**THE REPUBLIC OF UGANDA**

**THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION**

**CAD/ARB/No.14 of 2011**

**ENGINEERING SOLUTIONS (U) LTD …… APPLICANT**

**v.**

**NATIONAL FORESTRY AUTHORITY …….. RESPONDENT**

**RULING**

This Application for the compulsory appointment of an arbitrator was filed on 8th June 2011.

The hearing date was set for 8th June 2011 at 10.00a.m.

**8TH June 2011 APPEARANCE**

Dennis Owor - Applicant Counsel.
Kiwanuka Mohamed Ssenoga - Respondent Counsel.

Applicant's counsel submitted that the Application arises from Clause 13 on the contract between the parties for the supply of two tractors and one tractor-trailer. Clause 13 is a dispute resolution clause.

Further, in a nutshell that the respondent had failed to honor its obligations under the contract, hence the dispute between the parties, which needs resolution.

The Applicant served the Respondent with communication dated 30th May 2011 (Annex B – Affidavit in Support of Application deposed to by James Peter Middleton).

This communication proposed mediation. The Respondent proposed a mediator for consideration. The Respondent was given a 3-day ultimatum to confirm its commitment to the mediation.

The communication also proposed arbitration. It listed 2 (two) arbitrators for the Respondent's consideration.

The Respondent never replied to any of these proposals hence, the application for the compulsory appointment of an arbitrator.

In reply, Respondent's counsel does not deny that a dispute exists between the parties. He contended that the steps outlined in Clause 13 had not been exhausted rendering this Application premature.

Respondent counsel referred to Para.6 of the Affidavit in Reply deposed to by Gershom Onyango, the Respondent's Executive Director, filed on 17th June 2011. Para.6 indicates that the Applicant was invited, on 9th May 2011, to attend a meeting for amicable resolution of the dispute. This was in response to the Applicant's statutory notice, which was received on 13th April 2011.

It was submitted also, that the Respondent always wished to proceed under **S.11(3)(a) Arbitration and Conciliation Act**, Cap.4 Laws of Uganda (hereinafter referred to as the **ACA**). The problem was that the Applicant's 30th May 2011 communication gave a 7-day ultimatum for the Respondent to reply. This denied the Respondent the 30-day lead-time, during which time it would have appointed an arbitrator. To make matters worse the Respondent's hand was tied to the Applicant's nominees.

The problem was aggravated by the fact that Clause 13 does not indicate how the arbitration will be conducted.

Lastly the Respondent, could only appoint a mediator or arbitrator after invoking the provisions of the **S.2(1)(1)(c)** of the 2003, **Public Procurement and Disposal of Public Assets Act** (hereinafter referred to as the PPDA).

The Applicant's counter-reply submissions, emphasized that Clause 13 does not indicate that amicable settlement must first be resolved. That the act of consenting to the appointment of an arbitrator did not amount to procurement of public services.

Lastly that the clause did not indicate the number of arbitrators, which made the wish for 3 arbitrators irrelevant.

I now apply my mind to the resolution of this application.

Does S.2(1)(c) PPDA bind the Respondent, before appointing a mediation or arbitral tribunal?

The provision, reads as follows,

> **S.2 Application of the Act.**
> (1) This Act shall apply to all public procurement and disposal activities and in particular shall apply to -
>
> (c) procurement or disposal of works, services or supplies or any combination howsoever classified by-
>
> (i) entities of government within and outside Uganda; and
>
> (ii) entities, not of Government but, which benefit from any type of specific public funds specified in Paragraph (a) of this sub-section.

With respect, the appointment of a neutral (by this, I mean either the mediator or an arbitrator) under Clause 13 does not amount to the procurement of a public service, to be consumed by the Respondent.

The Respondent under the PPDA can dictate the output expected of a service provider. In contrast, the Respondent cannot dictate the neutral's output. The neutral, in the course of duty, is bound to hear out all parties. To do this - the neutral must be independent and impartial. Any procurement under the PPDA does not afford the neutral an opportunity to hear out all the parties. The PPDA procurement is a process controlled by the Respondent, where the applicant's intended service providers are seeking employment by the Respondent.

Clause 13 on the other hands requires joint-appointment of a neutral by both parties. Both parties will agree on the remuneration to be paid out to the neutral.

An appointed service provider, would owe a duty of care to the Respondent, as it's employer. In contrast, both parties, not only by the Respondent under the PPDA, appoint a neutral! A neutral, upon assumption of office, is called to serve the cause of justice. To this end the neutral must balance the scales of justice between the parties. The neutral owes no duty of care, to either party. Whereas the Respondent for breach of contract, or vice-versa can sue a service provider, the neutral cannot. The neutral's product can only be subjected to a challenge before the courts.

To my mind, the above discourse shows that the appointment of a neutral does not fall under the PPDA provisions by any shred of imagination.

The contentious dispute resolution clause reads as follows,

> **13. Resolution of Disputes:**
> Where the authority and the provider are unable to resolve any disagreement or dispute amicably, the matter will be referred to a mediator and if no agreement is reached, then the matter will be referred for arbitration in accordance with the Arbitration and Conciliation Act of 2000.

Having analyzed the clause, I find that it is a staggered clause, which sets out a three-phase dispute resolution scheme. First is a self-help scheme between the parties binding them to explore amicable settlement. Second is mediation, should amicable settlement fail. Third is arbitration, should mediation fail.

Indeed Para.6 of Gershom' Onyango's affidavit does indicate that the Applicant was invited to on 9th May 2011, to attend "… a meeting to find amicable resolution of the matter.".

The Affidavit makes no attempt to prove whether the invitation was oral or written.

The Affidavit makes not attempt to evidence how the invitation was communicated, to the Respondent.

James Middleton's Affidavit annexes proof of the Applicant's communication to the Respondent to consider the appointment of a neutral.

Either party is accusing the other of being unmotivated. The Applicant did not respond to the invitation to a meeting. The Respondent did not respond to the invitation to consent to the appointment of a neutral. Is either party right to keep silent? No!

I shall elaborate my answer below.

The obligation to breathe life into a dispute resolution clause is mutual. An action by one party, under the dispute resolution clause, ought to be reciprocated, by the other; failing which the dispute resolution forum will not be setup or considered forfeited or abandoned. When not reciprocated the party aggrieved is left with no option but to explore the next avenue available to fulfill the obligation, to realize the dispute resolution clause, so that the problem may be resolved. Sitting back is not an option! Therefore when the offer to attend a meeting was not reciprocated, the Respondent ought to have reiterated the request and also triggered off the mediation mechanism. However, I have noted earlier, that the Respondent's meeting request was not evidenced at all. With no evidence, I can only conclude that both parties abandoned the amicable settlement option.

The Respondent, upon receipt of the communication to concede to the appointment of a neutral, would have proceeded to salvage the amicable settlement forum. First by pointing out that no credible effort by the Applicant had been made to set up this forum. Secondly, by kick-starting the mediation forum. Sadly, there is nothing in the Respondent's affidavit to indicate that this option was actually explored, save for the bare statement in Para.9 of the Affidavit in Reply, hinting the willingness to settle the matter amicably. Why was this not evidenced, when it is trite that the purpose of an Affidavit is to adduce evidence?

Any deed by the Respondent as proposed above, is a neutral course of action. Establishment of the any envisaged forum, would only have resulted in resolution of the problem – and this is the true spirit and endeavor of Clause 13.

I would have found this Application premature, had any of the above scenarios been evidenced.

The Respondent submitted that it preferred to appoint a three-person tribunal. The submission from the bar comes too late. The Respondent was not right to remain silent on the Applicant's invitation to concede to the invitation for the appointment of a neutral. Had evidence of this wish been availed, I would have once again, found this application premature. I would have directed the parties to exhaust the avenue.

The prospect of a three-person arbitral tribunal has also been raised. I ask, supposing this matter was before a court, would the original court, not be manned by a single judge? Be that as it may, is the respondent aware that after conceding to the fact of arbitration, it would have invited, the applicant, to concede to the amendment of the arbitration clause to cater for the appointment of three arbitrators. This party autonomy principle, which would have been exercised outside CADER's doors, is enshrined in **S.10(1) ACA**.

In any event, the law is settled. When the clause is silent only one arbitrator will be appointed – **S.10(2) ACA**. In passing, the arbitration clause is not deficient given that the procedure to be followed during the arbitration, is outlined by the ACA, filling any lacuna in the clause or lapse between the parties during the arbitration – see Paras.79-82 in **Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd [2011] Federal Court of Australia 131**.

The parties would also jointly have addressed their minds to expertise or qualifications required of the arbitrator.

These illustrations show the range of options, exercised under the party-autonomy umbrella, which are forfeited when a party chooses to seat back. In this application the parties cannot address their minds to this because their minds are not at par!

The application for the compulsory appointment of an arbitrator is a grave one. It normally arises after communication has broken down between the parties – as it has been the parties to this application. It displaces the virtues of party autonomy. The application would have been stayed, had the Respondent evidenced a pro-active approach in bringing the dispute resolution clause to fruition.

I find the Respondent, faltered on all three stages of the staggered dispute resolution clause.

I find merit in this application.

I therefore find it fit to appoint an arbitrator as prayed for in this application.

I therefore appoint Jackie Nakalembe as the arbitrator.

Should Jackie Nakalembe not take up the appointment, for unforeseen reasons, I then appoint Solome Luwaga Dorothy Kiyimba Kisaka; they can only be approached in the sequential order listed.

Costs of this Application Motion shall be borne by the Respondent.

**Dated at Kampala on the 19th day of June 2011.**

**……**
**Jimmy M Muyanja**
**Executive Director, CADER.**