangement and was therefore estopped from turning around to insist on a new position. Estoppel or acquiescence as a principle was in the circumstances wrongly invoked by the Arbitrator for two reasons. Firstly, the FEFT agreement under clause 4.2 clearly envisaged a particular collection account, not one to be presumed. The Collection Account for which no charge whatsoever was prohibited under clause 8.3 of the FEFT agreement was one that had to be actually opened by the respondent pursuant to clauses 1, 12, 4.2 and 4.7 of the FEFT agreement and not any other. Any other collection account cannot and could not be the one subject to protection under clause 8.3. The clause does not talk of a collection account of any nature but rather one specifically opened by the respondent with the applicant. Secondly, there was clear evidence led to the effect that at all material time whilst the respondent used a Collection account of an Aggregator, it received regular communication that required it to open its own collection account. The Arbitrator ironically in conclusion agreed that there was

use of an Aggregator thus effectively rendering the issue irrelevant and inappropriate.

[14] Sub-issue three was whether the respondent breached the FEFT Agreement when it collected the 1% transaction charge. Having failed to effectively resolve her two sub-issues above in respect to the existence and ownership of a collection account by the respondent, the Arbitrator could not effectively resolve this issue. Unfortunately, the Arbitrator merely summed up the issue by stating that she had considered the intention of the parties and that notwithstanding the nature of a collection account, the applicant had breached the clause which barred deductions from the collection account. It is our submission that this amounted to blatant disregard of the available evidence in the circumstances which was all borne out of framing new sub issues that were clearly intended to unfairly attribute undue liability on the applicant at all costs. By so doing, the Arbitrator was in breach and for this and the other reasons, the Award ought to be set aside.

[15] The Arbitrator did not disclose her credentials which would have showed her past educational relationship with the Managing Partner of the respondent's firm of Advocates. The disclosure would have enabled the applicant to assess her independence and impartiality. As showed in the resolution of issue above, the Arbitrator's impartiality in handling the matter is quite questionable and is reflected in the award made. For instance, the conclusions do not match the evidence which was adduced before her. She delved into aspects for which no evidence had been called. Even if it were the case that the applicant did not as for the Arbitrator's credentials, which is denied, the Arbitrator still had a continuing duty to voluntarily make disclosure. By not doing this and then proceeding to make a contradictory decision not based on clear evidence, she was manifestly partial. She told a lie in the Arbitrator's Declaration of Acceptance and Statement of impartiality when she declared that she had no past or present relationship with any party's counsel, whether professional or of any kind.

[16] The Arbitrator breached the duty to decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, when she found the respondent to have been in breach of the FEFT Agreement when it did not open its own collection account and yet again allowed it to recover, allegedly because the applicant was in breach. The justice of the matter was such that the respondent having not done what it was supposed to do despite various reminders, it could not be awarded for its failing. By applying the principle of acquiescence in total disregard of the evidence or with want of supporting evidence, the Arbitrator acted unfairly and unjustly. Acquiescence could not particularly hold in the circumstances because the respondent was informed about the introduction of a charge on aggregators. Nothing had been acquiesced. The conclusion of the Arbitrator was clearly unfair and unjust.

[17] The Arbitrator further acted unjustly and unfairly when she failed to exercise her powers under section 19 (3) of *The Arbitration and Conciliation Act* to properly and judiciously determine the admissibility, relevance, materiality and weight of evidence. For instance, the evidence of a collection account was an email. The relevant witness of the applicant, who was a technical one, testified that the email was key because it is the one to which login credentials that facilitate FEFT transactions are shared by applicant. The Arbitrator attached little or no weight to the email which was submitted in evidence in breach of her duty and power under section 19 (3) of the Act. The fact of use of an email for this purpose, odd as it may have appeared to the Arbitrator is an aspect that falls within the trade usages in the telecommunications sector. It was a key consideration. It could not be wished away as it was.

[18] Thirdly, the Arbitrator awarded the respondent interest on the claimed sum and then went ahead to again award damages with interest. The award of interest on the claimed sum, if done correctly and deservedly, would constitute sufficient compensation for the respondent who never led any evidence to suggest that the sum claimed was business capital for which it had suffered loss as to warrant

general damages in addition to interest. Although the Arbitrator recognised the particulars of the contract between the parties, she did not decide the matter in accordance with it. This is exemplified by her recognition of the fact that the respondent had breached a key clause of the contract and for that reason even denied the respondent costs but yet again went ahead to reward it with a colossal sum of money.

[19] Integration of the respective parties' systems by among others use of a collection account was a key usage of trade applicable to FEFT Agreements. However, the Arbitrator paid no due attention to this. While the applicant's witness led expert evidence to demonstrate the uniqueness of the manner in which the agreement operated, the Arbitrator disregarded his evidence without seeking for or considering the evidence of an alternative or another expert in the circumstances. One particular key piece of evidence which the Arbitrator neglected to take into consideration was that of an email, that is, josephine@yo.co.ug, which was a key proof of ownership of a collection account. The email did not belong to the respondent. Opening of a collection account and use of an email as evidence of its existence is a usage of trade which was key in the matter between the parties but was ignored over by the Arbitrator.

[20] By disregarding the evidence of the applicant's witness who was an expert in the telecommunications sector, particularly the evidence with regard to a collection account, which is unique and peculiar to the relationship which the parties had, the Arbitrator failed to decide in accordance with the terms of the particular contract and to take into account the usages of the trade applicable to the particular transaction. The natural consequence of the Arbitrator's failings must be the setting aside of her award.

Submissions of Counsel for the respondent:

[21] Counsel for the respondent submitted that Clause 21 of the FEFT agreement is to the effect that all disputes arising between the parties shall be handled by Arbitration. It was therefore contemplated by the parties that any and all disputes arising from the arbitration were to be handled by Arbitration. It is established principle of law that a court can come up with issues, make amendments, strike out issues or even make additional issues as may be necessary for determining the matters in controversy between the parties. In order to enable the Court make the right decision framing of appropriate issues is of crucial importance. Therefore, once the arbitrator listened to the evidence of the parties and read the pleadings it became clearer for her that issues be added to reach a proper decision on the controversies.

[22] The sub-issues were not a digression from the reference to arbitration. In fact, the arbitrator raised the first sub-issue to address the defence of the applicant when it claimed that the Account No. 100001160 did not belong to the respondent. Whereas the burden of proof of that assertion lay on the applicant, there was no evidence provided to prove ownership of an account save for an email address. The record of proceedings clearly shows that the applicant made a Know Your Customer (KYC) report on the impugned account. It was also agreed that the KYC which was in the possession of the applicant would settle the issue of ownership of the account. The applicant conveniently chose to refrain from providing the KYC details to and yet it was the crux of its defence. The arbitrator found that the ownership of the account number could not be proved by an email address because even when the applicant changed an aggregator from M/s YO Uganda to M/s True African Limited, the email address did not change and yet the aggregators had changed. The Arbitrator was justified in making the decision that she made.

[23] It is not the business of this Court to determine if the Arbitrator reached the right conclusion at this stage and in this application. That would be subjecting the award to an appeal. At this point the applicant should only prove that the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration.

[24] The arbitrator did not create new issues for determination outside those that were referred to her. In the resolution of this sub-issue, she pondered on the evidence and pleadings of the parties and reached her conclusion giving reasons why she thought it was the right decision. In her decision denying the costs, the arbitrator did not confirm that account Number 100001160 belonged to an aggregator which was the applicant's case. Instead, she confirmed the claimant's case that the claimant operated an account attached to an aggregator. It is for that reason that she denied the costs. It is the claimant that operated the account and that was the position throughout the hearing. The claimant had access to the account, the money on the account was the claimant's money, the claimant had authority to offer login details of that same account to different aggregators (i.e. M/s Yo Uganda and then M/s True Africa), it also had the authority to close the account and open a new one on the advice of the applicant. On the strength of that evidence, the applicant failed to prove that the account belonged to any other person other than the claimant/respondent herein.

[25] The claimant/respondent never denied the use of the aggregator in running its account. It is for that reason that the arbitrator, in her wisdom, denied the respondent/claimant costs. It was not, as falsely alleged by the applicant, for the reason that the account belonged to aggregator. The arbitrator considered the defence of estoppel as raised by the Claimant /respondent and agreed with it, giving reasons why. This sub-issue was correctly derived from the issue agreed upon by the parties and it was in keeping with the reference to Arbitration.

[26] The Arbitrator did not act outside the arbitration agreement, he considered the evidence of the parties and in keeping with the Arbitration agreement, reached her own decision, giving reasons why she decided so. Court cannot re-examine and reappraise the evidence which has been considered by the arbitrator, sit on appeal over conclusions of the arbitrator in an application to set aside the award if it is not perverse. The applicant does not demonstrate anywhere any irrational, capricious, or arbitrary act by the Arbitrator. The arbitrator is rather faulted for reaching a decision that did not favour the applicant. The crux of the instant application requires the court to re-appraise the evidence and set up the award for scrutiny.

[27] The agreement provided for full integration which was done. The arbitrator found that no tangible explanation had been given by the applicant as to why the deductions were made. The applicant did not deny the deductions of shs. 368,580,811/= from account Number 100001160. However, the defence and the testimony of the applicant was to the effect that the deductions on the said collection account were done lawfully and were a direct consequence of the Claimant's own breaches. The Arbitrator examined the evidence from both sides and reached a decision with reasons why she did. The award does not delve in any aspect for which no evidence was called. The award was premised on the reference to arbitration and the decisions of the arbitrator were related to the evidence adduced throughout the trial.

[28] The deponent to the applicant's affidavits did not attend any proceeding at the arbitration. His averments as regards the request for disclosure are purely hearsay evidence and the said evidence is inadmissible. On the other hand, the respondent's deponent attended all the proceedings and his evidence carries more weight than that of the applicant in deciding whether the applicant indeed requested for the credentials of the Arbitrator. The record of proceedings shows no evidence of the applicant requesting for the Arbitrator's credentials. As a bare minimum, the applicant should have written a letter to demand for the said

credentials as it did on many other occasions when it sought the indulgence of the Arbitrator for extension of time to file submissions and in other instances. It is an afterthought that is not backed by any evidence and this court should be pleased to disregard it. In any case, the applicant waived its right under section 4 of T*he Arbitration and Conciliation Act*. Counsel Philip Kasimbi appeared for respondent at the hearing and not Mr. Okalang Robert. There is no evidence, to prove that Mr. Robert Okalang and the Arbitrator had a particular connection or had dealings with each other. Therefore, the arbitrator did not lie when she stated that she had no relationship with any party or its counsel. There was no relationship between Mr. Robert Okalang and the arbitrator that was worthy of disclosure to the parties. The declaration of impartiallty rendered by the Arbitrator was not false as alleged and there is no good ground for Impeachment of the award. The position of the Courts is that the alleged partiality should be direct, definite, and capable of demonstration rather than remote, uncertain or speculative. The allegation of the claimant fall from the precincts of the law as regards and we pray that the Court disregards this ground.

[29] The Arbitrator considered the fact that the applicant had previously offered to refund part of the money that it had irregularly deducted from the respondent's account. She found no reason why only part of the money should be refunded and not all of it. In her wisdom, the arbitrator held that the money that was irregularly deducted from the respondent's account be refunded. She also denied the respondent costs on account of the applicant's allegations that that the respondent did not open up an account of its own as provided for in FEFT agreement. The decision did not violate Section 28 (4) of The Act as alleged and this ground should be disregarded. The Arbitrator gave coherent awards based on her understanding of the Contract between the parties, the evidence provided at the hearing and the submissions of the counsel. It was clear that the email address had been used by two aggregators who were different entities and therefore it could not be the basis of ascertaining the owner of the account. In any case, the applicant had all the Information about the account holder through

a KYC report but only chose to present an email address. The award of damages and interest was justified and the arbitrator gave reasons why she reached the conclusions that she did on the award of damages and interest thereon. The courts will intervene only where the arbitrator unreasonably granted the damages in a manner that clearly overlooks the principles of the law.

The Decision:

[30] 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 or the validity of the arbitral award. When a court reviews an arbitration award, it should not concern itself with the merits of the determination (see *Simbamanyo Estates Ltd v. Seyani Brothers Co. (U) Ltd, C. A. Miscellaneous Application No. 555 of 2002*). 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.

[31] One of the fundamental objectives of arbitration is to provide a final, binding resolution of the parties' dispute. Essential to achieving this objective is the preclusive effect of arbitral awards: if parties are not bound by the results of the awards made against them, either dismissing or upholding their claims or declaring their conduct wrongful or lawful, then those awards do not achieve their intended purpose and are of limited practical value. Once the parties decide to have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the Courts save in the limited circumstances provided by the law. Therefore, save for specified circumstances, parties take their arbitrator for better or worse both as to decision of fact and decision of law. Recourse to the court against an arbitral award may be made only by an application for setting aside the award under section 34 (2) and (3) of *The Arbitration and Conciliation Act* which provide as follows;

(2) An arbitral award may be set aside by the court only if—

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

(i) A party to the arbitration agreement was under some incapacity;

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

(v) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;

(vi) The arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or

(vii) The arbitral award is not in accordance with the Act;

(b) The court finds that—

(i) The subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

(ii) The award is in conflict with the public policy of Uganda.

[32] The grounds for setting aside an award are exhaustive, and the court hearing an application to set aside an award, has no power to investigate the merits of the dispute or to review any decision of fact, and exceptionally save for fundamental

principles or basic notions of the law, any decision of law made by the tribunal. The objections raised by the applicant fall under section 34 (2) (a) (iv), (vi) and (vii), to wit; - there was evident partiality on the part of the arbitrator; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; and that the arbitral award is not in accordance with the Act.

i. Whether there was evident partiality on the part of the arbitrator.

[33] It is contended by counsel for the applicant that Mr. Robert Okalang, the Managing partner of Okalang Law chambers, the law firm that represented the respondent during the arbitral proceedings, studied with the Ms. Racheal Kabala, the Arbitrator, and they enrolled as Advocates on the same date of 8th November, 1988. The Arbitrator did not disclose her past educational relationship with the Managing Partner of the respondent's firm of Advocates, lied in her Declaration of Acceptance and Statement of impartiality made on 9th August 2022, when she indicated that she had no past or present relationship with any party's counsel, whether professional or of any kind, as a result of which she was manifestly partial. The applicant learnt of this relationship later from the records of the Uganda Law Society, hence the argument that her past educational and likely comradeship with the Managing Partner of the law firm which represented the respondent in the Arbitral proceedings, biased her evaluation of the evidence resulting in a contradictory decision not based on clear evidence. The respondent refutes this.

[34] It is trite that any tribunal permitted by law to adjudicate disputes and controversies not only must be unbiased but also must avoid even the appearance of bias. One of the most crucial aspects of the arbitrator's role is neutrality. Independence and impartiality constitute the core of arbitrator integrity. The lack of independence may create an imperfect arbitration, but

prejudgment renders the process a sham formality, an unnecessary social cost.

[35] Impartiality requires that the arbitrator should not sit in a proceeding in which he or she is interested, or is perceived to be interested financially, personally or otherwise. Partiality encompasses both an arbitrator's explicit bias toward one party and an arbitrator's inferred bias when an arbitrator fails to disclose relevant information to the parties. Evident partiality may be manifested by: (i) "actual partiality or bias;" or (ii) an "appearance of partiality;" or a "reasonable impression of partiality." While "actual bias" denotes a demonstrable situation where an arbitrator has been influenced by partiality or prejudice in reaching his decision, "apparent bias" denotes existence of a reasonable apprehension that the arbitrator may have been, or may be, biased. The test for the latter is whether the circumstances create room for justifiable apprehensions of bias. There are two aspects to the requirement of impartiality; first, the Arbitrator must be subjectively impartial, that is, he should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the Arbitrator must also be impartial from an objective viewpoint, that is, he must offer sufficient guarantees to exclude any legitimate doubt in this respect.

[36] Actual bias is established by evidence of the Arbitrator having some link with the party involved in a cause before him, whereby the outcome of that cause could, realistically, affect the arbitrator's interest. In the instant case, here is no evidence to show that the arbitrator has any financial interest whatsoever in the respondent, nor that he has a substantial relationship with its counsel. Therefore, the arbitrator did not stand to gain or lose anything from any ruling he made in the arbitration.

[37] On the other hand, apparent bias arises when, although the arbitrator is not a party to the proceedings, and does not have an interest in its outcome, there is something in the arbitrator's conduct or behaviour, their interests, affiliations or

their allegiances, that gives rise to a suspicion that they have not decided the case in an impartial manner. Bias must be distinguished from improper conduct. Bias tends to involve intentional, deliberate, and corrupt violations of a fair arbitration. On the other hand, misconduct is usually unintentional improper activities which prejudice the complaining party. The degree to which the conduct is indicative of bias, prejudice, or improper influence may include; conduct that overtly communicates hostile biases or naive stereotyping or actions which favoured, or might have favoured, one party. Evidence of such hostility might arise by way of comments or public statements made by the Arbitrator prior to or during the hearing, or in the course of the decision-making process. Such hostile comments or statements impair the fairness of the arbitral process.

[38] The concept of "bias" or "partiality" concerns the inclination of an arbitrator, either in favour of one of the parties or in relation to the issues in dispute. It must be demonstrated that the Arbitrator had an inclination, either in favour of one of the parties or in relation to the issues in dispute, or a direct and definite interest in the outcome of the arbitration. Bias was defined in *Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700*, thus;

> Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him.

[39] An appearance of partiality or a reasonable impression of partiality in arbitration occurs where a reasonable person would have to conclude that an arbitrator was

partial to one party to the arbitration. This requires an objective assessment in a fact-sensitive, case-by-case inquiry into each dispute with little predictability as to future outcomes, of whether a reasonable person would believe that an arbitrator was partial to a party to the arbitration. The test is whether the circumstances could properly cause a reasonably well-informed person to have a reasonable apprehension of a biased appraisal or judgment by the arbitrator, however unconscious or unintentional it might be. This entails a sufficiently obvious bias that a reasonable person would easily recognise. The applicant must not only provide proof of the improper conduct creating the appearance of partiality of the arbitrator, but also that the improper conduct affected the award that was ultimately decided upon.

[40] In *Re Medicaments and Related Classes of Goods (No 2); Director General of Fair-Trading v. Proprietary Association of Great Britain and Proprietary Articles Trade Association [2001] 1 WLR 700*, the court summarised the principles to be derived from this line of cases as follows:

> (1) If a [the arbitrator] is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the [the arbitrator] is to be presumed. (3) The Court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the [the arbitrator] might not have been impartial. If they do the decision of the [the arbitrator] must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the Court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice.

[41] The court must therefore first ascertain all the circumstances which have a bearing on the suggestion that the arbitrator was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to

conclude that there was a real possibility, or a real danger, the two being the same, that the arbitrator was biased.

[50] Impartiality is usually defined by the absence of prejudice. The test for apparent bias is "whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (see *Porter and Weeks v. Magill [2002] 2 WLR 37; [2002] 2 AC 357; [2002] 1 All ER 465*). The fact that the observer has to be "fair-minded and informed" is important. The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction (see *Taylor v. Lawrence [2002] 2 All ER 353 at p.370, para 61*). "Before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant…She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment" (see *Halliburton Company (Appellant) v. Chubb Bermuda Insurance Ltd [2020] UKSC 48*).

[51] The question for the court is whether the grounds raised, taken together with any other relevant factors, would have led the fair-minded and informed observer, having considered the facts, to conclude that there was in fact a real possibility that the arbitrator was biased. The test has been formulated in terms of the existence of a "real danger of bias." The test was articulated in *R. v. Gough [1993] AC 646* and followed in *Laker Airways Inc v. FLS Aerospace Limited [1999] 2 Lloyds Report 45 at pp.48-49*, to the effect that:

> The Court should ask itself whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour or disfavour the case of a party to the issue under consideration by him.

[52] Because arbitration is a form of adjudication, albeit a private one, it is important that the final outcome be the result of an impartial process in which all sides have

been fully heard. An arbitral tribunal must not only be fair-minded, but also be perceived by the parties as such. For the parties to accept the outcome of an arbitration, even if it runs against them, they must be confident that those who sit in judgement do so fairly and with an open mind.

[53] An arbitrator must not only be impartial but must also avoid the appearance of any inability to be impartial. An appearance of inability to be impartial occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the Arbitrator's honesty, integrity, impartiality, temperament, or fitness to serve as Arbitrator over the matter in issue is impaired.

[54] Doubts as to independence or impartiality of an arbitrator are justifiable if they give rise to an apprehension of bias in the eyes of an objective, reasonable observer. Appearance and perception often triumph over substance and reality. Confidence in the propriety of an arbitral award is eroded by improper conduct of an arbitrator, especially conduct that creates the appearance of any inability to be impartial. Arbitrators must avoid any behaviour which, in fact or perception, reflects adversely on their impartiality. An award may be set aside for the arbitrator having created a perception of partiality, even where no actual bias occurred. The issue therefore is answered in the affirmative; the award is vitiated by a reasonable apprehension of partiality on the part of the arbitrator.

[55] When deciding whether bias has been established, the court personifies the reasonable man. The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the Arbitrator, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him. Not only must the procedure be conducted fairly, but the

parties, particularly the one losing, must also perceive it as such. As Lord Hewart in *R. v. Sussex Justices, ex parte McCarthy [1924] 1 K.B. 256*, said "it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done." However, save in the case where the appearance of bias is such as to show a real danger of bias, apparent or unconscious bias is insufficient; for if despite the appearance of bias the court is able to examine all the relevant material and satisfy itself there was no danger of the alleged bias having in fact caused injustice, the impugned decision will be allowed to stand.

[56] To demonstrate evident partiality, the applicant must show that a reasonable person would have to conclude that an arbitrator was partial to the other party or the arbitration. It is not enough to demonstrate an amorphous predisposition toward the other side. The party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator.

[57] In the instant case, the Court is required to first ascertain all the circumstances which have a bearing on the suggestion that the Arbitrator was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the Arbitrator was biased. The observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. Before he takes a balanced approach to any information he is given, he will take the trouble to inform himself on all matters that are relevant. He is able to put whatever he has read or seen into its overall social, political or geographical context. He is fair-minded, so he will appreciate that the context forms an important part of the material which he must consider before passing judgment. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant (see *Gillies v. Secretary of State for Work Pensions [2006] 1 WLR 781 [17]*. An allegation of

apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided.

[58] The only fact advanced by the applicant as being indicative of bias is that the Arbitrator the Managing partner of M/s Okalang Law chambers which represented the respondent in the arbitral proceedings studied with the Ms. Racheal Kabala, the Arbitrator, and they enrolled as Advocates on the same date of 8th November, 1988. It has not been demonstrated that as a result of that past relationship, the arbitrator had any past or present business, professional or other similar close relationship with either party or their advocates and neither has lack of subject independence been demonstrated.

[59] Arbitrators are often selected by the parties precisely because of their expertise in the relevant field. Many businessmen desire such a forum so that their dispute may be considered within the context of their own commercial environment. Often arbitrators bring to their position expertise acquired from past associations with the industry which they now must adjudicate. Arising from their many years of experience in the industry will be many close alliances and friendships. Since arbitrators are inherently part of the business world, and considering that arbitration often involves a trade-off between arbitrator impartiality and expertise on one hand, and the fact that arbitration is voluntary in nature on the other, actual partiality or bias occurs where the arbitrator has a substantial interest in the dispute. In other words, the lesser ethical standard for arbitrators is seen as the result of a trade-off between impartiality and expertise, which parties choose when they feel it is to their benefit.

[60] Such interest must be direct, definite, and capable of demonstration rather than remote, uncertain or speculative. It means actual, discernible inclination to favour one party; a predisposition to a particular point of view which might affect the result. This will take the form of personal prior knowledge they may have of the facts of the dispute, or known direct or indirect financial or personal interest in the

outcome of the arbitration, including any known existing or past financial, business, professional or personal relationships, any such relationships with their families or household members or their current employers, partners, or professional or business associates, which might reasonably affect impartiality or lack of independence in the eyes of the parties. There should be persuasive evidence of partiality, rather than mere speculation or possibility or a vague appearance of bias. No arbitrator should have links with either side that provide an economic or emotional stake in the outcome of the case.

[61] Arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. No finding of actual bias will be made where the arbitrator's connection or relationship is too attenuated for any reasonable person to believe the arbitrator acted with partiality towards the applicant during the arbitration in question. It is inevitable that knowledgeable arbitrators will have some business relationships. As long as the relationships are unsubstantial, an arbitrator's "trivial" relationships with a party or counsel should not foreclose the arbitrator from being considered neutral.

[62] Since it would be unrealistic to expect arbitrators to sever all ties with the business world or the practice of law, it is equally unrealistic to apply the judicial standard of impartiality to arbitrators. In fact to do so might undermine arbitration as an alternative dispute mechanism since it would encourage the appointment of those who have never been actively involved in the field. If arbitrators must be completely sanitised from all possible external influences on their decisions, only the most naïve or incompetent would be available. Consequently, notions such as "proximity" and "intensity" will be invoked to evaluate allegedly disqualifying links or prejudgment. Because arbitrators are often experts within their respective fields, they have many more potential conflicts of interest than judicial officers. Therefore arbitrators should not be held to the same standards of judicial decorum as that applicable to judicial officers. Consequently the standard of bias

disqualification applicable to judicial officers does not establish evident partiality on the part of an arbitrator. In arbitration, both parties make an informed decision about the arbitrator's ability to act as an impartial adjudicator to their dispute.

[63] When a person is approached in connection with his or her possible appointment as an arbitrator, it is his duty to disclose in writing any circumstances which are likely to give rise to justifiable doubts as to his independence or impartiality (see section 12 (1) of *The Arbitration and Conciliation Act*). "Independence" means that an arbitrator must be free from any involvement or relationship with any of the parties. "Impartiality" on the other hand deals with the arbitrator's mental predisposition toward the parties or the subject matter or controversy at hand. It is the interior frame of mind that the arbitrator brings to the submission. It is well-recognised that an arbitrator is obligated to disclose personal or professional information that might deem her partial or biased. Failure by an arbitrator to disclose material relationships may support (though will not invariably lead to) a conclusion that there is a possibility of bias (see *Enka Insaat Ve Sanayi A.S. v. OOO Insurance Company Chubb [2020] UKSC 38; [2020] 2 Lloyd's Rep. 449*). Neutrality starts with complete and accurate disclosures. A court may find evident partiality where an arbitrator fails to reveal facts that could reveal a conflict of interest.

[64] By virtue of section 12 (1) of *The Arbitration and Conciliation Act* persons asked to serve as arbitrators should, before accepting the appointment, disclose any direct or indirect financial or personal interest in the outcome of the arbitration as well as any existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias, and any such relationships which they personally have with any party or its lawyer, or with any individual whom they have been told will be a witness. The obligation to disclose interests, relationships or circumstances that might preclude an arbitrator from rendering an objective and impartial determination is a continuing duty that requires an

arbitrator who accepts an appointment to disclose, at any stage of the proceeding, any such interests, relationships or circumstances that arise, or are recalled or discovered. In addition to relationships, it is imperative to disclose any life experience that may raise any doubt about the Arbitrator's ability to be impartial.

[65] Even though section 12 (1) of *The Arbitration and Conciliation Act* requires that a potential arbitrator to disclose any interest or relationship "likely to affect impartiality," there is no requirement that the potential arbitrator disclose all relationships that may conceivably be regarded as a basis for bias (see *Newcastle United Football Company Limited v. The Football Association Premier League Limited and others [2021] EWHC 349 (Comm*). Disclosure is required for those relationships that could preclude the Arbitrator from rendering an objective and impartial determination in the proceeding or might create an appearance of bias. Therefore, trivial, indirect, tenuous and non-substantial relationships need not be disclosed because full disclosure would be impractical for those arbitrators who are knowledgeable about their field. It must be expected that a potential arbitrator cannot recall, in order to disclose, every relationship, no matter how indirect or trivial, that might be considered a basis for bias. The duty to disclose is limited to interests or relationships likely to affect impartiality or which might create an appearance of partiality.

[66] If any nondisclosure, even of a trivial fact, would result in the setting aside of the award, it would make it very difficult to find qualified arbitrators. In any event, section 34 of *The Arbitration and Conciliation Act* does not specify an arbitrator's nondisclosure as a basis for setting aside an arbitral award. By virtue of section 9 of the Act, courts are prohibited from setting aside an award on grounds other than those listed in the Act. What is required to be proved is "evident partiality," and this is only achieved when a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration. The alleged bias

must be direct, definite and capable of demonstration rather than remote, uncertain or speculative.

[67] Furthermore, procedurally, doubts as to independence or impartiality of the arbitrator have to be determined as a matter of fact in the facts of before the particular arbitrator (see section 13 of *The Arbitration and Conciliation Act*). If a challenge is not successful, and the arbitrator decides that there is no reasonable apprehension of bias or other justifiable grounds to doubt the independence or impartiality of the arbitrator, he or she must then continue the arbitral proceedings and make an award. It is only after such award is made, that the party challenging the arbitrator's appointment on grounds of partiality, may make an application for setting aside the arbitral award in accordance with Section 34 (2) (a) (iv) of *The Arbitration and Conciliation Act*, on the aforesaid ground. This though appears to be a case of a displeased party conducting a thorough background investigation following the arbitration award for the sole purpose of uncovering just such an undisclosed relationship in the belief that it might allow for a successful challenge to the arbitration decision.

[68] Section 13 (2) of *The Arbitration and Conciliation Act* provides that a party who intends to challenge an arbitrator, must within fifteen (15) days after becoming aware of the composition of the appointing authority or after becoming aware of any circumstances disqualifying the arbitrator send a written statement of the reasons for the challenge to the appointing authority; and unless the arbitrator who is being challenged withdraws from his or her office or the other party agrees to the challenge, the appointing authority shall decide on the challenge within a period of thirty days from receipt of a written statement.

[69] To discourage eleventh hour challenges and ensure parties bring forward challenges as early as possible, time limits are set. By virtue of section 13 (3) of *The Arbitration and Conciliation Act* if a party appointed the arbitrator or participated in the selection, the party may only challenge the arbitrator within

fifteen (15) days after becoming aware of the composition of the appointing authority or for reasons of which the party became aware after the appointment was made. Accordingly, if a party challenges the arbitrator's jurisdiction, the arbitrator should consider whether the challenge was made within the time limit specified. Where a party becomes aware of a given matter after the time limit, an arbitrator should consider whether a make a timely challenge such that the challenge is made late and there is no good reason for the delay, or whether the party's position is inconsistent with an earlier stance, could result in a finding of waiver (see *Rail India Technical and Economic Services Ltd v. Ravi Construction, Bangalore, 2003 (4) RAJ 394 (Kar*). In the instant case the applicant does not disclose the date when the discovery was made.

[70] Apparent bias describes the situation where circumstances exist which give rise to a reasonable apprehension that the Arbitrator may have been, or may be, biased. Considering the circumstances, a reasonable person would not conclude that the Arbitrator was partial in favour of the respondent There is no evidence to suggest that the Arbitrator had reason to prefer one outcome of the arbitration to another or that he has reason to favour the respondent rather than the applicant. While the nature of some relationships would always force a reasonable person to conclude the arbitrator was biased, the relationship alleged in this instant case does not. It is a superficial relationship that did not create any financial or other interest of the arbitrator in the proceeding. Apart from having attended the same law class and enrolled on the same day approximately 34 years before the arbitration, there is no evidence to show that the arbitrator and the Managing Partner of the law firm that represented the respondent developed close ties of affection during or after that period. There is no evidence to show that the said Managing Partner played any direct or indirect role in the arbitration.

[71] Advocates who attended the same class as undergraduate or post-graduate students should be considered acquaintances. Similarly, when their interactions outside of court are coincidental or relatively superficial, such as being members of

the same place of worship, professional or civic organisation, or the like. Such an acquaintance, standing alone, is not enough to require disclosure. The Arbitrator is not required to disclose an acquaintance with a party or advocate in a proceeding, but, may do so if he or she would like to. On the other hand, friendship implies more than a mere acquaintance and some degree of mutual affection. Arbitrators need not disqualify themselves in all cases where a party or advocate is a friend and need not disclose all friendships. But they should disclose to the advocates or parties' information about any friendship with a party or advocate that the Arbitrator believes the parties or their advocates might reasonably consider relevant to a possible motion for disqualification, even if the Arbitrator believes there is no basis for disqualification. If a party objects to the Arbitrator's participation, the Arbitrator has discretion to decide whether or not to recuse him or herself; the Arbitrator may participate over the objection only if the Arbitrator believes that he or she can remain impartial, putting the reasons for the decision on the record.

[72] In the instant case, the relationship between the arbitrator and Managing Partner of the law firm that represented the respondent in the course of the arbitration is so remote with no direct link to the arbitration. The relationship, suggestive only of acquaintance, is not of a nature likely to create a mental attitude or disposition toward or against a party to the arbitration such as would affect impartiality, or which might reasonably create an appearance of partiality or bias. The Arbitrator did not tell a lie when she declared; "I hereby confirm that there is no past, or present relationship direct with any parties, their counsel, whether financial, professional or of any kind other relationship that disclosure would be called for….. There are no facts or circumstances past or present that need be disclosed because they might be of such nature as to call into question my neutrality and independence in the eyes of any of the parties to the dispute." The challenged relationship was too tenuous given that it is not a familial, business, or professional relationship, and had occurred decades earlier; certainly, remote in time. It was trivial and there was no need for its disclosure. The fair-minded and informed

observer, having considered the facts, would not conclude that there was a real possibility that Ms. Rachel Kabala was biased. The arguments of counsel are at best, uncertain and speculative. On these facts, a claim of evident partiality cannot be sustained. The answer to the issue therefore is in the negative; the award cannot be set aside on this ground since there is no manifest bias on the part of the Arbitrator.

ii. Whether the arbitrator engaged in the misconduct of exceeding her jurisdiction and not complying with the terms of the arbitration agreement;

[73] An arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law before rendering its award. It follows from the principle that arbitral jurisdiction derives from the parties' consent that the scope of the tribunal's authority also is limited by the parties' consent. An award may be remitted or set aside on the ground that the arbitrator, in making it, had exceeded his jurisdiction, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be enforced. An award that deals with a difference or dispute not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration, is *ultra petita*. If the tribunal failed to discharge its mandate by refusing jurisdiction over certain, or all, of that party's claims, then it is *infra petita*. It is often the case that, in enforcement or set-aside proceedings, an award-debtor will raise the argument that the issues or claims decided in an award exceeded or differed from those presented for adjudication by the parties to the tribunal, or where the tribunal determined *sua sponte* issues or claims not raised by the parties.

[74] All mistakes in procedure committed by the arbitrator which have or may have unjustly prejudiced a party are classified as "misconduct." Misconduct is used in

the technical sense as denoting irregularity, and not any moral turpitude or anything of that sort (see *London Export Corporation Ltd. v. Jubilee Coffee Roasting Co. Ltd. (1958) A.W.L.R. 661*). Misconduct is usually constituted by unintentional improper activities which prejudice the complaining party, such as; - an arbitrator deciding an issue without any evidence being presented on the issue; discussion of the matters with third persons; non-observance of the principles of natural justice; delegating the decision making power; exclusion by two of the arbitrators of the third from hearings or deliberations; a visit by one arbitrator alone to a construction site in violation of the submission agreement along with the obtaining of additional information from one of the parties on the equipment used, which information influenced the award; the tribunal's failure to give the parties notice and a proper opportunity to consider and respond to a new point that ultimately affected the arbitrator's reasoning in the award, and so on.

[75] Misconduct occurs when the arbitrator fails to decide all the matters which were referred to him or her, or goes beyond the terms of submission. "Misconduct" of an arbitrator includes any failure by the arbitrator to comply with the terms, express or implied, of the arbitration agreement (see *Margulies Brothers Limited v. Dafnis Thomaides & Co (UK) Limited [1958] 1 Lloyds Rep 250 at 253*). An award must determine all the differences which the parties by their submission referred to arbitration. An award which omits to decide some of the important issues raised by a party which are covered by the terms of submission is bad and unenforceable.

[76] An award is fatally defective it the arbitrator did not make a full and final award upon all the matters submitted to him (*infra petitia*). Although it is not necessary for the arbitrator to exhaustively give reasons for the conclusions arrived at by him or to give his findings on the issues raised in the case, the award should give a clear decision of the case. Where on the face of it the award is very vague and it is difficult to know what the findings actually were, the award is not a decision of the case at all. Further if the award does the very thing which the parties

wished to avoid, namely, going to a Court of law and bearing the expenses of protracted litigation, the purported award defeats the very purpose of arbitration by throwing the parties back to the very position from which they wanted to escape. The defect in the award then become a vital one that goes to the root and therefore is to be treated as otherwise invalid.

[77] Conversely an award that goes beyond the terms of submission (*ultra petita*), will be void and liable to be set aside. It is trite that the Tribunal gets its jurisdiction to pass an award from terms of the submission. The Tribunal cannot go beyond the terms of the submission to pass an award. An arbitral award is liable to be set aside if it deals with or does not fall within the terms of the submission of a dispute not contemplated by the reference, or if it includes a decision on matters outside that submission. The reference to a dispute under an agreement determines the boundaries of the arbitrator's competence and jurisdiction. If the arbitrator claimed authority not exercisable by him, the award to the degree to which it is outside the arbitrator's jurisdiction will be void and liable to be set aside.

[78] The Court may refuse to register and enforce the arbitral award if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced. An arbitrator will be found to have exceeded his powers by issuing an award on a basis that neither party had advanced during the arbitration. However, to the extent that the issues or claims are properly addressed in evidence and submissions, or orally argued during the proceedings, these issues and claims should be seen, in most instances, as properly within the purview of the arbitrator.

[79] In order to intervene on basis of misconduct, the court must be satisfied that there may have been, not must have been, or that the irregularity may have caused, not must have caused, a substantial miscarriage of justice that would be sufficient to justify setting aside or remitting of the award. The applicant must show both an irregularity affecting the tribunal, the proceedings or the award and that the irregularity has caused, or will cause, substantial injustice. Findings of the arbitrator on the factual matrix need not to be interfered with as the Court does not sit in appeal and the Courts are also refrained from re-appreciating or re-evaluating the evidence or the material before the arbitrator unless perversity is writ large on the face of the award (see *Captain Joseph Charles Roy v. D & D International (U) Limited, H. C. Misc. Application No. 283 of 2018*), or the award suffers from the vice of jurisdictional error. The sanctity of awards should always be maintained. An award is considered perverse if it renders a decision which is so irrational that no reasonable person would have arrived at and would not be sustained in a court of law; a patent illegality in the award which extends to the root of the matter without there being a possibility of alternative interpretation which may sustain the award.

[80] The fact-finding process by an arbitrator can be summarised in three categories: production of evidence; admission or rejection of evidence; and evaluation or interpretation of evidence. Production of evidence before the arbitrator is voluntary; it is up to the parties to produce whatever evidence they consider useful to their claims. In general, arbitrators have the power to receive every kind and form of evidence, and have attached to it the probative value it deserves under the circumstances of a given case. Arbitrators have broad discretion in the assessment of evidence so produced since they are not bound strictly by the rules on admissibility of evidence. The standard of proof, relevance and admissibility of evidence are all decided by the arbitrator.

[81] Courts have limited power to interfere with the arbitral award and cannot adjudicate in matters related to interpretation of the contract, determination of the

relevant facts, errors on application of law, reassessment or re-appraisal of the evidence, as the arbitrator is the master judge for qualitative and quantitative interpretation of the contract, the facts, evidence and relevant application of law to them. The Court cannot act as first appellate court for re-appraising evidence. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternative dispute resolution would stand frustrated. The arbitrator being the sole and final judge of fact, the Court is bound by the findings of the arbitrator and cannot review them unless they are completely unsupported by evidence or unless it appears from the award itself that there was no evidence to support the findings. It is not misconduct on the part of an arbitrator to come to an erroneous decision, whether his or her error is one of fact or law, and whether or not his findings of fact are supported by the evidence. It may, however, be misconduct if there are gross errors in failing to hear or improperly receiving evidence. The purpose of section 34 of *The Arbitration and Conciliation Act* is not appellate in nature but only to check the arbitral award not being arbitrary, perverse or patently illegal, going against public policy or vitiated by fraud, bias and corruption.

[82] A determination of whether or not the Arbitrator engaged in the misconduct of exceeding her jurisdiction and not complying with the terms of the arbitration agreement begins with an analysis of the scope of the submissions to arbitration. The relevant clause of the Facilitated Electronic Fund Transfer Platform Agreement states as follows;

> 12. DISPUTE RESOLUTION
>
> (i) Any dispute arising out of or in connection with this Agreement will in the first instance be referred to the parties Project representatives for discussion and resolution at an inter-Party meeting to be held seven (7) Business days after notification (by either party) of a dispute If a dispute is not resolved at that meeting, the dispute will be referred to the second management level who must meet within three business days of the reference to attempt to resolve the dispute If the unresolved dispute is having a material effect on the services

or the receipt by customers of the benefit thereof ,the parties wilt use their respective best endeavours to reduce the elapsed time in reaching a resolution of the dispute.

(ii) In the event of any dispute between the parties relating to this agreement, each party shall nominate a duly authorized person who shall be obliged to meet and endeavour to resolve such dispute through good faith negotiations. In the event of the dispute not being resolved within Fifteen (15) days of their meeting, such dispute shall be submitted to arbitration for resolution as follows:

(iii) The arbitration shall be held in Uganda and be to *The Arbitration and Conciliation Act (Amendment Act), 2008* fails, relief may be sought from the Courts of Law in Uganda.

[83] The expression "Any dispute arising out of or in connection with this Agreement" is wide enough to include the dispute of the nature the parties submitted to arbitration in the instant case. Thereafter the parties on 19th September, 2022 signed a Joint Case Scheduling Conference Memorandum identifying the following as the agreed issues; (a) whether the respondent breached the FEFT agreement when it collected a 1% charge on transactions; and (b) what remedies are available to the parties. In the award, the Arbitrator stated as follows;

> The tribunal considered the submissions of both Counsel where evidence in support of each parties' position with relevant authorities has been duly evaluated and assessed and while resolving the above issues as identified by the parties, the Tribunal took into account the following sub issues: whether Account 100001160 belonged to the Claimant, ……[and] whether [the] Collection Account opened and operated by the Claimant was in compliance with the provisions of the FEFT Agreement aforementioned…... whether the respondent breached the FEFT Agreement when it collected the 1% transaction charge on the transactions.

[84] It was argued by counsel for the applicant that the arbitrator erred in so far as in arriving at her decision, she canvassed matters that were not submitted to her. The Arbitrator came up with issues outside those agreed to by the parties and purported to resolve them with inconclusive determination due to lack of evidence as well as departure from the evidence which had been adduced. By so

doing, she went outside the scope of the reference to arbitration. Counsel submitted further that framing of the new sub-issues was clearly intended to unfairly attribute undue liability on the applicant at all costs.

[85] The term "issue" in arbitration means a disputed question relating to rival contentions in the arbitration. It is the focal point of disagreement, argument or decision. It is the point on which the dispute itself is decided in favour of one side or the other, by the Tribunal. Basically, it is at the commencement of the arbitration that the Arbitrator ought to ascertain upon what material propositions of fact or law the parties are at variance, and thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. Framing brings clarity to the real issue and cuts out all of the subterfuge and "background noise" that the parties may bring to the arbitration. For a correct and accurate decision in the shortest possible time in an arbitration, it is necessary to frame the correct and accurate issues. How an issue is framed influences scope of evidence that is led during the hearing.

[86] But just as Order 15 rule 5 (1) of *The Civil Procedure Rules* empowers the court at any time, before passing a decree, to amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties (see also *Kahwa Z. and Bikorwenda v. Uganda Transport Company Ltd [1978] HCB 318* and *Mundua Richard v. Central Nile Transporters Association (Miscellaneous Civil Revision 3 of 2017*), it is also trite that issues can be recast at any stage prior to the delivery of the award. However, considering that evidence is led by both the parties based on the issues framed, when there is a difference in substance between the issues as recast and the issues originally framed in the course of the hearing, recasting should be done with notice to the parties, who should also be given the opportunity to adduce any additional evidence or be heard in respect of the recast issues. If that

procedure is not followed, not only is the award vitiated but it also offends the principles of natural justice.

[87] On the other hand, where the issues as recast are substantially similar to the issues which were framed earlier, and the evidence on record is sufficient to decide even the recast issues, no prejudice will be occasioned to either party when the recasting is done without notice to the parties, or giving them an opportunity to adduce additional evidence, or to be heard in respect of the recast issues. In the latter situation, if at the time of writing the award the Arbitrator considers it prudent that the issues should be recast by way of amendment, deletion or adding any new issue that is required to be framed then, he or she has ample inherent power to recast the issues, provided the reasons for doing so are explained or are evident in the award.

[88] An arbitrator is entitled to draw appropriate inferences from the parties' evidence and submissions and evaluate them objectively, when deciding the existence and scope of the dispute. It is trite that although an issue may not have been raised specifically at the commencement of the arbitration, where both parties had a full and fair opportunity to litigate the issue, after full contest in which both parties had a fair opportunity to prove their respective case, it can actually be determined and necessarily decided by the arbitrator. Once an issue concerns the actual facts giving rise to the claim, and it was in fact actually litigated and was necessary to a final award on the merits, the arbitrator is entitled to make a finding on it whether or not the parties raised it as one of the issues for the arbitrator's determination. Pronouncements may be made in the award not only as to all matters that were in fact formally put in issue by the parties, but also on those matters that were offered and received to sustain or defeat the claim, where it is necessary to the arbitrator's award, in order to ensure the reliability, conclusiveness, completeness and fairness of the award.

[89] In the instant case, it is on basis of the pleadings, evidence and submissions of both parties that the Arbitrator recast the first issue, which had been framed earlier. When one party affirms and other party denies a material proposition of fact or law, then an issue arises. The sub-issues arose out of propositions of fact made by the applicant and opposed by the respondent. Material propositions are those propositions of fact or law which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. It was a material proposition of fact which the applicant specifically alleged as part of its defence to the claim. It cannot be really said that there was a substantive difference between the first issue as originally framed and the sub-issues, as recast, arising from it. The sub-issues were relevant, as they covered in a more focused detail, aspects of the dispute between the parties raised by the first issue and already canvassed in their respective evidence and arguments.

[90] While Counsel for the applicant asserted that the email address josephine@yo.co.uq was proof of ownership of the disputed account by the Aggregator, Counsel for the respondent made extensive submissions, especially in rejoinder, concerning the ownership of the account and the fact that it belonged to the respondent and not the Aggregator. An issue which surfaces in the course of an arbitration and which is known to all the parties cannot be said to be outside the scope of the submission to arbitration even if it is not part of any memorandum of issues or pleading (see *CEF and CEG v. CEH [2022] SGCA 54*). Thus, an arbitral award that deals with such an issue cannot be set aside for not “falling within the terms of the submission to arbitration The sub-issues were decided based on evidence which had already been led by the applicant and had been countered by the respondent. The framing of the additional issues as sub-issues was for the purpose of bringing clarity to the determination the real matters in controversy between the parties. On the facts of the case, the sub-issues as framed by the Arbitrator at the time of the award, were properly framed since they cover specific detail in the overall controversy between the parties as

set out in the pleadings and as brought out in the evidence and canvassed in argument.

[91] After analysing the evidence adduced by the parties and the submissions of counsel, in answer to the ultimate issue, the arbitrator found that the applicant had breached the FEFT Agreement when it started to charge 1% for every transaction contrary to the Agreement. The Arbitrator rejected the applicant's contention that the disputed account against whose funds the charge was levied, was a Collection Account belonging to an Aggregator. The arbitrator's chain of reasoning had a sufficient nexus to the parties' arguments. It is therefore not correct as submitted by counsel for the applicant that the Arbitrator made an inconclusive determination due to lack of evidence or that she departed from the evidence which had been adduced. The arbitral award does not deal with any dispute not contemplated by or not falling within the terms of the reference to arbitration and neither does it contain decisions on matters beyond the scope of the reference to arbitration.

[92] The applicant contends further that the arbitrator did not comply with the terms of the arbitration agreement. The jurisdiction of the arbitrator includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Where parties have agreed to a final and binding process of arbitration, the courts will seek to uphold, and trust, that process to the fullest extent possible. A Court proceeding under section 34 (2) of *The Arbitration and Conciliation Act* is not a court of appeal and errors of fact, if at all present, cannot be corrected by it. An arbitrator is the final judge of facts and it is not open to challenge that the arbitrator reached a wrong conclusion or has failed to appreciate facts or evaluated the facts in a skewed manner. An arbitral award will be confirmed even when the award does not conform to a court's sense of justice so long as the arbitrator offers even a barely colourable justification for the outcome reached. Even where an arbitrator has made an error of law or fact, courts generally may not disturb the arbitrator's decision. Parties who, having willingly chosen to

submit to arbitration, cannot be permitted to have the award set aside only because they are mystified by the result. A court must give deference to the decision of the arbitrator even if the arbitrator misapplied the substantive law in the area of the contract. Court cannot interfere with the discretion of arbitrators unless the decision is obviously arbitrary, or perverse, or there is an obvious error of discretion.

[93] Section 34 of *The Arbitration and Conciliation Act* provides for setting aside only on the grounds affecting legitimacy of the process leading to the decision as distinct from the substantive correctness of the contents of the decision. Setting aside, in the case of arbitration, focuses not on the correctness of the decision but rather more narrowly considers whether, regardless of errors in application of law or determination of facts, the decision resulted from a legitimate process. Setting aside requires a challenge to the legitimacy of the process of decision, rather than the substantive correctness of the award. It is settled law that where a finding is based on no evidence, or the arbitrator takes into account something irrelevant to the decision which he arrives at, or ignores vital evidence in arriving at his decision, such decision would necessarily be perverse. A finding of fact is only perverse if it outrageously defies logic as to suffer from the vice of irrationality or is arrived at on no evidence.

[94] I find that all matters decided by the arbitrator constituted part of the dispute, and were contemplated by and fell within the terms of the submission to arbitration. The award does not contain any decision on matters beyond the scope of the submission to arbitration. Hence, in the absence of proof to the contrary, relief granted by the arbitrator in respect thereof was wholly authorised and within his jurisdiction. In conclusion, it turns out that what the applicant is raising are matters it considers to be erroneous findings of fact and application of the law. It is evident that what the applicant is attempting to achieve is the setting aside of the award on basis of what it considers to be an erroneous decision, by forcing a rehearing and correction by the same court as if it is considering the award on

appeal, yet an application of this kind, it must be remembered, cannot be allowed to be an appeal in disguise. The court exercising the power of setting aside an arbitral award cannot sit in appeal over the award. To put it differently, an arbitral award cannot be set aside merely because it is erroneous in law or on the ground that a different view could have been taken by the court. The applicant having failed to demonstrate the arbitrator failed to comply with the terms, express or implied, of the arbitration agreement or otherwise engaged in any misconduct, r that the decision is obviously arbitrary, or perverse, but only seeks the court's re-evaluation of the evidence, this ground of objection too fails.

iii. Whether the award is contrary to *The Arbitration and Conciliation Act*.

[95] 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.

[96] 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*.

[97] It is the applicant's case that the Arbitrator failed in her duty imposed by section 28 (4) of *The Arbitration and Conciliation Act* when she failed to shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, when it rewarded the respondent in breach of the contract, while the justice of the matter was such that the respondent having not done what it was supposed to do despite various reminders, it could not be awarded for its failure. She also failed in that duty when she awarded the respondent interest on the claimed sum and then went ahead to again award damages with interest. The award of interest on the claimed sum, if done correctly and deservedly, would constitute sufficient compensation for the respondent who never led any evidence to suggest that the sum claimed was business capital for which it had suffered loss as to warrant general damages in addition to interest.

[98] The general principle underlying the award of general damages in contract is that the claimant is entitled to full compensation for his losses; i.e. the principle of "*restitutio in integrum.*" Where a party has sustained a loss by reason of a breach of contract, he or she is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. Damages are not awarded to enrich a claimant far beyond his actual losses nor should the claimant get far less than his actual loss. Therefore, when a claim for damages is made, the claimant is required to provide evidence in support of the claim and to adduce facts upon which the damages could be assessed. Before assessment of damages can be made, the claimant must first furnish evidence to warrant the award of damages. The claimant must also provide facts that would form the basis of assessment of the damages he would be entitled to. Failure to do so would is fatal to a claim for damages

[99] An award of interest is meant to compensate a person wrongfully deprived of money, for the period he or she has been deprived of the use of the money. Interest, as a rule is payable for the detention of such a liquidated sum whether

the duty to pay springs from a promise, or is one which is imposed by law apart from contract. This has been based upon the view that one who has had the use of money owing to another should in justice make compensation for its wrongful detention, as damages. Where the amount claimed for may be arrived at by a process of measurement or computation from the data given as proof, without any reliance upon opinion or discretion after the concrete facts have been determined, the amount is liquidated and will bear interest. The applicant having been ordered to refund the wrongfully made deductions/charges amounting to shs. 368,580,811/= with interest of 23% from the date of filing the claim until payment in full, the award of general damages on top of or in addition to that liquidated claim is a fundamentally erroneous proposition of law. It practically constitutes additional damages for loss of the use of money.

[100] It is not enough as a ground for setting aside an award that the arbitrator failed to understand or apply the law or made a mere mistake of law. The potential for mistakes on facts or law by the arbitrator is the price for agreeing to arbitration. An arbitration award will not be set aside, even when the award does not conform to a court's sense of justice, so long as the arbitrator offers even a barely colorable justification for the outcome reached. The general principle is that the arbitrator's decision is considered final and binding and thus the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact. Thus, an arbitral award will not be subject to being set aside for ordinary errors, even if an arbitrator's legal and procedural rulings might reasonably be criticized on the merits, but it will be set aside if it is violative of a strong public policy, or is totally irrational, or the arbitrator exceeded a specifically enumerated limitation on his power or the award constitutes a manifest disregard of the law by the arbitrator; a term that means the arbitrator knew the law but chose to ignore it, or practically directed the parties to violate the law. It requires more than a simple error in law or a failure by the arbitrators to understand or apply it; and, it is more than an erroneous interpretation of the

law. It is limited to the rare occurrences of apparent egregious impropriety on the part of the arbitrator.

[101] To modify or set aside an award on the ground of manifest disregard of the law, a court must find both that; (1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator was well defined, explicit, and clearly applicable to the case. A claim for general damages cannot as a matter of course result in an arbitral award without proof of the claimant having suffered injury or loss. An arbitral award to the contrary is patently illegal and in conflict with the public policy. Arbitral awards that quantify damages without sufficient legal and/or evidential justification and fail to provide parties with the opportunity to address such heads of claim, risk being set aside on account of violation of the rules of natural justice. An award which contains findings of fact made in circumstances of this nature is liable to be set aside for breach of natural justice.

[102] The arbitrator by her training and practice as an advocate of over 30 years is deemed to know the principles that guide the award of general damages. She refused to apply those principles or ignored them altogether when she awarded general damages on top of and in addition to the commercial rate of interest awarded on the liquidated claim. That additional award is a serious irregularity which has caused substantial injustice to the applicant. Since it forms a part of the award, the court can set aside that component of the award or remit it for reconsideration on the ground of a manifest disregard of the law by the arbitrator. Under section 38 (2) (b) of *The Arbitration and Conciliation Act*, the court may, as appropriate, confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration.

[103] That being so, this is a proper case in which it is appropriate to set aside only a part of the award and remit that part to the arbitrator for re-consideration. The award of general damages of shs. 30,000,000/= with interest of 8% from the date

of the award until payment in full is accordingly set aside and remitted to the arbitrator for re-consideration. Otherwise, the application to set aside the rest of the award is dismissed. The application having succeeded only in part, the applicant is awarded half the costs of the application.

Delivered electronically this 8th day of January, 2024……...Stephen Mubiru……

Stephen Mubiru
Judge,
8th January, 2024.

Appearances

For the applicant : M/s Nangwala, Rezida & Co. Advocates,

For the respondent : M/s Okalang Law Chambers.