

UGANDA / JUDGMENT

Tibeingana v Vijay & Anor (Miscellaneous Cause No. 10 of 2016) [2016] UGCommC 200 (21 December 2016)

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COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Miscellaneous Cause No. 10 of 2016

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE NO 10 OF 2016

[ARISING OUT OF CAD/ADR NO. 250F 2015]

IN THE MATTER OF THE ARBITRATION AND CONCILIATION ACT CAP 4

DEOX TIBEINGANA} PLAINTIFF

VERSUS

1. VIJAY REDDY}

2. VISARE UGANDA LTD} DEFENDANTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Applicants application was brought under the provisions of section 34 (2) and 71 (2) of the Arbitration and Conciliation Act Cap 4 and rules 7 (1), 8 and 13 of the Arbitration Rules for orders that the arbitral award in CAD/ABR/NO. 25 of 2015 be set aside and for costs of the application be provided for.

The grounds of the application are as follows:

1. The arbitral procedure was not in accordance with the agreement of the parties as the matter was referred to the arbitrator for mediation and not for final arbitration as the parties in their memorandum of understanding agreed to make a final agreement that would dispose of the matter.
2. The arbitral award with an interest rate of 24% per annum from 31st of October 2013 on the figure of US\$350,000, a third of which is also interest is beyond the scope of the reference to arbitration as the same is contrived, contrary to the agreement between the parties and unconscionable as the commercial interest rate for the United States dollar currency in Uganda ranges from 8 -11%.
3. The award is contrary to public policy and amounts to unjust enrichment as it entitles the Respondent to abnormal interests of 24% per annum on US dollars premised on a principal figure of US\$350,000 yet a substantive part of the principal amount is already interest. (The original contribution by the Respondent was US\$250,000 to which the Applicant added an interest of US\$100,000 bringing the total to US\$350,000).
4. There was evident partiality in the arbitrator as he did not consider the mitigating factors raised by the Respondent's witnesses and refused to grant the Applicant an opportunity to present his evidence in the form of a valuation report.
5. It is only just; fair and equitable that the orders prayed for by the Applicant are granted.

The application is supported by the affidavit of the Applicant Mr Deox Tibeingana which gives the facts in support of the application. In the affidavit he deposes that he executed a memorandum of understanding dated 29 of December 2012 with the sole intention of purchasing land measuring approximately 1.57 acres to be carved out of the property comprised in Kyadondo Block 255 Plot 86 and sell the same to a third party with a view to making profit. The parties to the memorandum of understanding tried to secure buyers for the land however all the efforts were falling short of the initial investments injected into the purchase of the land. On 5th August, 2013 the Respondent and the Applicant entered into another agreement as a result of the failure to secure buyers for the land and the Applicant opted to salvage his investment by offering to single-handedly develop the land and improve its value by erecting houses on the land and selling them at a profit. The Applicant single-handedly developed the land so as to save the investment contributed to by the Respondents. The first Respondent and the Applicant agreed that the interest rate of 11% per annum would be applied to his original contribution of US\$250,000 from 1st June 2013 and the Applicant would pay him a total of US\$357,592. At all material times the first Respondent was demanding the said sum from the Applicant. The interest rate of 24% per annum prayed for by the first Respondent and awarded by the arbitrator was contrary to the agreement dated fifth of August 2013 between the first Respondent and the Applicant. The Applicant contends that the interest rate is contrived, unconscionable and goes beyond the scope of the reference to arbitration. The first Respondent agreed to appoint an arbitrator permitted the matter in accordance with the memorandum of understanding as opposed coming up with a final decision on the matter which was contrary to the agreement between the parties. He agreed with

the Respondents that the memorandum of understanding was not final and the parties agreed to make a final agreement that would supersede the memorandum of understanding as the next condition precedent to arbitration. The final agreement was however not made.

The Respondents prematurely instituted a claim at the Centre for Arbitration and Dispute Resolution claiming for refund of his contribution amounting to US\$357,592, interest on the outstanding amount at the rate of 24% per annum and costs. The Applicant contends that all his actions were in good faith and had the intention of refunding all the money due to the Respondent but he was delayed due to circumstances beyond his control. Owing to the uncertainty the parties agreed later to make a final agreement. He had to borrow from several moneylenders after his application for loans to develop the land was rejected by banks and to date he is indebted to numerous creditors as a result of this investment and he is single-handedly responsible for the liability for loss incurred in the venture. He intends to call a valuation surveyor as a witness to adduce evidence to demonstrate to court that he did not earn any profit from the venture but the arbitrator went ahead to decide the matter without affording him an opportunity to adduce that evidence as a consequence he was prejudiced unfairly. As a party to the arbitration, the decision of the arbitrator amounted to bias on the part of the arbitrator and the Applicant claims to be prejudiced by his decision.

The evidence of the valuation surveyor and a valuation report are very important in proving that the business venture between the first Respondent and himself was unsuccessful and made no profit. That evidence would have enabled the arbitrator reached a fair decision without making an exorbitant award to the first Respondent. On 4th March, 2016 an award was made in favour of the Respondents by the arbitrator. The award was received on 10th March, 2016. It has an interest of 24% per annum against a transaction in US dollars and also includes US\$100,000 that was interest.

In reply Vijay Reddy the first Respondent deponed to an affidavit in which he states as follows: The application has no merit and is a nullity in law and an abuse of court process. He further asserts that it is intended to frustrate or deny the Respondents their rights. The first Respondent does not dispute paragraphs 1-8 of the affidavit in support of the application save to add that it was mutually agreed that he was only to contribute to the purchase of the land and the Applicant was to take over the complete ownership of the property and pay him his contribution plus interest irrespective of the status and development and sale of the property. Secondly, the interest was rightfully awarded by the arbitrator using his discretion under the law and upon waiving his claim for damages. This was a commercial/business transaction in which he has lost the use of his money over three years as it remained unpaid. In reply to paragraph 10 the final agreement executed between the Respondent and himself dated 5 of August 2013 clearly provides in clause 3 thereof that any dispute between the parties shall first be referred to arbitration in accordance with the Arbitration and Conciliation Act Cap 4. The Respondent had an opportunity to object to the arbitration proceedings at the stage of appointment of an arbitrator but did not do so whereupon he waived his rights under section 4 of the Arbitration and Conciliation Act when he consented to the appointment of the arbitrator and as evidenced by the letter of appointment.

Because the parties did not make the final agreement, the memorandum of understanding of 5th August, 2013 remains the final and binding agreement between the parties. Furthermore during the hearing of 4th December, 2015 the

Applicant was given an opportunity to add the evidence of an independent valuation surveyor, which evidence and witness statement was to be filed by 21 December 2015 before the hearing which took place on 5th January, 2016 but he did not produce the witness neither did he bring adduce in evidence a valuation report even after being given sufficient time to do so according to the evidence in the record of proceedings attached. Furthermore the arbitral tribunal made an order regarding the evidence of the independent valuation surveyor and the Respondent did not appeal against it and cannot therefore choose to object to it at this stage. The first Respondent contends that the valuation report is not and was not of any value to the proceedings because the issue of whether the Applicant made a profit or not does not change the fact that it was agreed by all parties that the Applicant would take over ownership of the property and pay back the Respondent's money irrespective of the development and status of the property.

On the basis of information of his lawyers, the first Respondent further deponed that the award was made in accordance with the law and there was no fraud and corruption in procuring it and the Respondent was given notice of the proceedings and appointment of the arbitrator. In the premises the Respondent opposes the application to set aside the arbitral award.

The Applicant was represented by Counsel David Sempala appearing jointly with Counsel Mulema Messieurs Mukasa of KSMO Advocates while the Respondent was represented by Counsel Charles Nsubuga of Messieurs Muwema & Company Advocates. Counsels agreed to and addressed the court in written submissions.

The gist of the Applicant's written submissions relies on the facts summarised by the court above. The Applicant contends that the deal went bad and the property was sold by the Applicant at a loss. The Respondents became impatient and filed the matter before the Centre for Alternative Dispute Resolution for arbitration. Accordingly the Respondent filed the claim for refund of the sum of US\$357,592 with another interest rate to be charged on this amount.

Secondly the Applicant at the hearing sought to adduce evidence of the valuation surveyor and a valuation report to prove to the arbitrator that no profits were reaped from the transaction with the Respondents on 29th December, 2009 and thereby arrive at a fair decision. Nonetheless, the arbitrator did not accord the Applicant an opportunity to adduce his evidence and ended up awarding the Respondent the outstanding amount coupled with an interest on the amount of 24% per annum. On 4th March 2016, the arbitrator made an award against the Applicant in which he ordered the Applicant to pay a sum of US\$357,592 with an interest rate of 24% per annum on the same amount. Accordingly the Respondent being an aggrieved person filed this application on the ground that the interest charged was blind to the contract between the parties and was leading to unjust enrichment or is contrary to public policy among other things.

1. Whether the interest charged on the outstanding amount of US\$357,592 was unlawful and contrary to public policy?
2. Whether the arbitrator in refusing to accord the Applicant opportunity to adduce evidence of a valuation surveyor acted partially and with the bias?
3. What remedies are available to the parties?

The Applicant relies on section 34 of the Arbitration and Conciliation Act for making the challenge to the award and particularly section 34 (2) (a) (vi) which allows an award to be set aside among other things where there is fraud, corruption and partiality of the arbitrator. Secondly, an award can be set aside for being contrary to public policy.

Whether the interest rate of 24% per annum charged on the outstanding amount of US\$357,592 was unlawful and contrary to public policy?

The Applicant's Counsel submitted that the figure of US\$357,592 was already inclusive of interest of US\$127,592 and it was erroneous to compound interest on the total of the figure which was inclusive of that interest. He contended that this would amount to unjust enrichment and is also contrary to public policy. Furthermore, the arbitrator awarded interest at 24% per annum on an amount which is in US dollars yet the dollar rate of interest was 11% per annum. On the basis of the above, the award ought to be set aside for being contrary to public policy among other things.

In support of the contention that the award is contrary to public policy, the Applicant contends that the arbitrator awarded compound interest as opposed to simple interest. He defined compound interest as interest on interest and it focuses on the value of the money for a period of time. He relied on the definition in *Sarah Kayaga Farm Ltd versus the Attorney General Civil Suit Number 351 of 1991*. As far as the evidence is concerned the first Respondent testified that he paid to the Applicant US\$250,000 and the difference that brings that amount to US\$357,592 was interest. The 24% interest awarded was interest upon the balance between the two figures and hence was compounded interest. In the case of *Attorney General versus Virchanda Mithalal & Sons Ltd Civil Appeal No 20 of 2007 [2009] UGSC 13* Honourable Justice GW Kanyeihamba JSC held inter alia that the award of interest is based on one or more of a multiplicity of grounds such as the law applicable to the transaction, the nature of the business transacted or agreed between the parties, the construction of the agreement or contract between the parties, the trade custom of the business out of which the indebtedness arose, intention of the parties or the consequences of the commercial transaction that was concluded between them. He relied on the judgement of Lord Denning in the case of *Wallersteiner v Moir (No 2) Moir v Wallersteiner and others (No 2) [1975] 1 All ER 849 at 855* giving the various grounds on which courts of equity awarded compound interest. In that case they held that in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or trustee or anyone else in a fiduciary position who misapplied the money or made use of it himself for his own benefit. The court presumes that the party against whom relief is sought has made the amount of profit which persons do ordinarily make in trade and in those cases the court directs interest to be paid. Secondly it is a matter of evidence as to what happened between the parties and the

nature of the transaction.

The Applicant's Counsel submitted that the arbitrator did not take into consideration the above principles in the award of compounded interest. Interest was awarded at 24% per annum from the 31st of November, 2013 until payment in full. No reasons were given for awarding the interest and it does not show that the interest flowed as a natural consequence of non-payment of the Respondent.

Additionally, there is no evidence that the Applicant misused or misapplied the monies or made use of it for his own benefit to justify the grant of compound interest.

The Applicant made heavy losses in the venture. Secondly the arbitrator denied the Applicant an opportunity to bring a valuation report and produce a valuation surveyor in support of his defence. Moreover the memorandum of understanding executed between the parties on 5 August 2013 and paragraph 5 thereof provided for an interest rate of 11% per annum. It was therefore safe to adopt the interest rate envisaged by the parties or the market rate of 10% per annum.

The Applicant's Counsel further submitted that compound interest is said to be legal when it is expressly provided for in the agreement of the parties. He relied on the case of Kanobolic Group of Companies Ltd versus Sugar Corporation (U) Ltd (Civil Appeal No 34 of 1997) [1998] UGCA 12/26 of June 1998 for the principle in Halsbury's laws of England Volume 27 3rd Edition page 8 that compound interest would not be allowed except where there is an agreement, express or implied to pay it or where the debtor has employed the money in trade and had presumably earned it or unless its allowance is in accordance with the usage of a particular trade or business. In the premises the Applicant's Counsel prayed that the interest awarded is reversed by this honourable court. He added that the principal amount was US\$230,000 and the interest awarded should be against the principal sum and not the total sum which includes the principal amount and the interest accrued at the time of the agreement i.e. the second memorandum of understanding. He invited the court to set aside the award for having a high interest rate that is compounded and which is excessive on grounds of public policy.

Reply of the Respondents Counsel on the first issue:

In reply the Respondent's Counsel relied on the facts in opposition to the application and agreed that under section 34 of the Arbitration and Conciliation Act, the grounds to set aside an award include corruption, partiality of the arbitrator and fraud. Secondly the award may be set aside for being contrary to public policy.

The Respondent's Counsel submitted that the Applicant's submissions failed to prove to court any of the grounds upon which an award could be set aside.

On the submission that interest awarded is against public policy, according to Black's Law Dictionary, public policy refers to principles and standards regarded by legislature as being of great fundamental concern to the state and the whole society or more narrowly, the principle that a person should not be allowed to do anything that will tend to injure the public at large. He submitted that the awarded sums did not at all injure the public nor are of great concern to the

state. The sums were agreed to by the parties to be paid in consideration of the Applicant taking over full ownership of the property. It was therefore not against public policy for the arbitrator to award US\$357,592 on the ground that the principal sum of US\$357,792 was agreed to by the parties under the agreement of 5th of August 2013. The agreement is very clear that the Applicant took full ownership of the property in exchange for the payment of US\$357,592 payable to the first Respondent. The Applicant confirmed his indebtedness to the Respondent during cross examination when he testified that according to the agreement he should have paid US\$357,592. It followed that the amount was awarded by the arbitrator based on the agreement between the parties who are bound by the terms of the agreement. In the case of Sarope Petroleum Ltd and another versus Habib Oil Ltd HCMA No. 0346 of 2011 arising from HCCS 0014 of 2009 Honourable Lady Justice Irene Mulyagonja following an earlier precedent held that it is of essence in business transactions that each party bargains own interest and for its own benefit and they have to look after their own interest and neither owes a duty of care or disclosure to the other according to the case of Clarion Ltd & others versus National Provident institution [2000] 2 All ER 265.

The Respondents Counsel concluded that the amount in issue was agreed to in the agreement and cannot be taken as interest.

On the question of whether interest of 24% was awarded on the United States dollar amount instead of 11% per annum, the amount was properly awarded by the arbitrator and is not compounded interest as submitted by the Applicant. The arbitrator has discretion to award such interest as prayed for by the Respondent. The point is that the Applicant had withheld the Respondents monies for over three years in a manner that is in itself fraudulent. The arbitrator took this into account and came to the right decision.

The Respondent's Counsel further submitted that the case of Sarah Kayaga Farm Ltd versus the Attorney General (supra) is distinguishable because it deals with interest on interest. What the arbitrator awarded was interest on the principal amount. Moreover the cases cited of Attorney General versus Virchand Mithalal & Sons Ltd (supra) supports the Respondents case because it illustrates that interest awarded depends on the construction of the agreement and the intention of the parties.

The Respondent's Counsel further submitted that the principal amount of US\$357,592 was the amount the parties agreed to be paid after the ownership of the property was fully transferred to the Applicant and the Applicant even allegedly sold the property for his own benefit and not that of the Respondents.

Counsel further submitted that the award of interest is at the discretion of the court according to the cases of Commodity Export International Ltd & another vs. MK M Trading Company Ltd and Another CACA 84 of 2008; and Harbutts Plasticide Ltd vs. Wayne tank [1970] All ER 225.

It is not in doubt that the applicants took the respondents monies and remained with it for over three years with no reasonable cause for which reason the interest awarded by the arbitral tribunal is justifiable. Furthermore in the case of J. K. Patel versus Spear Motors, Supreme Court Civil Appeal No. 4 of 1991, interest at 30% per annum was awarded on the United States Dollar

contract. It is therefore not new for the court to award such interest rates in Uganda. Such interest is ordinarily awarded in commercial transactions and this was a purely commercial transaction and not a friendly agreement. The parties sought to make a profit. In the premises the interest charged was lawful and not against public policy as submitted by the Applicant.

In rejoinder, the Applicants Counsel reiterated submissions that the principal amount of US\$357,592 was arrived at when the parties got US\$250,000 and applied an interest of 11% to it for a period of time and this was captured in the memorandum of understanding dated 5th of August 2015. The interest rate was from 1st June, 2013. Counsel submitted that it did not mean that the Applicant agreed that the principal was US\$357,592. Consequently the arbitral tribunal is at fault for coming up with a principal amount that is inclusive of the interest awarded. Counsel further reiterated submissions that the award of 24% includes interest on interest.

Resolution of issue number 1

I have carefully considered the submissions. The starting point for analysis is the award and then the agreement of the parties in that order. On the question of an award of US\$357,592, the award is contained at pages 4 - 6 of the award. The issue that the arbitral tribunal considered is recorded as "whether the Respondent is indebted to the claimant?"

To answer this question the tribunal found that the Respondent admitted being indebted to the claimant. The conclusion of the arbitral award is at page 5 of the word in the following words:

"Based on the Respondent's own admission 'we admitted to being indebted to the Claimants' and I hereby find, that the Respondent is indebted to the Claimant in US\$357,592 as agreed on 5/8/2013.

Secondly, I also find that according to the agreement the time for payment were 31/10/2013. It is not in dispute that since August 2013, the Respondent has not paid the money agreed to pay to the Claimants.

By the agreement of 5/8/2013, Reddy Vijay and Ignatius Tumwesiga ceased to have any ownership of the land at Munyonyo, which they had acquired jointly with the Respondent."

The arbitral tribunal relied on admission of the Respondent/Applicant. When he was cross examined, the Applicant testified that: "According to the agreement, I should have paid 357,592". He further went on to say that he was willing to pay after recovery from the financial problem. He further testified that he did not want to appear like he did not want to pay. In the last paragraph in cross examination he testified as follows: "Its my evidence, that I am indebted. We invested money and am willing to sit and agree at a later time."

I have accordingly considered annexure "B" relied on by the arbitral tribunal dated 5 of August, 2013. In the preamble it was agreed that the first Respondent contributed US\$250,000. Secondly, the Applicant contributed US\$230,000. And the third-party contributed US\$200,000. It was further written in the preamble that whereas the parties have agreed that their respective contributions above shall earn interest at the rate of 11% per annum from 1st June 2013. Secondly, they agreed that the Applicant would take over and have complete ownership of the property and pay off the

first and third parties apportioned sums according to the respective contributions by 31st October, 2013 irrespective of the status of the development of property and sale of the developed property. The first party would be paid US\$357,592. The third party would be paid US\$286,074. It was further agreed that the memorandum of understanding dated 5th August, 2013 sets out the basic outline of principles which the parties had provisionally agreed and it was subject to concluding a final agreement. The final agreement would supersede the memorandum of understanding.

I have carefully considered the conclusion of the arbitrator and have come to the conclusion that he relied on two basic things. The first was the agreement dated 5th August, 2013 in which the Applicant agreed to pay US dollars 357,792 to the first Respondent. Secondly, he relied on the admission of indebtedness of the Applicant.

While the amount of US\$327,592 seems to include agreed interest, that is not the end of the matter. The agreed amount was consideration for the first Respondent to pull out of the partnership in which they had made a joint contribution. The award amounted to an award of the principal amount. The amount is the contractual sum irrespective of how it was calculated and is consideration for the first Respondent to pull out of the deal he had made with the Applicant and the third-party. It is further agreed that no final agreement was ever made. Apparently the Applicant's problem is that he had sold the property at a loss. The problem with that submission is that he took over the property in consideration for paying off the Respondents. It could have been a bad deal to agree to pay off the Respondents and to stipulate the exact amount in the agreement.

In the case of Tersons Ltd v Stevenage Development Corporation [1963] 3 All ER

863 at 869 UPJOHN U after setting out the authorities agreed with the principle that the court will not interfere with questions of fact found by an arbitrator and will rarely interfere on points of law. He said:

"It is clear and indeed elementary law that when parties voluntarily agree to submit their differences to an arbitrator, they agree to accept his decision in every respect, subject to very limited exceptions. The law is well stated by the judge in the following passage in his judgment:

"The courts will not interfere with the conduct of proceedings by the arbitrator except in circumstances which are now well defined. If the arbitrator is guilty of misconduct, his award may be set aside or remitted. If the award contains an error of law on its face, it may be sent back or remitted. If a special case is stated on a question of law, the court will determine that question of law within the framework of the particular special case. But, if there is no misconduct, if there is no error of law on the face of the award, or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law so long as any mistake of law does not appear on the face of the award."

The judge then referred to Gillespie Brothers & Co v Thompson Brothers & Co, and quoted from the judgment of Atkin LJ to support his statement of the law; and he continued:

"All questions of fact are, and always have been, within the sole domain of the arbitrator, and only a limited control will be exercised over him in relation to questions of law."

I agree with every word of the judge which I have quoted."

In Uganda this principle is also partly set out under 34 of the Arbitration and Conciliation Act cap 4 which sets out limited grounds on which an award may be challenged and set aside by court. Section 34 (2) (a) (vi) (b) (ii) are relevant and provides as follows:

"34. Application for setting aside arbitral award.

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

1. the party making the application furnishes proof that— ...

(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...

1. the court finds that—

2. the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

3. the award is in conflict with the public policy of Uganda."

The Applicant relies on section 34 (a) (vi) which provides that the award may be set aside where:

"(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"

There is no evidence that the award was procured by fraud, or undue means. At the arbitral proceedings both parties relied on the agreement of 5th August 2013. The Applicant admitted that he was indebted. He could only be indebted if he agreed that he would solely have ownership of the real estate property the subject matter of the agreement and that he would pay the first Respondent and third party off. Having agreed that he would own the property and that he would pay off the first and third party, the Applicant cannot go back on the agreement and complain about the consideration. This agreement was never challenged as being contrary to public policy. Secondly, he cannot go back on the agreement to establish how the principal amount was arrived at. The amount awarded is in total the principal amount.

The only question remaining is whether the award of interest at 24% per annum from 31th November 2013 is unlawful and contrary to public policy.

The principles applied by this court in the award of damages are clear and are set out below. The enabling law is section 26 (2) of the Civil Procedure Act provides that:

"Where the decree is for the payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

Interest may be awarded from the date the cause of action arose and the arbitral tribunal cannot be faulted on this. Secondly the purpose for an award of interest is *restitutio in integrum* which means that the plaintiff may be restored as nearly as possible to a position he would have been in had the injury not occurred. The principles to do this are fairly straightforward as set out in the authorities quoted in H. C. C. S. No 345 Of 2014 Adjumani Service Station vs. Frederick Batte. In that case court relied on the authority of *Riches v Westminster Bank Ltd* [1947] 1 All ER 469 HL at page 472 where Lord Wright explained the essence of an interest award as:

"... payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...."

This principle is also set out in Halsbury's laws of England fourth edition reissue volume 12 (1) paragraph 850 that "it is assumed that the Plaintiff would have borrowed to replace the assets of which he has been deprived...". The fact that an award of interest is meant to compensate the plaintiff is explicitly held in *Tate & Lyle Food and Distribution Ltd v Greater London Council* and another [1981] 3 All ER 716 where Forbes J he held at page 722 that:

"I do not think the modern law is that interest is awarded against the Defendant as a punitive measure for having kept the Plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve *restitutio in integrum*.... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld."

An award of interest is therefore not unlawful but meant to compensate the plaintiff for the period he has been deprived of the use of the money which became due. The arbitrator complied with the law and the only issue left is whether an award of 24% was in the circumstances harsh and unconscionable.

The tribunal found that the breach by failure to pay occurred on the 31st of November 2013. In other words the clamant was deprived of the amount from that time. I find no error of law in that conclusion.

Last but not least I have noted that the issue of losses suffered by the Applicant was considered by the tribunal in the following words namely:

"The tribunal therefore find that, the Respondent bargained to have other joint owners pull out of the property. Unfortunately, he made losses and as a result he has not paid them.

Going by his submissions the Respondent holds the view that because he made losses, the claimant should be considerate and the tribunal should bear in mind that he lost the money.

Of course had the business proved very profitable, the claimant would not claim more than was agreed to on 5th August, 2013, in view of the tribunal, that is the essence of business."

The question of the rate of interest was not the subject matter of the tribunals ruling. Was it controversial?

In the case of ECTA (U) Ltd vs. Geraldine and Josephine Namukasa S. C. C. A No. 29 of 1994, it was held by Odoki Ag C. J that the court clearly has discretion to award reasonable interest. Because the award of interest is a discretionary matter, the court should not interfere with it unless it is manifestly excessive and an error of law can be imputed. It is my considered view that a reasonable interest depends of the facts and circumstances of each case. In the circumstances of the Applicant's case, he opted out of the partnership by paying off his other partners. However, his deal went sour because it could not realise what he wanted from the property. His partners were agreed to a sum of money. Because the tribunal did not address its mind on the hardships faced by the Applicant, it would have been fair to award reasonable interest that would take into account the hardships faced by the Applicant due to loss in the value of the property and the market rates as well as the agreement of the parties.

Because the tribunal did not take this into account, there was an omission on a matter of principle. An award of 24% would be unjust and would compound the bad bargain of the Applicant. A reasonable interest would be that contemplated by the parties and I agree on this issue with the submissions of the Applicant's Counsel. In the premises it is in the interest of justice that the award of 24% per annum should be set aside and substituted with an award of 11% per annum agreed to by the parties.

In the circumstances of this case it is just that the award of the tribunal of 24% per annum is set aside and substituted with an award of 11% per annum from the 31st of November 2013 till payment in full.

Whether the arbitrator in refusing to accord the Applicant the opportunity to adduce evidence of a valuation surveyor acted partially and with bias?

The Applicant's Counsel submitted that an arbitral tribunal is clothed with quasi judicial powers and is supposed to conduct a fair hearing which gets its basis from the rules of natural justice characterised by two rules namely: fair hearing and the rule against bias.

The Applicant's Counsels rely not only on the constitutional right to a fair hearing under article 28 of the Constitution of the Republic of Uganda but also on article 44 (c) to the effect that the right to a fair hearing cannot be derogated from. Article 42 provides that whoever appears before any tribunal is entitled to be treated fairly and justly. He relied on the case of National Council for

Higher Education versus Kawooya Constitutional Appeal No 04 of 2011. Fair hearing includes: "a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon enquiry, and tenders judgment only after a trial consideration of evidence and facts as a whole" (See Black's Law Dictionary). He contended that in the present case the arbitrator did not allow the Applicant to adduce evidence of the valuation surveyor with reference to the record of proceedings dated 12th January 2015.

In other words the arbitrator derogated from the Applicant's right to a fair hearing on grounds of time. He contended that arbitration is a private proceeding which is paid for and it is only fair that the option should have been given to the Applicant of the short adjournment with an order for him to pay the costs of the particular sitting. He contended that Justice hurried is Justice buried. The Applicant did not have ample time to present his case. In the premises the entire trial became a nullity because the rules of natural justice were not complied with. Had the Applicant been given an opportunity to adduce the evidence of the valuation surveyor and produce the valuation report, he would be able to demonstrate to the arbitrator that he did not earn any profits and in fact he incurred several losses from the venture by the arbitrator as evidence went ahead to decide the matter. It showed that there was a violation of the Applicant's right to a fair hearing.

In reply, the Respondent's Counsel submitted that the arbitral tribunal made a ruling on the point of the valuation surveyor and the ruling was never appealed against. The Applicant was given an opportunity to produce the valuation report and a valuation surveyor but failed to do so. In any case the Respondent's Counsel contends that the valuation report was not necessary at all since the Applicant testified and admitted to having sold the property. He could not therefore go ahead to value the property of another person who was not a party to the arbitral proceedings. The Applicant fully participated at the hearing of the arbitral proceeding and the arbitrator was never impartial at all. In the premises the authorities cited by the Applicant are inapplicable.

Resolution of Issue

I agree with the Respondent's Counsel that the tribunal properly addressed its mind on the law and the evidence. The valuation report if ever adduced in evidence showing how much the property was worth, was not material to the issue of whether the respondents relinquished their right to the property for an agreed consideration. It would only have proved that the deal was a bad bargain for the Applicant.

In the circumstances the tribunal was not biased and came to the right conclusion. The rights of the Applicant had not been prejudiced.

Whether the Applicant is entitled to any remedies?

In the circumstances Counsel prayed that the arbitral award is set aside for failure to comply with the rules of natural justice. As far as the compound interest is concerned, he prayed that this honourable court exercises its discretionary powers to modify the award. He further submitted that the entire award should be set aside for being a nullity without prejudice to the prayer to review the interest rate.

In reply the Respondent's Counsel submitted that there was never any breach of the law to warrant setting aside the arbitral award and as such the Respondent is entitled to all the remedies awarded by the arbitral tribunal and this honourable court ought to uphold the award. He submitted that the court should find that there was no merit in the application which ought to be dismissed with costs to the Respondent.

Resolution of issue

In light of my findings on the issues number 1 and 2, the only order that would follow is an order hereby made that the rate of interest of 24% per annum is hereby set aside and substituted with the rate of interest of 11% per annum.

In the circumstances, the award of the tribunal remains and is only affected by a variation in the rate of interest and each party will bear its own costs of this application.

Judgment Delivered on the 21st of December 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

David Sempala for Applicant

Respondent's Counsel absent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

21st December 2016

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Prepared on 14 October 2026 · Esheria