

TANZANIA / JUDGMENT

badugu ginning co ltd vs cdi distributors inc 2012 tzhccomd 66 14 december 2012

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TZHCCOMDDECIDED
14 December 2012

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM MISC. COMMERCIAL CAUSE NO. 14 OF 2012 IN THE MATTER OF THE ARBITRATION ACT, CAP.15 R.E 2002 AND In the Matter of Arbitration by the International Cotton Association Tribunal at Liverpool, England in Technical Arbitration & Appeal ICA Ref. A01/2010/39 AND In the Matter of Petition to Challenge the Award granted by the International Cotton Arbitration ("ICA Award) in favour of the Respondent BETWEEN BADUGU GINNING CO.LIM ITED..... PETITIONER AND CDI COTTON DISTRIBUTORS INC..... RESPONDENT Date o f last order: 23/10/2012 Date o f final submissions: 22/11/2012 Date o f Ruling: 14/12/2012

RULING

MAKARAMBA, J.: On the 2nd July, 2012, BADUGU GINNING CO.LIMITED, the Petitioner, filed a petition in this Court. The petitioner preferred the petition Page 1 of 19 under the provisions of section 12, 15, 16 and 30(1) (a), (b), (c) and (e) of the Arbitration Act, Cap. 15 R.E. 2002, read together with Rules 5, 6, 7 and 8 and section 38 (2), Rule 14(c) of the Second Schedule and section 95 of the Civil Procedure Code, Cap.33 R.E 2002. In the petition, the petitioner is seeking for the following reliefs:

- (i) An order to set aside the A ward; (ii) Costs o f the Petition; and (Hi) Any other order(s) this Honourable Court may deem just, fair and proper to grant. The background to the Petition briefly is that the Parties had entered into three written agreements in the 2010/2011 cotton season. The agreements were dated 12th February, 2010 (Contract No. CDI-P 1421), 12th May, 2010 (Contract No. CDI-P 1655) and 30th May, 2010 (Contract No. CDI-P 1755). These agreements were for sale and purchase of 360, 200 and 200 metric tonnes of Tanzanian raw cotton. The Parties chose to be bound by the Bylaws and Rules of International Cotton Association Limited, of January 2010. A dispute arose between the parties. They submitted it to the International Cotton Association Ltd Tribunal (ICA), the Tribunal. The Tribunal issued an award in favour of the Respondent. The Petitioner was not satisfied by the decision of the ICA Tribunal. The Petitioner appealed to the ICA Technical Appeal Committee ((TAC), the Committee. The Committee confirmed the earlier award in favour of the Respondent and thus issued an award in favour of the Respondent, dated Page 2 of 19 14th February, 2012, the Final Award. The Respondent came to this Court seeking to register the Final Award as a

decree of this Court. It is against the registration of the Final Award in this Court by the Respondent the Petitioner now seeks to challenge and hence this Ruling. The petition was disposed of by way of written submissions by Mr. Chacha, learned Counsel from the South Law Chambers Advocates for the Petitioner and M/S Linda Bosco, learned Counsel from IMMMA Advocates for the Respondent. Mr. Chacha submitted that, the sitting of the Appeal Committee was supposed to be at Liverpool, England from 7th October, 2011. However, the Committee not only failed to sit but also allowed its responsibilities to be usurped by N.R. Scott and one a Mr. Kai Hughes who was not even on the list of appointed Appeal Committee Members or reservists. Mr. Chacha submitted further that, the procedures, appointments, qualifications, quorum and voting of the Appeal Committee are found in Bylaw 312 of the ICA Bylaws and Rules. Bylaw 312 (4-6) provides that: "4. Appeal committee will consist of Chairman (who must be a director or ex-director when appointed), and four other people, who must be Full members or Associate Member when they are appointed. All Technical Appeal Committee members must additionally be qualified to the standards as set by Directors from time to time. Page 3 of 19

5. A member of an appeal committee may only attend and vote at committee meetings if he has been present at all previous meeting.
6. At any meeting of an appeal committee, a quorum must comprise the Chairman and three, or at the Chairman's discretion, two members. In the event that there is no quorum, the Directors will appoint a new appeal committee. However, the provisions of this paragraph may be varied by the Directors if both parties agree in writing." Mr. Chacha also referred this Court to Bylaw 308 (1) of ICA Bylaws and Rules which provides that: "An Award shall be in writing, dated and signed by all members of the Tribunal and shall contain sufficient reasons to show why the tribunal has reached the decisions contained in it, unless parties agree otherwise or the Award is by consent." Mr. Chacha submitted further that, the Committee neglected to collectively deliberate and give its award on submissions presented. The powers of the Committee have been usurped by the Chairman and one Kai Hughes, Mr. Chacha further submitted. The Committee members neither considered nor sat or cared to sign the award prepared by the Chairman and Mr. Hughes, which act according to Mr. Chacha, amounts to misconduct. The Petitioner expected the appeal to have been conducted Page 4 of 19 fairly and without any misconduct on the part of any of the Committee members including the Chairman, Mr. Chacha further submitted. According to Mr. Chacha the Respondent has not fulfilled the conditions for enforcement of a foreign award under the provisions of section 30(1) (b) (c) of the Arbitration Act, Cap.15 R.E. 2001. Mr. Chacha surmised that, the ICA award was neither made in conformity nor constituted in the manner agreed upon by the parties under Bylaw 308.1 of the ICA Bylaws and Rules (herein referred as "Bylaws"). In her response M/S Bosco, learned Counsel for the Respondent submitted that, the Award dated 31st May, 2011 was signed by all members of the Tribunal and contained sufficient reasons for the decision reached. However, M/s Bosco further submitted, the Petitioner appealed to the Committee. Consequently, the directors of the ICA proceeded to appoint the members of the Committee in accordance with Bylaws 312 (1) and

(4) which provides that:

- (1) /Is soon as the appellant has served its case for appeal and the Respondent has served a response, the Directors shall appoint a Technical Appeal Committee (Appeal Committee).
- (4) z4/7 Appeal Committee will consist of a chairman (who must be a director or ex-director when appointed) and four other people, who must be individual members when they are appointed. All Technical Appeal Committee members must additionally be Page 5 of 19 qualified to the standards as set by the Directors from time to time. According to M/s Bosco, the Petitioner was notified on the appointments of the Members of the Committee vide a letter dated September 30, 2011, {a copy of which was availed to this Court for easy of reference). According to the letter, the appointed members of the Committee were N. R. Scott (Chairman), A. Adlington, H. J. Davies, F. A. Grobien and R. H. Pollard (as members) and A. S. Hursthouse and D. J. Welsh (as Reserves). In the same letter, the Petitioner was notified of the time limit within which any member may object to the appointment of the Members of the Committee. However, the Petitioner never objected which implies that the Committee was properly and legally constituted, M/s Bosco further submitted. In support of her arguments, M/s Bosco referred this Court to the case of REES VERSUS WATERS, 16 M & W as quoted at page 57 of the Halsbury's Laws of England, in which it was stated that: '>1/7 Award will not be set aside if the matter excluded was not specifically brought before the arbitrator." M/s Bosco submitted further that, it was not mandatory for an award by the Committee to be signed by any or all the members of the Committee. M/s Bosco pointed out that, Bylaws 308 (1) as cited by Mr. Chacha, refers to an Award made by the Tribunal and not that of the Members of the Committee. M/s Bosco added that, since there is no any Page 6 of 19 provision which requires the Award by the Committee to be signed by any or all the members of the Committee, the Award dated 14th February, 2012 having been signed by the Chairman and Secretary and having been stamped becomes effective and binding upon parties to the Arbitration. It cannot therefore be said that, the signing of the Award by the Chairman and Secretary of the Committee can amount to misconduct on the part of the members of Committee or be said to be an error on the face of record, M/s Bosco further submitted. According to M/s Bosco, what constitutes misconduct has been well elaborated in Halsbury's Laws of England, 3rd Ed, Vol.2 at page 57 that: "....the expression is of wide import, including on the one hand bribery and corruption and on the other, a mere mistake as to the scope of the authority conferred by the agreement of reference or a mere error of law appearing on the face of the award....thus misconduct occurs if the arbitrator or umpire, as the case may be, fails to decide all the matters which were referred to him ; if by his award he purports to decide matters which have not, in fact, been included in the agreement of the reference; if the award is inconsistent or uncertain or ambiguous, or is on its face erroneous in matter of law, or even if there is some mistake of fact but in such case the mistake must be either admitted or at least dear beyond any reasonable doubt, if there has been irregularity in the proceedings, as for example where the arbitrator failed to give notice to the parties of the time and place of meeting....." Page 7 of 19 On the other side, M/s Bosco further submitted that, an error on the face of record was defined in the

case of CHAMPSEY BHARA AND COMPANY VERSUS KUVRAJI BALLQW SPINNING AND WEAVING COMPANY LIMITED [1968] AIR Bern 217 as quoted in the case of DB SHAPRIYA AND CO- LTD VERSUS BISH INTERNATIONAL BV [2003] 2 EALR at page 410 in which it was stated that: "An error of law on the face of the award means, in their Lordships view, that you can find in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his Judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the party's rights depend to see if that contention is sound." M/s Bosco surmised that, the Foreign Award filed in this Court has met all the requirements as per section 30(1) of the Arbitration Act for it to be enforceable as it was a decree of this Court. In his rejoinder, Mr. Chacha referred this Court to Bylaw 312.9 which states that: "An appeal involves a new hearing of the dispute and the appeal committee can allow new evidence to be put forward. It may confirm, Page 8 of 19 vary, amend or set aside the award of the first tribunal and make a new award covering all of the matters in dispute." According to Mr. Chacha, since under Bylaw 312.9 an appeal amounts to new hearing of a dispute where even evidence is admitted, the Committee made a New Award. Mr. Chacha surmised that, the act of referring the Arbitral Award to the Technical Appeal Committee is against both the public policy and the laws of Tanzania. Mr. Chacha added further that, the Respondent did not take any efforts to bring any evidence to prove the fact that, the Committee Award at appellate stage was a singular decision of one N.R. Scott in exclusion of all appointed and consented 'Arbitrators/ Mr. Chacha submitted further that, the Committee Award lodged in this Court does not show, indicate or claim to have been conducted by all or majority of the Committee members. The burden of proving whether the tribunal had ever met or as to how the Award was procured lies with the Respondent. It was the further submission of Mr. Chacha in rejoinder that, under section 30(1) (b) and (c) of the Arbitration Act, Cap. 15 R.E 2002, the ICA Tribunal was supposed to be constituted in conformity to the letter dated 30th September, 2011 marked as BDG/CDI 3 and Bylaw 308 of the Bylaws. Departure from these mandatory conditions is valid ground for setting aside the Arbitrator's Award. Failure by arbitrators to discharge their duties, unilaterally extending scope of the authority of Chairman, usurping of powers and irregular appointment and signing of the Award by Kai Hughes are sufficient to amount to misconduct on the face of record. Page 9 of 19 In this petition, the petitioner seeks to challenge the Arbitral Award on two main grounds. First, that the Arbitral Award dated 14th February, 2012 is defective on the face of record for not having been signed by the other Members of the Committee. Secondly, that the proceedings of the Tribunal and the Award are void for having been tainted with arbitrariness, since the decision of the Tribunal or Committee completely ignored, refused or neglected to consider facts giving rise to the dispute, and as a result the Tribunal arrived at a wrong decision, by making a grossly excessive award in favour of the Respondent. The first ground is that the Arbitration Award dated 14th February, 2012 is defective on the face of record for not having been signed by the other Members of the Committee. Mr. Chacha contends that, the Award dated 14th February, 2012

was signed by the Chairman and other person by the name of Kai Hughes (Secretary of Committee), who was not among the appointed Members of the Committee as per the letter dated 30 September, 2011 ("BDG/CDI 3"), annexed under paragraph 2 to the Reply to the Answer of the Petition. According to Mr. Chacha, it is mandatory under Bylaw 308 (1) of the Bylaws that the Award be signed by all Members of Tribunal duly appointed and/or consented by the parties to the contract. Bylaw 308 (1) of the Bylaws provides as follows: "An Award shall be in writing, dated and signed by all members of the Tribunal and shall contain sufficient reasons to show why the tribunal has reached the decisions contained in it, unless parties agree otherwise or the Award is by consent." Page 10 of 19 In my considered opinion, Bylaw 308(1), as M/s Bosco rightly submitted, refers to the original award dated 31st May, 2011. I have noted however, that, there is confusion among the parties to this petition in respect of which set of Bylaws and Rules should be referred as pertaining to the Arbitration proceedings. The records show that, there are two different sets of Bylaws by ICA which have been produced in this Court by the learned Counsels for easy of reference. The first set of Rules is the Bylaws and Rules of the International Cotton Association Limited, approved on the 10th December, 2009 and come into force on the 1st January, 2010. These have been annexed to paragraph 1 to the Reply to the Answer to Petition and marked as BDG/CDI 2. The second set is the Bylaws and Rules of the International Cotton Association Limited, approved by members on the 9th December, 2010 and which come into force on the 1st January, 2011. These have been annexed in the Respondent's Reply to Written Submissions by the Petitioner. It should be noted that, the Claimant, the Respondent herein, CDI Cotton Distributors Inc., referred the matter to the ICA arbitration on or before the 14th October, 2010, as per the Final Notice by the Applicant attached to the Claimant's Particulars of Claim, marked as Exh.KH5. The law which by that time was in operation was Bylaws and Rules of the International Cotton Association Limited which were approved on the 10th December, 2009, and came into force on the 1st of January, 2010. Undoubtedly therefore, by that time the prevailing Bylaws and Rules were the ones which came into force on the 1st January, 2010. In my considered view, the reference by learned Counsel for the parties in this Petition to Page 11 of 19 bylaws should have focused on the Bylaws which came into force on the 1st January, 2010. Let me now consider and determine the main issue in this petition, that the Arbitral Award dated 14th February, 2012 is defective on the face of record for not having been signed by the other Members of the Committee. It is without dispute that, the Award dated 14th February, 2012 was signed by N. R. Scott as Chairman and Kai Hughes as Secretary of the Committee. This, in my considered view was proper in terms of Bylaw 346 of the ICA's Bylaws, which provides as follows: "Every Award relating to quality made under our Bylaws must be made in writing on our official form and signed by the arbitrator or both arbitrators, or the umpire if there is one. The Chairman or Deputy Chairman and the Secretary of the appeal committee must sign an appeal Award "(the emphasis of this Court). As M/s Bosco rightly submitted, that fact was not questioned and there is no dispute that Mr. Kai Hughes was a Secretary of the Committee. The Petitioner queries in paragraph 3 of the Petition as to why the Award was not signed by other members of the Committee as required by ICA Bylaws. I have had a look

at the list of the other members of the Committee other than Mr. N. R. Scott (the Chairman) as per the list of names appearing in the letter dated 30th September, 2011. Rather unfortunately, from that list there is no one who was appointed as Secretary of the Committee. Thus, no one from the other appointed members as suggested by the Petitioner, Page 12 of 19 could be capable of signing the Award, since they did not qualify as secretaries in terms of Bylaw 346. As I intimated to earlier in this ruling, since Bylaw 308(1) is inapplicable to the Award dated 14th February, 2012, it could not be said that the Award is in violation of any law. Accordingly, this Court finds and holds that, the Award filed by the Arbitrators of ICA on the 28th May, 2012 was duly signed in accordance with section 12 of the Arbitration Act, Cap.15 R.E. 2002 and Bylaw 346 of the ICA's Bylaws. On the foregoing reasons, the first ground of the petition must accordingly fail. Let me now turn to consider the second ground of the petition that, the proceedings of the Tribunal and the Award are void for having been tainted with arbitrariness, since the decision of the Tribunal or the Committee completely ignored, refused or neglected to consider facts giving rise to the dispute, as a result of which the Tribunal arrived at a wrong decision, which awarded grossly excessive award in favour of the Respondent. In my considered view, the second ground of the petition, seems to be pegged on the provisions of section 30(2) (c) of the Arbitration Act Cap. 15 which states as follows: "Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part if the court is satisfied that-

- a.not relevant
- b. not relevant Page 13 of 19
- c. the award does not deal with g// the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration, (the emphasis is of this Court). The issue is therefore whether the contested award dealt with all the questions which were referred to it by the parties or whether it contains decisions on matters beyond the scope of the agreement for arbitration. I am alive to the reasons by the Appellants for appealing to the Committee as described in the first paragraph of page 4 of the Award dated 14th February, 2012 as follows:
 - i. The quantum of the Award against the Appellants. The Respondent's claim was grossly exaggerated. Had the Tribunal properly examined the evidence and the issues, it would not have wrongly awarded interest and costs in favour of the Respondent. ii. The Arbitrators' neglect of the facts. iii. The errors of law perpetrated within the award. iv. The invoicing back date determined by the arbitrators
 - v. The bias of the arbitrators or their deliberate ignoring of the facts. Page 14 of 19. vi. The lack of impartiality of the arbitrators, as evidenced within the Award. vii. The awarding of interest. In the last paragraph of the same page, that is, page 4 of the Award dated 14th February, 2012, the Arbitrators stated as follows: "We have duly considered the parties' arguments and paid due attention to the evidence provided including the first tier arbitration documents and the submissions of both parties in this Appeal. In the light of the

foregoing facts, it seems that the second ground of the petition touches on the very facts which were referred to the Committee as an appeal. The Petitioner therefore wants this Court to re- open matters which were already considered by the Tribunal. The parties having submitted themselves to the Tribunal, this Court takes into account that the parties have consented to be bound by the Rules, Procedures and the decision of the Tribunal. It is the parties themselves, who decided to oust the jurisdiction of this Court by referring their dispute to Arbitration. It is therefore difficult at this stage for this Court to re-open and re-argue matters arising in the dispute which have already been submitted and decided on merits by the Tribunal. It is worth to note the salutary rendering in paragraph 8 of the 1st Schedule of the Arbitration Act Cap. 15 Page 15 of 19 R.E 2002 of the Laws of Tanzania, which emphasizes the finality and binding nature of arbitral awards as follows: "The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively, "(the emphasis is o f this Court). It is worth also underscoring here that the agreement tpo submit matters to arbitration is sacrosanct and that in the absence of sufficient grounds courts of law exercise great care in interfering with the decision of arbitral tribunal lest the whole purpose of arbitration which is proving an alternative avenue for settling commercial disputes will be defeated. I am alive also to the position courts of law in this Country take in relation to the finality and binding nature of arbitral awards as have been exemplified in the recent decision in the case of TANZANIA ELECTRIC COMPANY LTD VERSUS DQWANS HOLDING SA (COSTA RICA) AND DQWANS TANZANIA LIMITED (TANZANIA), Misc. Civil Application No.8 of 2011 (unreported) and that of KBL ENTERPRISES LTD VERSUS CPI COTTON DISTRIBUTORS INC, Misc. Commercial Cause No.26 of 2011 (unreported). It is not the province of courts of law to investigate the merits of proceedings before arbitral tribunals in order to find out whether arbitrators have committed errors of law and correct them. This legal position finds expression in the case of UNION OF INDIA VERSUS BUNGO STEEL FURNITURE (P) LTD in which it was held that: Page 16 of 19 "The Court has no jurisdiction to investigate into merits o f the case and to examine the documentary and oral evidence for the purpose o f finding out whether or not the arbitrator has committed an error o f law. Subject to the remedies provide under the Act, the award cannot be set aside, amended, modified or affected in any way whatsoever." In the present petition, the petitioner has not been able to establish any invalidity on the face of the award such that it will enable this Court to set aside the award. I have also noted that, the seat of the Arbitration Committee was in Liverpool, England. This was clearly stated in page 12 of the Award dated 14th February, 2012. Even the procedures on how the appeal was conducted by the appointed committee have also been clearly stated in the same award. In my view, even if the facts giving rise to the dispute have not been considered in the Award dated 31st May, 2011, the same facts were well considered in the Final Award dated 14th February, 2012. Again, in case of a foreign arbitral award, a party is allowed to challenge the enforceability of an award under the provisions of section 30 of the Arbitration Act, Cap. 15 R.E. 2002 of the Laws of Tanzania. In terms of section 30(2) of the Act, a foreign award shall not be enforceable if the court is satisfied that: "... the award has been annulled in the country in which it was made; or the party against whom it is sought to enforce the award

was not given notice of the arbitration proceedings in sufficient time to enable Page 17 of 19 him to present his case or was under some legal incapacity and was not properly represented; or the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration. In the present petition, the petitioner has failed to establish that the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration. It is for the foregoing reasons that the second ground of the petition must also fail. In the whole and for the reasons I have explained above, the petition fails. It is hereby dismissed with costs. It is ordered that the Arbitral Award filed in this Court on the 28th May 2012 is hereby registered and it shall be enforced as if it were a decree of this Court. Order accordingly. R.V. MAKARAMBA JUDGE 14/12/2012 Page 18 of 19 Ruling delivered this 14th day of December, 2012 in the presence of Mr. Mkonji, Advocate for the Petitioner and Mr. Nyika, Advocate for the Respondent. R.V. M A K A RAM BA JU D G E 14/12/2012 Page 19 of 19

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Prepared on 14 October 2026 · Esheria