THE REPUBLIC OF UGANDA

THE CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

MISC. APPLICATION NO.12 OF 2008

(ARISING OUT OF CAD/ARB/NO.10 OF 2007)

ROKO CONSTRUCTION LTD …….. APPLICANT

VERSUS

AYA BAKERY (U) LTD …….. RESPONDENT

RULING

The application, brought under Sections 14(1), (2), 18, 31(1) and Rule 13 First Schedule Arbitration and Conciliation Act (hereinafter referred to as the ACA),was filed on 15th August 2008, seeks orders that:-

1. The Appointing Authority (CADER) terminates the mandate of Mr.Precious Ngabirano (Arbitrator) in the above matter.
2. That the Appointing Authority (CADER) appoints a fresh Arbitrator to replace Mr. Precious Ngabirano in the above matter.
3. The costs of the application be provided for.

The hearing was set for 10.00a.m, 20th August 2008. On 20th August 2008, only Mr. Enos Tumusiime and Mr. Acali Manzi appeared on behalf of the Applicant in their respective capacities as counsel and corporation Secretary. The Respondent was neither represented by counsel nor by any of their corporate officers.

On 20th August 2008, I found communication dated 18th August 2008 from Kalenge, Bwanika, Kimuli & Co. Advocates requesting that the matter be moved to 29th August 2008 to enable Mr. Moses Kimuli prepare for the hearing of the Application as Counsel for the Respondent.

It is unfortunate that the Respondent's Counsel was under the impression that the 18th August 2008 communication was sufficient in itself to cause an adjournment.

It would have been prudent if the Respondent's Counsel had sent either an officer from the Respondent's company or another counsel to hold brief for him along with the diary so that if an adjournment were to be granted it would have been with the co-operation of all the parties; moreover to a date convenient to all the parties.

For this reason I directed that the Applicant should proceed to argue out their application.

Again on 20th August 2008, I found a reasoned Notice of Withdrawal from the office of arbitrator issued under S.14(1)(b) ACA, filed by Mr. Precious Ngabirano.

I must confess that initially I presumed the notice of withdrawal would dispose of this matter. Applicant's counsel insisted on proceeding with his application. Later on upon reflection, I changed my mind for the reasons which I explain below.

The Withdrawal Notice reads as follows,

"THE REPUBLIC OF UGANDA

IN THE CENTRE FOR ARBITRATION AND DISPUTE

RESOLUTION (CADER) CAD/ARB/NO/10 OF 2007.

ROKO CONSTRUCTION LTD ……. CLAIMANT

VERSUS

AYA BAKERY (U) LTD ……... RESPONDENT

NOTICE OF WITHDRAWAL FROM OFFICE OFARBITRATOR (Under S.14(1)(b) of the Arbitration and conciliation Act Cap 4)

Take notice that I have withdrawn from the office of the Arbitrator in the above matter in accordance with S.14(1))(b) of the Arbitration and conciliation Act (Cap 4).

I have taken this decision due to the following reasons:

1. The Claimant alleges that I am responsible for delay of the proceedings whereas it is the one that has failed to agree with the Respondent on an expert who is supposed to handle technical issues and make a report. This report is essential in the just and expeditious disposal of the matter.

2. The Claimant has created an impression that I have only put into consideration the Respondent's Counsel's engagements in allowing adjournments. I have been fair to both parties. For example on 29/4/08 in the middle of the testimony of Mr. Dragomir Lakic the Managing Director of the Claimant, we had the matter stood over to allow Counsel for the Claimant Mr. Enos Tumusiime to attend what he said was an urgent matter at the

High Court. In fixing dates, I had to accommodate both Counsel who appeared to have several engagements.

3. The parties agreed on the venue, as per S.20(1) of Arbitration and Conciliation Act. I had no business in enforcing payments on the part of the Respondents as the Claimant seems to suggest.

4. Since the Respondent was represented by Counsel, I had no duty to enforce the attendance of its officers whether senior or not.

5. The Claimant has filed Miscellaneous Application No.12 of 2008, making false allegations against me, when it is aware that I am not party to the application and as such have no right to be heard.

6. Throughout the conduct of these proceedings, I have been motivated by the need to do justice and not merely to dispose off the matter.

Dated at Kampala this 19th day of August 2008.

Signed: Ngabirano B. Precious – Arbitrator.

To be served upon:

1. M/s Tumusiime, Kabega & Co. Advocates

P.O. Box 21382

Kampala.

2. M/s Kalenge, Bwanika, Kimuli & Co. Advocates.

P.O. Box 8352

Kampala.

3. The Executive Director, CADER."

The five reasons stated in the Withdrawal Notice, in effect constitute a direct response by the Arbitrator to this application.

Section 14(1)(a) ACA vests the parties with the power to jointly terminate the mandate of the arbitrator where both parties are in agreement that the arbitrator has failed to perform functions of the office or to act without undue delay.

In this instance, a right of audience is not extended to the arbitrator.

In the event that the parties are unable to agree that the arbitrator has failed to perform the functions of the office or to act without undue delay, then the aggrieved party has a right to apply to CADER to determine the issue under Section 14(2) ACA.

The right of the aggrieved party, to resort to CADER under S.14 (2) ACA, flows from S.14(1)(a) ACA, which I have already observed does not grant the arbitrator any right of audience.

Another example is where the arbitrator issues a declaration of impartiality to the parties pursuant to S.12 (1) ACA; this was done in this case. The arbitrator's declaration would not estop any party from filing, with CADER, a challenge regarding the arbitrator's impartiality under S.13 (2) ACA. In this instance the arbitrator is also not granted any right of audience.

The Sections 13ACA and 14 ACA instances, which I have referred to above, do not require the arbitrator to give any reasons.

It becomes more difficult when the arbitrator who withdraws from office, gives reasons which are connected with the application, such as the one I have before me.

In this case, Applicant's counsel, also responded to matters raised by the arbitrator. The legislature did not intend that parties and arbitrators should be engaged in any way apart from what is envisaged by the ACA.

Arbitrators are vested with judicial immunity which protects their person from claims by the parties regarding any judicial intervention professed by them.

This is why there can be claim for general or special damages under Sections 13-14 ACA.

The reason for this is because the arbitral process and tribunal is a process established by the parties to serve their needs. The right of recourse under the ACA is reserved only to the parties, because the entire arbitral process is aimed at serving the parties interests. Take these two cases for example.

On 3rd March 2008, the Superior Court of New Jersey in Rick Malik v. A Fred Ruttenberg, Docket No. A- 6615-06T3, refused to recognize any liability on the part of the arbitrator or the American Arbitration Association for the grievous bodily harm which had been inflicted upon the claimant, by another party, whilst on recess break.

On 30th April 2008, the Pennsylvania District Court in The Honarable Edwin E. Naython v. Stradley, Ronon, Stevens & Young, LLP & Andrew L. Dennis, Civil No. 07-4489 (RMB), refused to allow prosecution of the civil claim by the

arbitrator that one party had defamed him by challenging his refusal to rescue himself thereby resulting in damage to reputation, emotional harm and loss of earnings on the part of the arbitrator.

Therefore the relief mechanism invoked in arbitrations is not for the redemption of the arbitrator but the arbitral process.

Here I have in mind the sanctions imposed by the Penal Code Cap.120, in respect of the arbitral process. Section 2(u)(iv) Penal Code includes arbitrators in the definition of "person employed in the public service". The offences affecting the arbitral process or the arbitrator include provision of false information to the arbitrator [S.115], disobedience of arbitral orders [S.117], threatening arbitrators [S.93], failing to obey summons issued by the arbitrator [S.107(1)(b)] or impersonating arbitrators [S.90].

Sections 13, 14 and 34 ACA are clear examples that arbitrators are open to judicial review either by CADER, the appointing authority or CADER as the case may be, without the opportunity for vindication or right of audience on the part of arbitrators.

Arbitrators are entitled to right of audience when charged under the Penal Code with the offences of failure to disclose their interest in any particular matter [S.88] or issuing false awards [S.89]. In light of the above, I find the reasoned withdrawal notice; specifically addressing itself to this application was misplaced.

Whereas it is within the right of any arbitrator to withdrawal from office, it is not right for an arbitrator to base his withdrawal on a challenge raised by a party or even give reasons.

The maxim jus est norma recti; et quicquid est contra normam recti est injuria – a legal right must be within the rule of right; and whatever is contrary to the rule of right is wrong - may here, come in handy.

Lord Pearce in the landmark judicial review case Anisminic Ltd v. Foreign Compensation Commission [1968] App.L.R 12/17, observed that,

"Or in the intervening stage, while engaged on a proper enquiry, the tribunal … may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account.

Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity."

Therefore any withdrawal by the arbitrator must be exercised independently and not pursuant to a challenge seeking to terminate the arbitrator's mandate.

The reasons given, in this instant application flawed the arbitrator's withdrawal notice and inextricably linked it to this application thereby rendering it null and void, as far as this application is concerned.

In this case the arbitrator was out of line to respond to the grounds raised in this application. Had the Withdrawal Notice not given any reasons I would have been prepared to hold that the application had been overtaken by events.

I now turn to the application.

The essence of this application is reflected in Para.19 of the Affidavit sworn by Dragomir Lakic, which states, "19. That as a result of the undue delays caused, permitted tolerated and granted by the learned Arbitrator, these arbitral proceedings have taken over one year to the prejudice of the Applicant." (emphasis mine).

Section 31(1) ACA obligates the arbitrator to make the award within two months of entering on the reference. The arbitrator is only vested with jurisdiction to enlarge time for making the award.

The totality of Dragomir Lakic's affidavit is that the arbitration proceedings are not close to an end.

An arbitrator assuming jurisdiction in any case, under Section 31(1) ACA, holds himself out that he will be available to work under the time schedule suggested by the legislature.

Of course there will be instances where the time is bound to stretch past the two months. Such occasions will not trigger a protest by either party under Section 14(2) ACA, or even if such protest were raised then it would be evident that the applicant seeks to resolve the case by a side wind – Para. 8, Hon. Justice James Ogoola, Tropical Investments Ltd v. Jimmy Mukasa, M.A. No.45/2004 Commercial Court Division (unreported), delivered on 30th June 2005.

To this end it has been observed that the parties are free to impose upon the arbitrators whatever time limits the parties think appropriate for the completion of the arbitration

proceedings and the making of an award [Section 8.49.1 Arbitration Law, Lloyd's Commercial Law Library (service issue No.38: 2 August 2004)].

Taking into account that Section 31(1) ACA, the arbitrator can only extend the time within which to deliver the award and not the time within which to hear the matter, the "over one year" period mentioned in Paragraph 19 of Mr. Dragomir Lakic's affidavit does not leave one in doubt that the arbitrator has failed to act without undue delay.

I find merit in this application and therefore terminate the mandate of the Mr. Precious Ngabirano as arbitrator in this matter.

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Delivered on the 22nd August 2008 at Kampala.

Jimmy Muyanja

EXECUTIVE DIRECTOR.