THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL APPEAL NO. 14 OF 2011

HERITAGE OIL & GAS LIMITED::::::::::::::::::::::::::::::APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY::::::::::::::::::::::::RESPONDENT

BEFORE. THE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

This is an appeal against the findings of the Tax Appeals Tribunal (the Tribunal) in Miscellaneous Application No.6 of 2011 arising out of TAT Applications Nos. 26 and 28 of 2010. The appeal was preferred under the provisions of section 27 of the Tax Appeals Tribunal Act (Cap 345) (TAT Act) and section 76(d) (1) of the Civil Procedure Act (CPA).

The brief facts giving rise to this appeal are that the appellant entered into a Production Sharing Agreement (PSA) for petroleum exploration, development and production with the Government of the Republic of Uganda (the Government) on 1st July 2004. The said agreement contained an arbitration clause to the effect that

dispute under the agreement which could not be settled amicably within sixty days would be referred to arbitration in accordance with the United Nations Commission for International Trade Law (UNCITRAL) Arbitration Rules.

The appellant sold its interests under the agreement to Tullow Uganda Limited under a sale and purchase agreement and a supplemental agreement thereto. As a result of the said sale, and under the authority of the Income Tax Act, (ITA), the respondent issued tax assessments for Capital Gains Tax which the appellant objected to and filed two applications in the Tribunal, that is TAT Applications No. 26 and 28 of 2010.

Before hearing of the two applications could be finalized, the appellant filed Misc. Appl. No. 6 of 2011 in the Tribunal under sections 5 and 71 of the Arbitration and Conciliation Act (Cap 4) (herein after referred to as "the ACA"), rule 30 of the Tax Appeals Tribunal (Procedure) Rules (TAT Rules) and section 101 of the CPA, seeking to stay the proceedings in those applications and have the matter referred to arbitration in accordance with the arbitration clause in the PSA. The Tribunal heard and dismissed the application with costs hence this appeal.

There are three grounds of this appeal namely that:-

1. **The Tribunal erred in law in declining to grant the application to have the legal proceedings under Tax**

Appeals Tribunal Applications Nos.26 and 28 of 2010 stayed and referred back to Arbitration.

2. **The Tribunal erred in law in holding that the Arbitration and Conciliation Act (Cap. 4) is inoperable as the Respondent was not a party to the Production Sharing Agreements.**

3. **The Tribunal erred in law in holding that the Tax Appeals Tribunal mandate cannot be fettered by a contractual provision in an agreement.**

The appellant was represented by Mr. Peter Kauma while the respondent was represented by Mr. Ali Sekatawa as lead counsel assisted by Mr. Mathew Mugabi and Mr. Rodney Golooba. Both counsels first filed skeleton arguments and subsequently appeared to argue the same. Counsel for the appellant argued ground 2 first followed by grounds 3 and 1.

As regards ground 2, he submitted that section 2 of the ACA defines a party to an arbitration agreement to include *a person claiming through or under a party*. He submitted further that it also defines an arbitration agreement as;

> *"an agreement by the parties to such agreement to submit to arbitration all or certain disputes which*

> *have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not".*

He argued that under section 21 of the TAT Act, the Tribunal is given powers of the High Court and under rule 30 of TAT Rules, it is stated that where those rules do not provide for a matter, the rules of practice and procedure of the High Court shall apply. He contended that it follows that the Tribunal is accordingly mandated under section 5 of the ACA to refer matters to arbitration.

Counsel further submitted that section 2(3) of the Uganda Revenue Authority Act, (Cap.196) (the URA Act) provides that the Uganda Revenue Authority ("URA") shall be an agent of the Government and shall be under the general supervision of the Minister of Finance.

He argued that it is a generally accepted principle that an agent cannot (as agent) do something which the appointing principal is incapable of doing/contracting. He submitted that accordingly an agent is constrained by the same constraints upon the principal. He contended that in the instant matter the principal, the Government, is constrained by its contractual obligations.

He submitted that there is no contention that the Government entered into the PSA ultra vires and in the absence of such then it must abide by its contractual obligations and so too must its agent. He submitted further that consequently, the URA though a body corporate is an agent of the Government and is bound by the arbitration clause in the PSA entered into between the Government and the appellant.

He disagreed with the Tribunal for ruling that URA is an agent of Government only in respect of collecting and remitting revenue to the latter and enforcing the laws thereto. He argued that there is no authority either within the URA Act or elsewhere in Uganda law to support this contention. He contended that even if this position were correct the dispute at hand is clearly one as regards the collection of revenue and in that regard the URA is the agent of the Government.

Counsel for the appellant also disagreed with the Tribunal for its observation that the PSA were not signed by the Minister of Finance but by the Minister of Energy and the Permanent Secretary on behalf of Government. He submitted that it was erroneous in both law and fact to hold that an agreement entered into by the Government is only binding on the line ministry of the official that signed it. Further, that any such contention would be in direct breach of section 89(B) (2) of the ITA.

He relied on the provisions of Part IXA of the ITA and specifically sections 89A (1), 89B (1), 89B (2), and 98A (1) to disagree with the Tribunal's ruling that the agreement was not a "Tax Collection Agreement" but a "Production Sharing Agreement" and as such outside the URA Act. He contended that that was a misinterpretation of the law which was wholly inconsistent with the above provisions of the ITA.

He referred to Article 14 of each PSA which provided that:-

> *"All central, district, administrative , municipal and other local administrators or other taxes, duties, levies or other lawful impositions applicable to licensee* ***shall be paid by the licensee in accordance with the laws of Uganda in a timely fashion****".* (Emphasis mine).

He also referred to Article 26.1 of the PSA, the arbitration clause, which provides that:-

> *"Any dispute arising under the Agreement which cannot be settled amicably within sixty (60) days shall be referred to Arbitration in accordance with the United Nations Commission for Internal Trade Law (UNCITRAL) Arbitration rules……..The Arbitration award shall be final and binding on the Parties to this Agreement"*

He contended that the tax dispute, being a dispute between the parties under the agreement was to be referred to arbitration. On this ground, he concluded that the Tribunal erred in holding that the arbitration agreement was inoperable and sought an order from this court reversing that decision.

On ground 3, counsel contended that the Tribunal erroneously found that to grant an order for stay of proceedings would be to fetter its mandate. He argued that the choice of arbitration by way of an arbitration agreement is recognized in Uganda and is enforceable under the ACA which allows a court or a tribunal to refer a dispute to an alternative forum by choice of the parties. He further argued that such agreement by virtue of the fact that it is recognized by statute could not be taken to fetter the mandate of the tribunal or court.

He accordingly prayed that this decision be reversed and this court finds that reference to arbitration would not be a fetter to the mandate of the Tribunal or in the alternative if it is found that there is inherent conflict between the ACA Act and the TAT Act then this Court should find that there is need for an amendment to address this.

On ground 1of the appeal, counsel for appellant submitted that the wording of section 5 of the ACA is mandatory and the only instances in which the court shall not refer the matter to

arbitration are given in section 5(1) and (b) of the ACA. He contended that the two arbitration agreements contained within the PSAs are not null and void, inoperative or incapable of being performed.

He submitted that two separate arbitration proceedings have been launched in London by the appellant against the Government. He argued that the Government had recognized and engaged in the arbitrations by appointing legal representatives to deal with proceedings together with appointing its party appointed arbitrator in accordance with the UNCITRAL Rules. That therefore there was clearly a dispute between the two parties which included the issue whether the tax assessed pursuant to the assessment was lawfully imposed.

He argued that in the alternative, it was a matter for the Arbitral Tribunal to consider and decide whether it has jurisdiction or not in accordance with Article 21(1) of the UNCITRAL Rules which provides that; *“The arbitration tribunal shall have the power to rule on objections that it has no jurisdiction…..”*

Counsel submitted that since none of the instances which would exclude a reference to arbitration were shown, the Tribunal was bound, pursuant to section 5 of the ACA, to refer the matter to arbitration but it failed to do so.

He referred to the case of ***Mungereza v Price Waterhouse Coopers Africa Central; (2002)1EA 174 at page 180 and 182***, where the Court of Appeal of Uganda *inter alia* held that where parties clearly, voluntarily and willingly subscribed to arbitration agreements as a means of solving their differences then to depart from it, the appellant had to show good reason.

He also referred to ***Halsbury's Laws of England 3rd Edition Vol.2 page 26 paragraph 60***, where it is stated that the Court must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement.

In conclusion of his arguments on all the grounds of this appeal, counsel for the appellant prayed that this appeal be allowed and the Court makes the following orders:

1. The appeal is allowed setting aside the findings, observations, ruling, pronouncements and orders of the Tax Appeals Tribunals in TAT Misc. Application No. 6 of 2011.
2. The legal proceedings under TAT Applications Nos. 26 and 28 of 2011 be stayed and referred back to arbitration.
3. The Respondent pays the costs of the appeal and in the Tribunal.

Counsel for the respondent in response opposed the appeal and argued all the three grounds concurrently in support of the findings and decision of the Tribunal. He contended that the ACA was inoperable since the respondent was not a party to the PSA. He stated that the tests to be met under Section 5 of the ACA are that; there must be a matter which is subject matter of an arbitration agreement before a judge or magistrate; a party should apply to a judge or magistrate for the matter to be referred back to arbitration; and the party applying should do so after the filing of a statement of defence in which case it is only the defendant/respondent that can apply for referral to arbitration and not the plaintiff/applicant.

He argued at length that the PSA was between the Government of Uganda and the appellant and not the respondent. Further that it is trite law that arbitration agreements are strictly construed in respect to signatories and cannot be implied by way of inference or agency. To this end he cited the case of ***Indowind Energy Ltd Vs Wescare Limited, Supreme Court of India Civil Appeal No. 3874 of 2010***, where the holding in case of ***Yogi Agrawal Vs Inspiration Clothes, S.C.C.A 372 of 2009***, was cited to the effect that; *"it is fundamental that a provision for arbitration to constitute an arbitration agreement for the purpose of section 7 should satisfy two conditions:-*

a) *It should be between the parties to the dispute;*
b) *It should relate to or be applicable to the dispute"*.

He further argued that the respondent was established by the URA Act as a body corporate with perpetual succession and a common seal and capable of suing and being sued in its corporate name. He submitted that this position was fortified in the case of ***Commissioner General and URA Vs Meera Investments S.C.C.A No. of 2007***. Further that, the right to sue Government of Uganda on the other hand emanates from the Constitution of the Republic of Uganda and the Government Proceedings Act Cap 77.

He contended that it was clear from the above provisions of the law that the Government of Uganda and the respondent are two distinct entities capable of suing and being sued in their own right. He further contended that the parties in the arbitration proceedings and those in the Tribunal proceedings are different

He submitted that S.5 of the ACA which the application for stay was brought refers to a judge or magistrate which concepts are defined in the Interpretation Act and does not include the Tribunal. He concluded that the appellant had failed to meet the above tests and on that basis the Tribunal did not err in declining to grant the application to have the legal proceedings under TAT applications 26 and 28 of 2010 stayed and referred back to arbitration.

He also submitted that Article 14 of the PSA provided that taxes shall be paid in accordance with the laws of Uganda in a timely fashion. He contended that it is trite law that taxes are statutorily provided for and do not arise from contract neither does URA's mandate to collect taxes arise from a contractual provision. He noted that it was in recognition of this fact that parties agreed as per Article 14 of the PSA that taxes would be paid in accordance with the laws of Uganda. He contended that any agreement to the contrary would not be in accordance with the law and to buttress this point he cited the case of ***Republic v Commissioner of Customs and Excise and Attorney General (ex parte) Mwalimu K. Digoro (on behalf of the Muslim youth of Kenya) Civil Application No. 62 of 2006***.

He submitted that tax dispute resolution mechanisms in Uganda are constitutionally entrenched. He further submitted that Article 152 (3) of the Constitution of the Republic of Uganda provides for Parliament to make laws to establish tax tribunals and the TAT Act was made to establish the Tribunals for the purposes of settling tax disputes. He contended that this jurisdiction could not be waived or fettered by the purported arbitration clause or any Minister or the Commissioner.

He submitted that sections 99,100 and 101 of the ITA read together with the TAT Act provide only two avenues of objection to a tax assessment as in this case either in the Tribunal or the High

Court. He contended that arbitration by agreement is not one of the ways that have been listed in the ITA for resolving a tax dispute.

He contended that the appellant willingly submitted to the statutory tax dispute resolution mechanism and had taken various steps in the prosecution of its objection and so the alleged arbitration proceeding was an afterthought.

He submitted that the Tribunal exercised its discretion judiciously after considering all the circumstances of this case and arrived at a correct decision. He urged this court not to interfere with the Tribunal's discretion. He cited a number of authorities that deal with exercise of discretion to stay proceedings, namely; ***Shell (U) Ltd v Agip (U) Ltd S.C.C.A No. 49 of 1995,*** and ***In Riechold Norway ASA and Another v Goldan Sachs International [2002]2 ALL ER 679***.

Finally, he submitted that the appellant's conduct showed that it was just forum-shopping and had failed to meet the required tests for stay of proceedings enumerated by the Supreme Court in **American Express International Banking Corporation v Atul Kumar Sumantbhai Patel; S.C.C.A. No. 5 of 1985**. He prayed that in view of the above, this appeal should be dismissed with costs.

In this judgment, I will address grounds 1 and 2 of the appeal concurrently as in my opinion they are all intertwined and lead to the single issue as to whether the Tribunal erred in refusing to grant the application for stay of proceedings before it and refer the matter to arbitration.

I will start with the argument by counsel for the respondent that the URA, the respondent in this case, was not a party to the PSA and for that reason section 5 of the ACA is inoperable. It is not disputed that URA is a body corporate with perpetual succession and common seal capable of suing and being sued in its corporate name. But does that make it autonomous from the Government of Uganda? I think not. In my view the case of ***Commissioner General and URA Vs Meera Investments*** (supra) should be looked at in its context. In that case, court was looking at the corporate capacity of URA while determining the issue as to whether or not the Commissioner General was a proper party to the suit. I therefore find that case not applicable to the circumstances of this case which concerns the status of the URA as an agent vis-à-vis the Government its principle.

The short title of the URA Act states that it is, *"An Act to establish the Uganda Revenue Authority as a central body for the assessment and collection of specified revenue, to administer and enforce the laws relating to such revenue and to provide for such related matters".*

In whose interest and for whose benefit does the URA collect revenue? I do not think this point needs to be belaboured because section 2 (3) of the URA Act is explicit on it. The URA is a statutory body established under section 2 of the URA Act as an agent of Government whose operations are under the general supervision of the Minister responsible for finance.

Under section 3 (1) of the URA Act the functions of the authority include advising the Minister on revenue implications, tax administration and aspects of policy changes relating to all taxes referred to in the first schedule to the Act. As a central body charged with revenue collection under the supervision of the Minister for Finance, and whose functions also include advising the Minister on revenue implications and aspects of policy changes on tax, it follows that URA as a statutory agent is part and parcel of Government. It cannot therefore in my opinion be seen to disassociate itself from the PSA, which its principle the Government lawfully signed with the appellant. To attempt to do so would just be splitting hairs!

In light of the above, with all due respect, I think the argument of counsel for the respondent was misconceived; self defeating and can only serve academic purposes without addressing the reality. I believe, the Tribunal basing on that misconceived argument

misdirected itself and arrived at a wrong finding and ruling that the URA was not party to the PSA.

Be that as it may, there is another fundamental issue closely linked to this one which must first be considered in order to fully determine grounds 1 and 2 of this appeal. This is to do with the applicability of section 5 of the ACA to proceedings before the Tribunal.

In that regard, I now turn to consider the argument that section 5 of the ACA is not applicable because it refers to a judge or magistrate and not the Tribunal. Indeed I have looked at that Act in its totality and I agree with the submission of counsel for the respondent that it was intended to be applied in proceedings before courts and not tribunals like TAT. The words ***"judge"*** and ***"magistrate"*** are not defined under it but I find section 5 (2) instructive. It provides that;

> *"Notwithstanding that an application has been brought under subsection (1) and the matter is pending before* ***the court****, arbitral proceedings may be commenced or continued and an arbitral award may be made"* (emphasis mine).

The word ***"court"*** is defined under section 2 (f) to mean ***"High Court"***. A "***judge"*** is defined under section 2 (h) of the Civil

Procedure Act to include a "***magistrate"*** exercising civil jurisdiction in a Magistrate's Court. And a Magistrate's Court is defined under section 2 (l) of the same Act as a court established under the Magistrates Court Act.

The Tribunal as indicated above was established under the TAT Act so there is no way it could be considered a Magistrate's Court by any stretch of imagination. It follows from the above definitions that members of the Tribunal cannot be referred to as a judge or magistrate and it was never the intention of the Legislature that they would be referred to as such. If indeed Parliament wanted the ACA to apply to tribunals like TAT, the definition of court would have included tribunals. I believe in that case the words ***"judge"*** and ***"magistrate"*** would have also been defined under that Act to include members of the Tribunals.

Attempts by counsel for the appellant to argue that section 5 of the ACA is applicable to the Tribunal as deduced from section 21 of the TAT Act which gives the Tribunal powers of the High Court and rule 30 of TAT Rules which gives the Tribunal discretion to apply the rules of practice and procedure of the High Court in my opinion is farfetched and not sustainable in view of the express definitions highlighted above.

For the above reason, I agree with the finding of the Tribunal that section 5 of the ACA was inoperable. I do not have any reason to

interfere with the findings of the Tribunal and its refusal to grant the stay except to state as earlier indicated above that it misdirected itself to the extent that it found and ruled that Government did not bind URA in the PSA.

Another issue that was argued at length by both counsels is whether tax matters were part of the dispute anticipated under Article 26.1 of the PSA. It was argued for the appellant that since payment of taxes was specifically provided for under Article 14 of the PSA, it followed that any dispute arising from it like the tax payable in this case would be part of the disputes anticipated to be referred to arbitration under Article 26.1 of the PSA.

On the other hand, it was contended for the respondent that taxes are statutorily provided for and any acts to make it contractual would be ultra vires. I agree with this submission. Article 152 (1) of the Constitution of Uganda provides that no tax shall be imposed except under the authority of an Act of Parliament. The ITA and other tax statutes specify the taxes payable and the URA is mandated to collect those taxes. That mandate of the URA to collect tax in accordance with the laws of Uganda cannot not be fettered or overridden by an agreement. To this end, it was held by ***Egonda J***, in the case of ***K.M. Enterprises and Others v Uganda Revenue Authority HCCS No. 599 of 2001***, that:-

> *"...exercise of statutory powers and duties* ***cannot be fettered or overridden by agreement****, estoppels, lapse of time, mistake and such other circumstances..."* (Emphasis mine).

I believe the Government was alive to the fact that tax matters in Uganda are statutory and not contractual that is why in Article 14 of the PSA it was agreed that all taxes, duties, levies or other lawful impositions applicable to the licensee would be paid by the licensee in accordance with the laws of Uganda in a timely fashion.

I am of the opinion that this article of the PSA also implied that any dispute relating to payment of those taxes would be resolved in accordance with the laws of Uganda. This is because the mechanism for tax dispute resolution in Uganda is explicit under the ITA and TAT Act.

The rationale for making tax matters statutory and not contractual is to enable Government achieve the objectives of taxation which, as stated by ***Prof. D.J. Bakibinga*** in his book titled; ***Revenue Law in Uganda*** are: - to raise revenue; to achieve economic stability and development; and to bring about income distribution. Taxation is a tool by which the sovereign state extracts finances or funds from its people and property to provide public revenue to support Government expenditures and

public expenses. It is the most reliable source of funds for most developing economies and therefore subjecting it to the whims and negotiation skills of contractors and Government Officials would create uncertainty and inequity on the amounts payable and cause economic instability.

In the instant case, it could not have been the intention of at least Government to agree that tax dispute would be referred to arbitration as any attempt to do so would be contrary to the laws of Uganda. It would also be contrary to Article 14 of the PSA which clearly stated that tax would be paid in accordance with the laws of Uganda in ***a timely fashion***. Allowing the tax dispute to go through the arbitration process in London would definitely not facilitate the timely payment of the taxes as agreed. This means that tax by inference was excepted from the scope of the arbitration agreement and as such it was not one of the contemplated arbitrable disputes under section 26.1 of the PSA.

The above findings largely dispose of grounds 1 and 2 of this appeal which fail for reasons that section 5 of the ACA is inoperable and tax matters are statutory and not contractual. It only succeeds in a small aspect to the extent that the Tribunal misdirected itself and arrived at a wrong conclusion that URA is not bound by the PSA. Otherwise I find that the Tribunal exercised its discretion judiciously in refusing to stay the proceedings and

refer the matter to arbitration because it was not seized with that jurisdiction.

As regards ground 3 of this appeal, Article 152 (3) of the Constitution of Uganda provides that Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes. The TAT Act was enacted in accordance with this provision. It established the Tribunal whose main function is to review taxation decisions upon application being made to it by an aggrieved party.

Section 14 (3) of the TAT Act provides that; *"a tribunal shall in the discharge of its functions be independent and shall not be subject to the direction and control of any person or authority"*.

This provision is similar to Article 128 (1) of the Constitution that provides for independence of the judiciary. My understanding of this provision is that it is intended to protect and guarantee the independence of the Tribunal in so far as its hearing and deciding of tax disputes is concerned. The Tribunal considered this provision in its ruling and wondered what it would do with the decision of the arbitral body if proceedings before it were stayed and the matter referred to arbitration. It was of the view that it would amount to the Tribunal exercising its mandate under the influence or direction of another person. It was in that context

that the Tribunal held that its constitutional mandate could not be fettered by a contractual provision in an agreement.

I find this argument valid only in view of the fact that the TAT Act and the ACA do not provide for stay of proceedings and referral of tax disputes before the Tribunal to arbitration. Otherwise, if it had been provided for, the above finding of the Tribunal would have been wrong because courts stay proceedings and refer matters to arbitration in accordance with the law without their mandate to administer justice being fettered in any way.

Be that as it may, I will not delve much into this argument because in the absence of any provisions of the law allowing the Tribunal to refer proceedings before it to arbitration it remains an academic one. In the circumstances, I cannot fault the Tribunal for its findings in which case ground 3 of this appeal also fails.

In the result, all the 3 grounds of this appeal fail except for the small aspect stated above and so the appeal must fail. I accordingly dismiss it with costs and confirm the decision of the Tribunal.

Consequently, the interim order of stay of proceedings before the Tribunal that was granted by consent of counsels pending the hearing and determination of this appeal has now accordingly lapsed.

Dated and signed this 13th day of September 2011.

Hellen Obura
JUDGE

Ruling delivered in chambers in the presence of Mr. Peter Kauma for the appellant and Mr. Ali Ssekatawa appearing with Mr. Rodney Golooba for the respondent.

JUDGE
13/09/2011