IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Misc. Civil Cause No. 0003 of 2020

In the matter between

WELHAI INTERNATIONAL ECONOMY AND
TECHNICAL COOPERATIVE COMPANY LTD **APPLICANT**

And

HANSA ENGINEERING SERVICES LIMITED **RESPONDENT**

Heard: 23 June, 2020.
Delivered: 23 July, 2020.

Civil Procedure *— Arbitration — setting aside an arbitral award— setting aside an arbitral award may be justified is where 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, and or where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the Act — Arbitration, as an alternative forum to courts for the determination of disputes arising out of commercial and other relationships, can only take place if agreed to by the disputants, either in advance, i.e. in an arbitration agreement (normally an arbitration clause in a contract), or by way of a submission to arbitration of a specified existing dispute. — sections 11 (2) (b) and (3) (b) of The Arbitration and Conciliation Act— An arbitration notice may be ineffective and accordingly defective or invalid for flouting the procedure for the commencement of an arbitration.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] The This is an application made under sections 34 (2) and 71 (2) of *The Arbitration and Conciliation Act,* and Rules 7 (1), 8 and 13 of *The Arbitration Rules,* seeking an order setting aside an arbitral award delivered on 14th October, 2019. It is contended by the applicant that the tribunal which made the award was not properly constituted, the applicant was not given a fair opportunity of being heard during the proceedings, the amount awarded exceeded the contract sum and therefore the award ought to be set aside. The respondent did not file an affidavit in reply.

[2] The background to the application is that by an agreement dated 15th October, 2018 the applicant sub-contracted the respondent at a sum of shs. 118,066,000/= to undertake some construction works at a waste water plant (lagoon) under construction by the applicant at Pece Flats, Senior Quarters, in Laroo Division, Gulu Municipality. By that agreement, the respondent was to execute clay layer works at that plant within twenty days from the date of signing the agreement. The applicant was to pay 20% of the contract sum in advance, and 10% of it to be paid with each corresponding 10% completion of works. The last 10% was to serve as the retention fee payable six months from the date of completion. Clause 5 states; “Dispute resolution: this contract is governed by the law of the republic of Uganda. In case of any dispute, both parties shall come together and resolve the matter amicably or refer the matter to arbitration and the decision thereon shall be final and binding upon both parties.”

[3] The respondent received the 20% advance payment of the contract sum (shs. 23,613,200/=) and began execution of the works on or about 20th October, 2018. The respondent completed them within the agreed time and demanded payment of the balance, which was not forthcoming. The respondent then filed a suit under summary procedure but when the applicant’s applicant for unconditional leave to appear and defend came up for hearing, the court referred the parties to arbitration in accordance with clause 5 of the agreement of sub-contract. The

respondent appointed a single arbitrator, Mr. Nuwagaba Collins. Attempts to cause the applicant's attendance of the arbitration proceedings having been unsuccessful, the arbitrator proceeded ex-parte, whereupon he awarded the respondent a sum of shs. 212,518,800/= which award the respondent sought to enforce by way of attachment and sale of the respondent's trucks. The respondent secured an order of stay of execution and then filed this application.

Reply by the respondent.

[4] Opposing the application by way of an affidavit in reply sworn by the respondent's Managing Director, Mr. Ochen Joel Nicholas, the respondent contends that the applicant deliberately chose not to participate in the appointment of the arbitrator and not to participate in the proceedings, despite having been served with summons on multiple occasions. In making the award, the arbitrator was guided by evidence adduced by the respondent.

Arguments of counsel for the applicant.

[5] In their submissions, Counsel the applicant, argued that the respondent unilaterally referred the dispute to arbitration contrary to the dispute resolution clause in their agreement. The applicant was never notified of the proceedings and the resultant award until 14th February, 2020 when it was served with a notice to show cause why the award should not be executed and later on 18th February, 2010 some of its trucks were attached in execution. There not having been a mutual submissions to the jurisdiction of the arbitrator, the resultant award was a nullity. The respondent did not file submissions in response.

[6] The general principle is that the parties, having chosen to have their dispute determined without recourse to the Courts, indeed, having contracted on that basis and being entitled to do so and to have their agreement carried out, there should be a minimum of interference by the Courts with the ultimate award.

However, provision exists for setting aside an award for specified reasons. Some of the circumstances within which setting aside an arbitral award may be justified is where 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, and or where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or failing such agreement, was not in accordance with the Act (see section 34 (2) (iii) and (v) of *The Arbitration and Conciliation Act*).

[7] The ability to launch arbitration proceedings depends exclusively on the parties' will since this dispute resolution method is purely consensual. Clause 5 of the sub-contract agreement constitutes an arbitration agreement within the meaning of section 3 (3) (a) of *The Arbitration and Conciliation Act.* By that clause, an aggrieved party may initiate arbitration by sending written notice of an intention to arbitrate to the other party, such notice would ordinarily include a description of the dispute, the amount involved, and the remedy sought. According to section 11 (2) (b) of *The Arbitration and Conciliation Act,* the parties are free to agree on a procedure of appointing the arbitrator or arbitrators and if there is no agreement in an arbitration with one arbitrator, the parties have to agree on the person to be appointed.

[8] Arbitration, as an alternative forum to courts for the determination of disputes arising out of commercial and other relationships, can only take place if agreed to by the disputants, either in advance, i.e. in an arbitration agreement (normally an arbitration clause in a contract), or by way of a submission to arbitration of a specified existing dispute. Courts usually defer to arbitration provisions and hold them as binding as long as the provision is clear and unambiguous.

[9] Arbitration by a submission agreement represents, in fact, the apotheosis of consensualism because the parties accept arbitration in full knowledge of the extent of an existing dispute. In practice though, it is not always an easy matter to

convince a business partner to agree to arbitration after a dispute has arisen, since the breaching party may wish to postpone the resolution of a dispute indefinitely. In such situations, section 11 (3) (b) of *The Arbitration and Conciliation Act,* provides that where the parties fail to agree on the arbitrator, the appointment shall be made, upon application of a party, by the appointing authority (an institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators).

[10] Any court will want to safeguard against awards made against persons who did not agree to arbitrate. The authority and jurisdiction of arbitrators are in every instance dependent upon two factors: the autonomy of the parties and the laws governing arbitration. The arbitration agreement decides the scope and extent of jurisdiction of the arbitrator. By virtue of clause 5 of the sub-contract agreement, considered alongside sections 11 (2) (b) and (3) (b) of *The Arbitration and Conciliation Act,* a single arbitrator that is neither consensual nor appointed by the "appointing authority" would have been improperly constituted and be without jurisdiction. The process for constituting of the arbitral tribunal also affects arbitral power. It is the role or responsibility of the arbitrator to take a view on jurisdiction whether or not the parties raise it. An arbitrator should assume the role only after satisfying himself or herself that the conditions for the exercise of power to appoint an arbitrator under the contract are present in the case and have been satisfied. If the parties agreed to arbitration by a consensual arbitrator, there is no basis to oblige the other party to participate in an arbitration convened unilaterally.

[11] On the other hand, a breach of natural justice is a ground on which an aggrieved party may rely to set aside an arbitral award. Section 24 (5) of *The Arbitration and Conciliation Act* requires the parties to be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal. Natural justice is an administrative law concept that encapsulates two famous maxims: (i) no one shall be a judge in his own cause (*nemo iudex in causa sua*), and (ii) each party

is to be given the opportunity to be heard (*audi alteram partem*). The test is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his or her deliberations. Put another way, the issue is whether the material could reasonably have made a difference to the arbitrator, rather than whether it would necessarily have done so. In the instant case, breach of natural justice denied the arbitrator the benefit of the applicant's case entirely.

[12] An arbitration notice may be ineffective and accordingly defective or invalid for flouting the procedure for the commencement of an arbitration (see *A v. B [2017] EWHC 3417 (Comm)* and *Easybiz Investments v. Sinograin and another (The "Biz") [2011] 1 Lloyd's Rep. 688*). In *Easybiz*, a single arbitration notice commenced proceedings in relation to 10 separate bills of lading, which did not contain arbitration clauses, but incorporated the terms of a charterparty which provided that disputes be referred to London Maritime Arbitrators Association arbitration. All the bills incorporated the charterparty arbitration clause which provided that all disputes would be dealt with by arbitration in London according to English Law governed by London Maritime Arbitrators Association arbitration terms. A recovery agent commenced arbitration under all ten bills of lading on behalf of the cargo interests appointing Mr Clive Aston as arbitrator.

[13] The notice of appointment was addressed to the ship-owners and other interested parties and listed all ten bills of lading. The owners were called upon to appoint their arbitrator within fourteen days. The owners appointed Mr Colin Sheppard under protest and disputed the jurisdiction of the panel as a preliminary point. The tribunal found that the notice was effective to commence arbitration and interrupt any time bar and that, in effect, the notice commenced ten separate references. The Judge agreed that the reference was not a composite one, which was not envisaged by the arbitration clause, but ten separate references, sensibly appointing the same arbitrator for each. However

in *A v. B [2017],* the court rejected the argument that reference to “arbitration” in the singular should be read as including “arbitrations” in the plural, holding that the Rules did not envisage several arbitrations being commenced under a single request.

[14] I find in this case that the appointment of Mr. Nuwagaba Collins as arbitrator was inconsistent with clause 5 of the sub-contract agreement, considered alongside sections 11 (2) (b) and (3) (b) of *The Arbitration and Conciliation Act*, and he therefore acted without jurisdiction. The subsequent notice of appointment of arbitrator and notices of hearing too were thus ineffective.

Order:

[15] In the final result, the resultant arbitral award is unenforceable and is hereby set aside. The costs of the application are awarded to the applicant.

Delivered electronically this 23rd day of July, 2020 ……Stephen Mubiru……..

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicant : M/s Conrad Oroya Advocates.

For the respondent :