

UGANDA / JUDGMENT

Car and General (U) Ltd v AFS Construction Ltd (Miscellaneous Application No. 87 of 2015) [2016] UGCommC 208 (16 December 2016)

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COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Application No. 87 of 2015

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISCELLANEOUS APPLICATION No. 87 OF 2015

Arising Out of CAD/ARB No. 1 of 2010

CAR AND GENERAL (U) LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

AFS CONSTRUCTION LTD ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

This is an application by way of Chamber Summons brought under S. 34(2) (a) (iv) & (vi) of the Arbitration and Conciliation Act cap 4 and rule 13 of the Arbitration rules. It seeks orders that the award that was delivered by the Arbitrator Mr. G. W Katatumba on the 30th April be set aside and the costs of the application be provided for. The parties hereto are parties to a building contract for construction of a show room, workshop, car park and access road at a contract sum of USD 637,146.12. The respondent ran into financial difficulties prior to completion of the works and requested for an early release of the retention bond. A dispute arose concerning the completion of the snagging works after what is called practical completion of the works.

The parties sought to resolve the dispute through arbitration. They referred the matter to Arch. G. W Katatumba for Arbitration. An arbitral award was issued but the applicants are dissatisfied with it and seek to have it set aside.

The contentions leading to this application were argued substantially by Counsel representing both the applicant and the respondent in their written submissions which are on record. The applicant raised the following grounds on which it based its application for setting aside the award.

1. That the arbitrator erred in law and fact by delivering the award based on issues that were not framed at the commencement of the hearing
2. The arbitrator erred in law and fact when he ordered the respondent to pay the penultimate certificate No. 16 and interest thereon.
3. That the arbitrator erred in law and in fact when he ordered that the respondents make its own arrangements to complete the defects by applying the retention amount.
4. The arbitrator misdirected himself in law and fact that the respondent should pay general damages of USD 8000.
5. The arbitrator further erred in law and fact by delivering the award in total disregard of the applicant's case and submission.
6. The arbitration fees are in total breach of his undertaking that was made at the commencement of the arbitral proceedings.
7. The respondent colluded with the arbitrator and settled the fees claimed by the arbitrator which had been disputed by both parties on principle, which action influenced the award delivered by the arbitrator.
8. By the time the said award was delivered, the applicant had withdrawn from the arbitration proceedings
9. The award prepared on 30th April 2014 and delivered by the arbitrator was out of time and thus in breach of the Arbitration and Conciliation Act cap 4.
10. That in light of the matters aforesaid, it is just and equitable that the award so granted be set aside and a fresh hearing be ordered.

Recourse against an arbitral award is governed by section 34 of the Act. In the case of ***SDV Transami Vs Agrimag Ltd Arb Cause 2/2006*** court held that;

“There are limited grounds for setting aside an arbitral award and it is only upon the grounds laid down in s.34 that court can set aside the award”.

The section provides:-

34. Application for setting aside arbitral award.

(1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the court only if—*

(a) the party making the application furnishes proof that—

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;

(iii) 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;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;

(vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or

(vii) the arbitral award is not in accordance with the Act;

(b) the court finds that—

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

(ii) the award is in conflict with the public policy of Uganda.

It is therefore clear that the Arbitration and Conciliation Act strictly provides for the circumstances under which an arbitral award may be set aside and these are the grounds that I expected the applicant to rely on in its application. In the present case, the applicant brought the application under subsection Section 4 and 5 of Section 34 of the Act.

With due respect to the Learned Counsel for the applicant, he raised over ten grounds for the application but most of the grounds were matters of fact and hardly showed how these grounds contravened the strict provision of the law.

The only ground perhaps he raised that may contravene the strict provisions of the law is grounds 8 and 9.

1. *By the time the said award was delivered, the applicant had withdrawn from the arbitration proceedings*

2. *The award prepared on 30th April 2014 and delivered by the arbitrator was out of time and thus in breach of the Arbitration and Conciliation Act cap 4*

He submitted that the award was signed by the Arbitrator on 30th April 2014 and delivered on 15th January 2015. He averred that ordinarily under the law, the Arbitrator should have delivered the award by or before 19th November 2014 in order for it to fall within the legal provisions of the Act.

He cited Section 31 (1) of the Arbitration and Conciliation Act which provides that;

The arbitrators shall make their award in writing within two months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award.

He further contended that the arbitrator did not ask for enlargement of time within which to deliver the award. That on 14th August 2014, the applicant having given the arbitrator ample time to deliver the award withdrew from the proceedings and wrote to him to inform him so.

Counsel for the respondent argued that the applicant withdrew from the proceedings at its own peril and his withdraw was of no consequence.

He relied on the case of ***Charles Carihfield Vs Steven Brown and Home Show LLC*** in the Supreme Court of Appeals of West Virginia No. 34593, a decision Counsel argued was persuasive where court held that;

A party to a binding, irrevocable arbitration cannot unilaterally withdraw from participation in the arbitration after it has began. If a party to a binding, irrevocable arbitration unilaterally withdraws from arbitration, the claims or issues raised by the withdrawing party are abandoned, thereby precluding them from being pursued in any subsequent arbitration or civil action.

The Arbitration and Conciliation Act is silent on whether the party to the arbitration proceedings can withdraw from them and the effect of so doing. The closest provision to that effect is section 32 that provides for the termination of the arbitral proceedings which provides that;

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

(2) 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.

(3) Notwithstanding subsection (2)(c), the arbitral tribunal may terminate the arbitral proceedings where there has been an unconscionable delay, on the application of either party or of its own motion.

(4) Subject to sections 33 and 34, the mandate of the arbitral tribunal shall terminate upon the termination of the arbitral proceedings.

Since the conduct of the applicant is not covered in any of the above provisions, I agree with Counsel for the respondent that his alleged withdraw was of no consequence.

Counsel for the respondent further submitted that the Arbitrator communicated that the award was ready by 30th April 2014 and only awaited for the parties' payment of his fees for him to deliver the award. From the evidence on record, the respondents paid their fees and the fee not yet paid was that of the applicant.

From the correspondences between the appellant and the arbitrator, it is evident that instead of payment of the fees, the appellant decided to withdraw.

I am inclined to agree with Counsel for respondent that the withdraw was too late. The proceedings had come to an end, they were only waiting for the appellant to clear the arbitrator's fee as agreed and the award would be delivered. In the result, I am therefore not satisfied that the appellant had withdrawn from the proceedings in accordance with the law so as to viciate the award.

On the issue of the delay in deliverance of the award, as already discussed, the arbitrator had already informed the parties that the award was ready and was only waiting for the parties to pay his fees for it to be delivered. Since it were the parties especially the applicant who delayed to pay, this was a mistake on their part, the Arbitrator had done his job. This cannot be said to be in conflict with the Act and I do not allow this ground.

In conclusion therefore, it is my finding that the applicant has not satisfied any of the strict grounds the law sets up for an arbitral award to be set aside and accordingly this application is dismissed with costs.

B. Kainamura

Judge

16.12.2016

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