

UGANDA / JUDGMENT

Ajanta Pharma Ltd v Attorney General & Anor (Arbitration Cause No. 11 of 2011) [2012] UGCommC 90 (16 August 2012)

[2012] UGCommC 90

COURT

Commercial Court of Uganda

BEFORE

Obura, J

CASE / FILE NUMBER

Arbitration Cause No. 11 of 2011

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

ARBITRATION CAUSE NO. 11 OF 2011

(ARISING FROM CADER ARBITRATION NO. CAD-ARB-02-OF 2011)

AJANTA PHARMA LIMITED:.....APPLICANT/CLAIMANT

VEVRSUS

THE ATTORNEY GENERAL OF UGANDA:.....RESPONDENT

AND

JAMES NANGWALA:.....RESPONDENT/ARBITRATOR

BEFORE : HON. LADY JUSTICE HELLEN OBURA

RULING

This application was brought under section 34 of the Arbitration and Conciliation Act, Cap 4 (hereinafter called the Act) and section 35 (I suppose 33) of the Judicature Act, Cap 13. The applicant is seeking for orders that:-

- a) The arbitral award of Mr. James Nangwala, arbitrator dated 13th September 2011 given in CAD-ARB-02-2011 between Ajanta Pharma Limited v. Attorney General be set aside.

- b) Consequently, Mr. James Nangwala be ordered to refund to the applicant the deposit of USD 38,500 made on account of Arbitration fees and administration expenses.
- c) Directions and/ or orders be given for the arbitrator to submit his itemized bill of arbitrators fees and administration expenses for subsequent taxation by the appropriate and lawful authority.
- d) Directions to the Centre for Arbitration & Dispute Resolution (CADER) to lawfully exercise its statutory mandate and enforce the applicable laws, rules and regulations with special reference to enforcement of the code of Ethics of Arbitrators, Scale of fees chargeable by arbitrators and generally better and effective performance of arbitration process under the Act.
- e) **Costs of this application be provided for.**

The brief grounds for the application as stated in the notice of motion and the affidavit in support sworn by Mr. Godfrey Magezi are that:-

1. **There is evident partiality and bias of the arbitrator in making the challenged award.**
2. **The arbitral award is not in accordance with the Act.**
3. **The arbitral award is in conflict with the public policy of Uganda.**
4. **The arbitrator misconducted himself and acted unethically contrary to the Act and prescribed Code of Conduct.**
5. **The arbitrator did not conduct a hearing to determine his fees but unilaterally withheld the applicant's advance as his fees and ordered the applicant to recover from the Attorney General 50% of the withheld sum as a reimbursement.**
6. **The arbitrator did not complete the execution of his mandate which was terminated and accordingly was only entitled to a proportionate or pro rata remuneration measured as a fraction of his output measured against the final agreed deliverable, i.e. final award.**
7. **The arbitrator has no or any lien in the fees deposited for the arbitration process and is not entitled to withhold or order for the forfeiture of the deposit.**

An affidavit in reply and opposition to the application was sworn by Mr. James Nangwala the arbitrator and 2nd respondent. He deposed, inter-alia; that during the preliminary hearing in the arbitral proceedings the mode of remuneration of the arbitrator was discussed between the arbitrator and the parties' respective counsel and their representatives and the parties chose to remunerate the arbitrator by a block sum.

The parties had opportunity to make consultations on the remuneration which involved them leaving the room. They agreed on a figure and an agreement on fees was signed by the arbitrator and the parties whereby 50% of the total fees and agreed expenses was to be paid as a commitment fee by the claimant by 10th August 2011 which was done. A copy of the agreement was attached as annexure "JN2".

He further deposed that when the Solicitor General wrote an afterthought letter regarding the agreed fees CADER duly responded in its letter of 14th August 2011. A copy of the letter was attached as annexure "JN3". The Attorney General did not file its defence on the two occasions given to it and the Act and the procedural rules of arbitration which had been agreed upon by the parties duly provided for how to proceed in case of default by either party.

Mr. Nangwala averred that the claimant expressed its wish not to proceed with the arbitration ex parte and purported to agree to a challenge outside the Act. He nevertheless gave an order terminating the proceedings which he contends is not an award but had its foundation in the conduct of the parties and was permissible under the Act. He deposed that the failure to conduct the arbitral proceedings to their logical conclusion was brought about by the parties and not himself.

I wish to observe that the Attorney General who was named as the 1st respondent and duly served neither filed an affidavit in reply nor any submissions.

When this application came up for hearing, Mr. Mohamed Mbabazi for the applicant and Mr. Alex Rezida for the 2nd respondent agreed to file written submissions which they did. I have carefully considered those written submissions together with the affidavits in this ruling.

Counsel for the applicant submitted on the four issues which he framed for determination by this court, namely;

1. **Whether the order terminating the proceedings by the respondent was an arbitral award within the meaning of the Act.**
2. **Whether the 2nd respondent is entitled to retain the deposit paid by the applicant as arbitrator's fees for work done up to the termination of his mandate as arbitrator.**
3. **Whether the respondent as arbitrator fairly and lawfully determined his fee commensurate with the amount of work done in CADER Arbitration No. CAD-ARB-02-2011.**
4. **Remedies available to the applicant.**

Counsel for the 2nd respondent on the other hand submitted on the three issues which in his opinion arise from the facts of this case namely;

1. **Whether the order terminating the arbitral proceedings is an award.**
2. **Whether the consent agreement entered into by the applicant and the Attorney General removing the respondent as arbitrator is illegal.**

3. Whether the applicant is entitled to a refund of the commitment fee.

With due respect to counsel for the 2nd respondent, I do not think the legality of the consent agreement entered into by the applicant and the Attorney General to remove the respondent as arbitrator is an issue for determination in this application. The arbitrator already terminated the arbitral proceedings on the basis of that agreement although he observed that it was made outside the Act. In my considered opinion he cannot again challenge its legality at this stage as it would be of no consequence. The arbitrator in the Order of Termination of Proceedings made on the 13th day of September 2011 stated in the 2nd last paragraph that:-

“.....I therefore find the consent Agreement signed by the parties to have been outside the Act. Nevertheless, it is an agreement signed by the parties whose substance is not to proceed with the arbitration under my authority as arbitrator.**For the above reasons, I therefore find that under section 32 (2) (c) of the Act, continuation of the proceedings under my authority has become unnecessary. I therefore issue an order terminating the arbitral proceedings**under my authority as arbitrator pursuant to the said provision**”. (Emphasis added).

For the reason that the arbitrator terminated the arbitral proceedings on the basis of that agreement, I will not delve into that matter in this application. I find that the first two issues framed by counsel for the applicant adequately takes care of all the matters in controversy and so I will only consider those two issues in this ruling.

However, before I consider them, I wish to highlight the background of this application as gathered from the documents attached to the application and the affidavit in reply. The applicant entered into an agreement with the Government of Uganda (GOU) for the supply of malarial drugs for the contract sum of USD 17,952,305. In accordance with the terms of the contract, the applicant provided a performance guarantee and the GOU opened/established a letter of credit in favour of the applicant for a sum of USD 8,976,154 upon which the applicant supplied and delivered part of the drugs as required.

The applicant then notified the GOU that it had completed delivery of all the consignment under the 1st letter of credit and requested that a second and last letter of credit be opened to enable it supply the balance of the drugs as per the contract. The GOU did not open the 2nd letter of credit on the ground that there was a change in policy hence the dispute by which the applicant alleged breach of contract.

The agreement contained an arbitration clause to the effect that if the parties fail to resolve a dispute or difference by mutual consultation within 28 days from the commencement of such consultation, either party may require that the dispute be referred for resolution under the arbitration law of Uganda or such other formal mechanism specified in the Special Condition of Contract (SCC).

The parties made consultation and failed to agree and the applicant filed a Notice of Arbitration with CADER which was not opposed by the Attorney General. The Executive Director CADER made a ruling by which Mr. James Nangwala was appointed as the single arbitrator over the matter.

Mr. James Nangwala accepted the appointment by signing the Arbitrator's Declaration of Acceptance and Statement of Impartiality. He then held the first preliminary hearing in which among other things his fees and administration expenses and mode of payment were discussed and agreed upon by the parties.

The parties agreed to pay the arbitrator's fees by block sum of USD 75,000 and administration expenses of USD 2,000 all totaling USD 77,000. The parties agreed to contribute equal amount (50% each) payable in two installments. The claimant (applicant) was to pay the first installment/deposit of 50% (USD 38,500) on or before 10th August 2011 and the balance of 50% was to be paid by the respondent (Attorney General) on notification of readiness of the award to the parties by the arbitrator.

At the 2nd preliminary proceeding, counsel for the 1st respondent moved the arbitrator to reconsider the mode of payment of the arbitrator's fees by charging hourly in accordance with the rules of CADER as opposed to the block sum that the parties had already agreed upon. His ground for that application was that he was caught off guard because he did not know the mode of remuneration of arbitrators.

The arbitrator declined to reconsider the fees and ruled that a case had not been made out for the arbitrator to revisit a matter which was duly discussed taking into account his seniority, the value of the subject matter and the role to be played by him; agreed upon and concluded.

The Solicitor General then wrote a letter dated 10th August 2011 to the Executive Director CADER by which he protested the fees as being exorbitant. He pointed out that the internal meeting held in Attorney General's chambers had agreed on Mr. Nkurunziza as a sole arbitrator but to their surprise the officer who represented their office presented different facts, that is, a new arbitrator and the fees agreed to.

He stated that if the said amount was paid to the arbitrator by the Attorney General's chambers it would automatically cause an audit query. He further stated that the officer who exceeded his authority and accepted the arbitrator's charges without consulting the Accounting Officer had been cautioned. He sought the indulgence of the Executive Director CADER to halt the process so that they could proceed before the mutually agreed arbitrator Mr. Nkurunziza.

The Executive Director CADER responded to the letter of 10th August 2011 and explained the circumstances under which CADER intervenes under the Act and advised the Solicitor General on the procedure that should be followed. The arbitrator also wrote to explain his position.

Afterwards, the Solicitor General wrote another letter to the Executive Director CADER reiterating the earlier position as contained in the letter of 10th August 2011 but with more emphasis on the fact that if the amount was paid it would cause audit query that could result into

dismissal of an official involved and possible criminal prosecution. Further that the officer from Attorney General's chambers who agreed to the fees did not consult the Accounting Officer or exhaust the known ladders of hierarchy in the Attorney General's chambers. He concluded by alleging that the action of the arbitrator was suspect and expressed their unwillingness to continue with him.

The parties subsequently filed a Consent Agreement by which they agreed to terminate the appointment of Mr. James Nangwala as the arbitrator and mutually agreed to the appointment of Mr. Nkurunziza as the arbitrator.

Upon receipt of the Consent Agreement, the arbitrator made an order terminating the arbitral proceedings. He also ordered the respondent (Attorney General) to refund to the claimant 50% of the commitment fees the latter paid to him. It is that aspect of the order on fees that has aggrieved the applicant and is sought to be set aside.

With the above background in mind, I now proceed to consider the first issue as to whether the order terminating the arbitral proceedings is an arbitral award within the meaning of the Act. Section 2 (1) (b) of the Act defines the phrase “**arbitral award**” as “**any award of an arbitral tribunal and includes an interim arbitral award**”.

***Black's Law Dictionary 8th Edition* defines the noun “award” as “a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.-Also termed arbitrament”.**

Section 31 of the Act provides for the form and content of arbitral award. Form V in the second schedule to the Act also indicates the content of an award.

In the instant case, the order sought to be set aside by this application was made by the arbitrator in accordance with section 32 of the Act. Section 32 (1) provides that:-

“The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under subsection (2)”.

Subsection (2) provides that:-

“The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) the claimant withdraws his or her claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his or her part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the arbitral proceedings or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary”.

Clearly from the facts of this case and the order made by the arbitrator, the arbitral proceedings were terminated before hearing of the substantive dispute took place. There was as such no interim or final arbitral award but an order of the arbitral tribunal terminating the proceedings under section 32 (2) (c). There is therefore no arbitral award in the form and content stipulated by section 31 of the Act. This answers the first issue in the negative.

Be that as it may, the next question that arises is whether this court can consider this application on its merit since there is no arbitral award to set aside. The applicant brought this application under section 34 of the Act which provides for setting aside arbitral award and section 35 of the Judicature Act whose head note is “*appeal for habeas corpus*”. I want to believe that that section was cited erroneously since I do not see its relevance to this application.

I will give counsel for the applicant the benefit of the doubt and assume that he meant section 33 of the Judicature Act which enjoins this court to grant all such remedies as any of the parties to a cause or matter is entitled to so that as far as possible all matters in controversy between the parties are completely and finally determined so as to avoid multiplicity of legal proceedings.

Much as there is no arbitral award to set aside, the arbitrator in the last paragraph of his ruling made an order which has aggrieved the applicant. I have carefully looked at the Act and the rules made there under and I find that there is no remedy provided for parties to an arbitration proceeding who are faced with a situation like this one. Should this court therefore just throw out this application on the ground that the order sought to be set aside is not an arbitral award that can be set aside under section 34 of the Act? Is there no remedy for the applicant in the circumstances as argued by counsel for the 2nd respondent?

This court finds fortitude in the case of ***Dr. Joshua Emmanuel Tegule & Others v Uganda Medical Practitioners and Dental Surgeon’s Council HCMA No. 39 of 1991*** where the court was faced with more or less similar situation and counsel for the respondent prayed that the applicant should not be heard because the law on which he was supposed to base his application had never been made. It was observed by the court that:-

“If I were to follow the reasons advanced by Mr. Nyakairu, counsel for the respondents, and throw away this applicant on this ground, it would appear as if courts of law have no means of remedying a situation of this nature. This would be shutting the doors to justice.

However, I do take comfort in other legislation which in my opinion show that the courts cannot shut the doors to justice. Even in a situation like the one at hand, there is a way. Section 17 (2) (the current section 39 (2)) of the Judicature Act gives an answer. It states:

“*17 (2) where in any case no procedure is laid down for the High Court by any written law or by practice the court may, in its discretion adopt a procedure justifiable by the circumstances of the case”.

As aforementioned, the Act does not provide for the procedure of challenging any other order made by an arbitrator apart from the arbitral award. In view of that lacuna, I find a fallback position in sections 33 and 39 (2) of the Judicature Act already alluded to herein above as well as section 98 of the Civil Procedure Act which saves the inherent power of this court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

I know it could be argued that the applicant did not cite section 98 of the Civil Procedure Act in its application but it is now settled that citing a wrong provision of the law or failure to cite a provision of the law under which a party seeks a redress before court is a technicality which should not obstruct the cause of justice. This was the ruling of ***G. M. Okello, JSC*** in ***Alcon International Ltd v The New Vision Printing & Publishing Company & Another, Civil Application No. 4 of 2010***.

In the circumstances of this case, I will exercise the powers given by the above mentioned provisions of the law and consider this application on its merit since I believe there is no prejudice that would be occasioned to the parties by doing so. I am also inspired by the provisions of Article 126 (2) (e) of the Constitution which provides that substantive justice shall be administered without undue regard to technicalities.

This then leads me to consider the 2nd and last issue as to whether the 2nd respondent is entitled to retain the deposit paid by the applicant as arbitrator's fees for work done up to the termination of his mandate as arbitrator.

As stated in the background to this application, the arbitrator held only two preliminary hearings and the arbitral proceedings were terminated before the substantive dispute between the parties was heard. It was strongly argued for the 2nd respondent that in the first preliminary proceedings the issue of remuneration of the arbitrator was discussed and agreed upon by the parties and an agreement was signed to that effect.

However, I wish to observe that in a letter written by the Solicitor General attached to the application which I have already alluded to herein above, it was stated that the officer who represented the Attorney General did not consult the Accounting Officer or even exhaust the known ladders of hierarchy in the Attorney General's chambers. In other words, it is contended that the officer exceeded his powers by committing the Government to pay an amount of money that would cause an audit query.

It is an established practice that officers from Attorney General's chambers act in close consultation with the Solicitor General who is the Accounting Officer on matters that has serious financial implication. Unlike counsel for other litigants who once instructed, can commit their clients without need for any specific instructions, officers from Attorney General's chambers are required to seek specific approval on matters of serious financial implications from the Accounting Officer who takes personal responsibility for the same as per section 8 (2) of the Public Finance and Accountability Act, No. 6 of 2003.

The logic behind this practice is not difficult to discern. The financial obligations of Attorney General's chambers just like any other Government ministry and department are met by Government using tax payers' money drawn from the Consolidated Fund.

Article ***174 (3) of the Constitution*** provides that; **“*the functions of a Permanent Secretary under this article include-***

1. ***.....***
2. ***.....***
3. ***.....***
4. ***Subject to article 164 of this Constitution, responsibility for the proper expenditure of public funds by or in connection with the department or ministry*”.**

Article 164 (1) provides that the Permanent Secretary or the accounting officer in charge of a ministry or department shall be accountable to Parliament for the funds in that ministry or department. Clause (2) of that article provides that any person holding a political or public office who directs or concurs in the use of public funds contrary to existing instructions shall be accountable for any loss arising from that use and shall be required to make good that loss even if he or she has ceased to hold that office.

Oversight over use of money from the Consolidated Fund is done by the Auditor General in accordance with the provisions of the ***Public Finance & Accountability Act*** and the ***Public Finance and Accountability Regulations, 2003***. Regulation 15 (3) (b) provides that:-

Regulation 15

“(3) *In performing the functions referred to in this regulation, the Auditor General shall satisfy himself or herself that -*

(a)

***(b) the expenditure and receipts shown in the accounts have been dealt with in accordance with proper authority and that all expenditure conforms to the authority that governs it*..”;**
(Emphasis added).

I believe it was in view of the above provisions of the law that the Solicitor General expressed fears that if the money was paid out as agreed by the officer who represented the Attorney General it would attract an audit query that would cause dismissal and prosecution of the officers involved.

In the premises, would it therefore be said that the agreement on the arbitrator's fees signed by the parties is binding when one party is challenging it for lack of authority/failure to follow proper procedure by the person who signed on its behalf? My considered opinion is that the agreement was signed with a common mistaken belief of all the parties that counsel for the Attorney General had authority to sign on behalf of his client. It was later pointed out that he did

not have that authority because the officer did not seek the approval of the accounting officer as required by law. The agreement which he signed was disowned by the party on whose behalf he purported to sign. I find that the agreement has been vitiated by common mistake and therefore cannot be binding on the parties.

The arbitrator himself was cognisant of the need for parties to come for the proceedings with representatives who could make binding decisions on behalf of their respective principals and that is why he stated so in the last paragraph at page two of the record of the first preliminary proceeding.

In the circumstances, I find that the 2nd respondent is not entitled to retain the deposit paid by the applicant as arbitrator's fees on the basis of that agreement. I also find the order made by him that the applicant should recover 50% of that money from the Attorney General, unfair and unjust. I do not see how Attorney General would pay that money to the applicant when it is disputing the agreement on which it is based. In my view, the arbitrator by making that order was just widening the dispute between the parties.

It was strongly argued for the 2nd respondent that the 50% paid by the applicant was a commitment fee which is non-refundable. I have already ruled that the agreement which is the basis of that argument is not binding for the reasons already stated above. However, even if it were to be binding, I have a few observations to make as follows.

First of all, what was discussed by the parties and agreed upon according to the record of proceedings was the arbitrator's fees and payment of the same in two equal installments. The claimant (applicant) was to pay the first deposit and the respondent (1st respondent herein) was to pay the 2nd and last deposit. The word commitment fee did not feature in the record of discussions at all. However, in the agreement that the parties subsequently signed, clause 2 (a) referred to the advance sum of USD 38,500 to be paid by the claimant as commitment fee.

Secondly, earlier in clause 1 (a), it was agreed that the fees to remunerate the arbitrator for delivery of the award, case preparation and taxation of costs thereof was USD 75,000 and under clause 1 (c), it was agreed that secretarial fees for record of proceedings, mail, travels etc was USD 2000. To my mind the agreed fees was pegged to the deliverables which were even specified and could only be claimed upon those deliverables being made. In the event that the deliverables were not made, it is my considered view that the payment would be based on the actual work done in which case the arbitrator's bill of fees and expenses would have to be taxed unless mutually agreed to.

To this end, ***Russell on Arbitration 22nd Edition, Sweet & Maxwell Ltd 2003*** in paragraph 4-092 at page 122 while discussing payment of the arbitrator's fees where no award is made states that; **"*the law now entitles an arbitrator to reasonable fees for work done until the time when activity ceased, plus his reasonable expenses*"**.

Just to consider the argument on commitment fee further, according to ***Sundra Rajoo on Remuneration of Arbitrators*** as reported in ***[2002] 4 MJL cliv***;

“A commitment fee is a fee payable to an arbitrator in any event, even if the arbitration does not take place. It constitutes compensation for the time lost. The purpose of such a fee, when properly imposed, is to provide recompense for an arbitrator who has set aside a period for a hearing and is unable to obtain equally remunerative work during that time”.

The above author cautions that: -

“*The proper time for the arbitrator wishing to insist on payment of a commitment fee is before appointment. After appointment, it is too late to insist on a commitment fee, since the imposition of a commitment fee at that stage would constitute a variation of the arbitration agreement, which would require the consent of the parties”.

***Russell on Arbitration* (supra) states in paragraph *4-098 at page 125* that:-**

“*The right to a commitment fee is not an implied term of an arbitrator’s appointment, and the matter should therefore be dealt with by an express agreement at the time of his appointment”.

As aforementioned, the record of the first preliminary proceeding that discussed the arbitrator’s remuneration does not indicate that the issue of commitment fee was discussed and agreed upon. What was discussed and agreed upon was a deposit of 50% of the agreed fee by the claimant. I am of the considered opinion that a deposit is different from a commitment fee. They are both forms of advance payment but they do not mean the same thing. A commitment fee is non-refundable while the entire deposit or part of it may be refunded depending on the stage at which the arbitral proceedings are terminated.

I have already observed that the word commitment fee appeared in the agreement that was later signed by the parties and the arbitrator but not in the record of proceedings. I have read the entire agreement and I find that use of the word commitment fee in clause 2 (a) is not in tandem with the rest of the content of the agreement particularly clause 3. This calls for interpretation of the agreement as a whole by looking at the intention of the parties.

***Chitty on Contracts Volume 1 paragraph 12-044 at page 604* states that:-**

***“The common and universal principle ought to be applied, namely, that [an agreement] ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement and that greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent”*. (Emphasis added).**

A commitment fee is an advance payment that is made before commencement of the arbitral proceedings. If the 50% advance was indeed an agreed commitment fee, why then did clause 3 (d) of the agreement provide that; **“*any party whose dues under this agreement have not been fully paid waives the right to challenge or appeal against the award”*?**

That clause, in my view, presupposes that the dues from the claimant (applicant) which was agreed to be paid as the first deposit could still be outstanding at the time the award is made. To my mind that provision defeats the argument that the 50% was a commitment fee.

Thirdly, I find that it would not be fair for one of the parties to the arbitration to fully pay the commitment fee. That, in my view, would have an effect on the impartiality of the arbitrator. I believe if the parties had indeed discussed and agreed on a commitment fee they would have both agreed to contribute equally towards the same. But since it was never discussed, the parties only agreed to payments of deposits with one party paying upfront and the other paying after the award is made.

I believe the arbitrator himself recognized the unfairness of one party shouldering the fee up to the point when the proceedings were terminated and that is why he ordered the applicant to recover 50% of the same from the 1st respondent. If indeed that amount was an agreed commitment fee, I do not think he would have cared about the applicant recovering part of it from the 1st respondent.

Fourthly, according to the ***Handbook on Arbitration Practice by Ronald Bernstein, John Tackerberry, Arthur L. Marriot and Derek Wood, 3rd Edition, Sweet & Maxwell in paragraph 2-245 at page 74***; if cancellation fees, which in effect is the commitment fees, are reasonable and have no element of “windfall profit” in them, then in principle it is unobjectionable to make such agreement with parties. The authors also caution that the charges should bear some real relation to the risk that cancellation will actually mean a loss of income either through having turned other work away, or being unable to get other work at short notice.

In the instant case, I am of the view that payment of 50% of the fee as compensation for the time lost would have an element of “windfall profit” and it would not be in the best interest of justice for this court to sanction it.

For the above reasons, even if I were to find that the agreement was binding, I would have still found that the 50% deposit made by the applicant was not a commitment fee/non-refundable. I would have ordered the arbitrator to refund the same to the applicant.

However, I find that the order made by the arbitrator in so far as the 50% deposit is concerned was based on the mistaken belief that the agreement was valid. In view of my finding that the agreement is not binding for the reasons I have highlighted above, maintaining that order would be irregular, unjust and unfair to the applicant.

I accordingly set aside the order of the arbitrator on the 50% deposit on fees and order that the arbitrator refunds the USD 38,500 to the applicant. The 2nd respondent is directed to submit his itemized bill of arbitrator’s fees and administration expenses for the actual work done up to the time of termination of the arbitral proceedings for taxation against both parties.

As regards the prayer for directions to CADER to lawfully exercise its statutory mandate and enforce the applicable laws, rules and regulations with special reference to enforcement of the code of Ethics of Arbitrators, scale of fees chargeable by arbitrators and generally better and

effective performance of arbitration process under the Act, I do not see its basis. The applicant has not shown how CADER has failed to exercise its functions in this case. On the contrary, it was the parties to the arbitration that failed to follow the proper procedure as I will point out shortly. I therefore decline to give the direction sought as there is no justification for doing so.

I also do not find any merit in the allegation that the arbitrator misconducted himself and acted unethically contrary to the Act. In principle, there is nothing irregular or unethical about an arbitrator discussing his fees with the parties and entering an agreement in respect of the same. However, this must be done before the commencement of the arbitral proceedings and with the representatives of the parties that have authority to bind them.

On the issue of costs, I wish to observe that although the applicant is the successful party in this application, its conduct and/ or that of its counsel also contributed to the confusion that gave rise to this application. First of all, as rightly pointed out by the 2nd respondent, the manner in which the parties sought to remove the arbitrator was outside the Act. Instead of consenting to terminate the appointment of the arbitrator under a non-existent provision of the law, the parties could have agreed to terminate the arbitral proceedings under section 32 (2) (b) of the Act or the procedure for challenging the arbitrator as provided under section 13 (1).

Secondly, this application could have been avoided if the applicant had, before taking any steps, discussed with the arbitrator the effect of terminating the arbitral proceedings on the deposit it had already made to him. Perhaps they would have agreed on a fee for the services rendered before the applicant made itself vulnerable by signing the consent agreement to terminate the appointment of the arbitrator.

For the above reasons, I order that each party should bear its own costs.

I so order.

Dated this 16th day of August 2012.

.....

Hellen Obura

JUDGE

Ruling delivered in chambers at 3.00 pm in the presence of Mr. Richard Kabazi holding brief for Mr. Mohammed Mbabazi for the applicant, Mr. Alex Rezida for the 2nd respondent and Mr. Godfrey Magezi representative of the applicant company.

JUDGE

16/08/2012

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