IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 12

COURT CLERKS: T. P. SALLAH & ORS

DATE: 23/09/2020

BETWEEN **FCT/HC/CV/1018/2020**

AUTOCORP IMPEX PTE LIMITED ……. APPLICANT

AND

ABUJA URBAN MASS TRANSPORT COMPANY LIMITED…… RESPONDENT

RULING

The Applicant herein commenced the instant proceedings vide originating motion on notice dated and filed 5th December,2018 pursuant to the provisions of Order 2 Rules 1 & 6 and Order 19 Rule 12(g) of the FCT HighCourtCivil Procedure Rules 2018, Sections 29 and 30 of the Arbitration and Conciliation Act and under the inherent jurisdiction of this Court seeking the following reliefs against the Respondent:-

(1) An Order of this Honourable Court setting aside the Award dated 6th November, 2019 made by the Arbitral Tribunal comprised of Dr. Alex A. Izinyon, SAN as the Sole Arbitrator in the arbitration between Abuja Urban Mass Transport Company and AutocorpImpex PTE Limited.

ALTERNATIVELY

(2) An Order of this Honourable Court remitting the award dated 6th November, 2019 made by the Arbitral Tribunal comprised of Dr. Alex A. Izinyon, SAN as the Sole Arbitrator in the

arbitration between Abuja Urban Mass Transport Company and AutocorpImpex PTE Limited, back to arbitration for reconsideration.

(3) For such further order(s) as this Honourable Court may deem fit to make in the circumstances.

The grounds of the instant application areas follows:-

Further, in support of the application is a 37-paragraphs Counter Affidavit deposed to by one Col. Arc. Geoff Onyejegbu (Rtd) and accompanied by Exhibits A1 – A10. The Applicant's Counsel also filed a Written Address dated and filed on 5th February,2020.

In response to the instant application, the Respondent filed a Counter Affidavit of 25 paragraphs with two Exhibits marked exhibits R1 and R2.The Respondent'sCounsel's Written Address dated 24th March, 2020was filed on 6th May, 2020.

In reaction to the Respondent's processes, the Applicant filed a Further Affidavit of 5 main paragraphs with two exhibits and their Counsel's Reply address on points of law.

The learned Silk, J.K Gadzama SAN, Counsel to the Applicant formulated the following sole issue for the determination of this application:-

> *"Whether in the circumstances of this case, the Applicant is entitled to an order of this Honourable Court setting aside the Award dated 6th November, 2019 made by the Arbitral Tribunal comprised of Dr. Alex A. Izinyon, SAN as the Sole Arbitrator in the arbitration between the Parties or in the alternative, an order remitting the Award back to arbitration for reconsideration."*

The Respondent's CounselOladokunIbitoye Esq, onhis part distilled the sole issue for determination thus:-

> *"Whether in the circumstances of this case, the Applicant is entitled to an order of this Honourable Court setting aside or remitting for reconsideration the Award dated 6th November, 2019 made by the Arbitral Tribunal comprised of Dr. Alex A. Izinyon SAN as the sole Arbitrator in the arbitration between the parties when the award was validly made and the grounds for setting aside has not been proving (sic) by the Applicant."*

Now a perusal of the two issues distilled for determination by the respective Counsel the Respondent's issue is but a mere modification of the Applicants issue. I will therefore adopt the issue as distilled by the Applicant's Counsel to determine the instant application.

The issue therefore for determination is:-

> "Whether in the circumstances of this case, the Applicant is entitled to an order of this Honourable Court setting aside the Award dated 6th November, 2019 made by the Arbitral Tribunal comprised of Dr. Alex A. Izinyon, SAN as the Sole Arbitrator in the arbitration between the Parties or in the alternative, an order remitting the Award back to arbitration for reconsideration."

In its affidavit in support of the application, the Applicant avers that it is a company engaged in the business of property development and states that the Respondent (a company engaged in the business of transportation) had made allocations to some persons in its (Respondent's) terminus in Durumi District of Abuja which terminus was however demolished by the FCT Development Control. That the said persons to whom allocations were made (and represented by the Applicant) proceeded to institute a suit No. FHC/ABJ/CV/191/99 against the Respondent at the Federal High Court Abuja for refund of the money paid for the allocation but the suit was eventually settled amicably by parties and consent Judgment was entered in that suit to the effect that the persons represented by the Applicant would be

relocated to another terminus. A certified true copy of memorandum of settlement dated 18th July, 2000 is annexed to the affidavit as Exhibit A1. Pursuant to this, the Applicant avers that the itself and the Respondent entered into a development agreement dated 18th June,2009 for the Applicant to construct a new bus terminus i.e. Kaura Bus Terminus comprising of 496 shops at Plot No. 1156, Cadastral Zone B11 measuring about 2.03Ha, Kaura District of the FCT. A copy of the said development agreement is attached as Exhibit A2 while Exhibit A3 isthe working drawings.

It is the Applicant's further averment that a dispute arose between parties to the development Agreement (Exhibit A2) i.e. the Applicant and the Respondent, and in line with clause 18(1) of the said agreement, the Respondent commenced arbitration against the Applicant which arbitral tribunal was constituted by Dr. Alex Izinyon SAN as the sole arbitrator. By points of claim dated 6th Sptember,2018 the Respondent sought various reliefs against the Applicant while the Applicant filed its points of defence and counter-claim on 21st November,2018. Exhibits A4 and A5 are copies of the said points of claim and points of defence/counter-claim. Exhibit A6 is also annexed as copy of the Respondent's Reply filed on 13th December,2018 in reaction to the Applicant's defence/counter-claim while Exhibit A7 is the Applicant's own Reply filed on 21st December,2018. The Applicant further avers that it called a sole witness at the arbitral proceedings and tendered 7 documents including a valuation report from JideTaiwo& Co which was admitted as Exhibit R7 by the Sole Arbitrator. A copy of the said valuation report is attached to the Applicant's affidavit in support and marked Exhibit A8 while a Certified True Copy of the record of arbitral proceedings is Exhibit A9. That the work done by the Applicant at the Kaura Bus Terminal was valued at N724, 380,207.00 according to the valuation report by JideTaiwo& Co. It is the Applicant's averment that despite the Arbitral Tribunal's finding at page 9 of its Award that the Respondent was in breach of the Development Agreement (Exhibit A2), and without considering the valuation report Exhibit A8, the sole arbitrator gave his award on

6th November,2019 wherein he made resolutions and gave directions at page 18 of the Award in respect of the claim and counter-claim. A copy of the Award is Exhibit A10. That it was clear that the Respondent had breached a fundamental term of the development agreement which required it to facilitate the funding of the project, delivery and permission to the Applicant to deposit the certificate of occupancy in respect of the property with a bank as security for loan. That it was also clear that the Respondent had breached the duty under the development agreement requiring it not to use its title over the property in any way prejudicial to the Applicant's interest. That despite these evidence before the sole arbitrator that the Respondent had breached fundamental clauses of the development agreement, the sole arbitrator proceeded to give award in the Respondent's favour granting the first and third reliefs sought by the Respondent.

In alleging misconduct, the Applicant avers that the sole arbitrator failed to consider the valuation report by JideTaiwo, Estate Surveyors and Valuers (tendered and admitted in evidence by consent of parties at the arbitration) in arriving at the sum of ₦7,000,000 as the value of the improvements made by the Applicant. That the reason given by the sole arbitrator in his award for refusing to rely on the valuation report was that it was not addressed to the Applicant but to First Bank of Nigeria. That the sole arbitrator also refused to rely on the said valuation report (showing value of work done as ₦724,207.00) in ascertaining the sum due to the Applicant on quantum meruit nor did he invite/call any expert evidence on the sum due as quantum meruit. That the sole arbitrator is neither a quantity surveyor nor estate valuer and therefore had no basis for arriving at the sum of ₦7,000,000 awarded as quantum meruit to the Applicant as value of work done by it. That the sum of ₦7,000,000 which the sole arbitrator arrived at based on quantum meruit is unfair and a clear mistake of fact with no factual basis. According to the Applicant, the sole arbitrator was wrong to have arbitrarily held in his award that the structures on ground at the Kaura site was not up to 30% as required by the

development agreement without any expert evidence. It is averred that the arbitral tribunal did not act fairly towards the parties by failing to rely on the valuation report before it and also failing to call for expert opinion to assess the value of improvements made by the Applicant on the site. That the sole arbitrator misconstrued the construction on the site to be DCP level despite personal physical visit and inspection of the project on ground. The Applicant avers that the Award of the Sole Arbitrator, Dr. Alex Izinyon, SAN made on 6th November,2019 is bad on the face of it and it ought to be set aside or in the alternative, remitted back to arbitration for reconsideration. That if the instant application is not granted, the huge resources expended by the Applicant on the Kaura Bus Terminal will go to waste with no remedy to the Applicant.

On the otherhand, by its counter-affidavit, the Respondent admitted that there was a dispute between parties that led to arbitration, in line with the development agreement, and culminated in a final award published on 6th November,2020 by the sole arbitrator who was jointly appointed by parties to this application. The Respondent avers that, in line with the Award, it wrote a letter dated 24th January,2020 (through its Counsel) to the Applicant seeking to comply with the terms thereof but the Applicant refused to comply with the award. Exhibit R1 to the counter-affidavit is a copy of the said letter. According to the Respondent, no evidence was given by the parties at the arbitral proceedings concerning architectural, structural, mechanical or electrical drawings. The Respondent denies that the valuation report admitted in evidence as Exhibit R7 at the arbitral proceedings was admitted by consent of parties as the Respondent had objected vehemently to its admissibility. A copy of the record of arbitral proceedings is attached to the counter-affidavit as Exhibit A9. That the sole arbitrator had admitted the valuation report and directed parties to address him in their final address on the issue of its relevance which was the ground of the Respondent's objection. The Respondent had in its final written address contended that the valuation report was not relevant and the sole arbitrator had made his findings on the issue of

relevance in his award. Exhibit R2 is a copy of the Respondent's final written address at the arbitral proceedings. The Respondent denies the Applicant's allegations of breach and further avers that it is on record that the certificate of occupancy was delivered to the Applicant within 3 months of executing the development agreement and the Applicant never informed of its application for credit facility.

The Respondent denied that the sole arbitrator misconducted himself and further avers that the sole arbitrator based his award on the evidence placed before him. That in doing so, the sole arbitrator did not act outside the scope of the agreement between parties and issues submitted to the Tribunal. Those parties were afforded fair hearing and allowed to present their case to the arbitral tribunal having voluntarily submitted to arbitration. That there is nothing to warrant the setting aside of the award as the Applicant is only trying to frustrate the Respondent from recovering its certificate of occupancy and taking possession of its property from the Applicant.

The facts alleged in the Applicant's Further Affidavit at paragraphs 4 (c),(d) and (i)is to the effect that it had written Exhibits FA1 and FA2 (dated 7th February,2020) delivered by email and hard copy in response to the Respondent's letter dated 24th January,2020. That it (Applicant) had also addressed the arbitral tribunal on the issue of the valuation report which report the sole arbitrator ignored by arbitrarily awarding ₦7, 000,000 as quantum meruit to the Applicant. That the Respondent did not release the Certificate of Occupancy at the time of executing the development agreement.

Now after considering the affidavit evidence of both parties in the instant application, as I said earlier, written addresses were filed by their respective Counsel.Referring this Court to Section 30 of the Arbitration and Conciliation Act, learned Senior Counsel to the Applicant, Chief J.K. Gadzama SAN submitted in his written address that where an arbitrator has misconducted himself or there is an error on the face of the award as in the instant case,

the Court has powers to interfere and set aside the award. He relied on the cases of ***ARBICO (NIG.) LTD V. N.M.T. LTD (2002) 15 NWLR (PT. 789) P. 1 and TAYLOR WOODROW (NIG.) LTD V. S.E. GMBH (1993) 4 NWLR*** (full citation not supplied) to urge this Court to hold that there was misconduct on the part of the sole arbitrator in this case which warrants the setting aside of the award. He submitted that the sole arbitrator misconducted himself by intentionally and manifestly disregarding the law as to the interpretation of the Development Agreement (Exhibit A2) which was crucial to the determination of the issues referred to him. He argued that despite finding at page 9 of the Award (Exhibit A10) that the Respondent was in breach of the Development Agreement, the sole arbitrator nevertheless proceeded to grant the reliefs sought by the Respondent and this is gross misconduct making the award liable to be set aside. It is the position of the learned Silkthat the Applicant's affidavit in support shows that the award contains material mistake of facts and the Arbitrator failed to act fairly towards the parties. He contended that the sole arbitrator's failure to rely on the valuation report and call expert evidence in ascertaining the value of work done by the Applicant is a clear material mistake of fact. He relied on the English case of ***FAYLEIGH LTD V. PLAZAWAY TRADING LTD (2014) 1EHC 52.***

Learned Senior Counsel submitted that the sole arbitrator was under a duty to call for independent expert evidence (having refused to rely on the valuation report on value of work done by the Applicant) instead of arbitrarily arriving at the paltry sum of ₦7,000,000 which he awarded considering he is neither a quantity surveyor nor estate valuer. Counsel posited that this is an error on the face of the award which warrants it being set aside. He added that another yardstick for considering whether an award ought to be set aside for misconduct is where an arbitrator had done anything either expressly or impliedly for which a reasonable by-stander would conclude that he was unfair to either or both parties. Counsel cited the case of ***TRIANA LIMITED V. UNIVERSAL TRUST BANK PLC (2009) LPELR-CA/4/69/2004***. He argued that the sole arbitrator in this case

irrationally arriving at the sum of ₦7,000,000 as quantum meruit, without any basis despite the valuation report before him, qualifies as misconduct. He urged this Court to resolve the sole issue in favour of the Applicant and set aside the award in its entirety or, in the alternative, remit the award back to arbitration for reconsideration and rectification.

In response and arguing against the grant of the instant application, learned Counsel to the Respondent submitted in his address that the Court will not set aside or remit for reconsideration an award that was validly made within the scope of the matter submitted for arbitration particularly when the arbitrator has not misconducted himself or the award was not improperly procured. He relied on Sections 29(2) and 30(1) & (2) of the Arbitration and Conciliation Act on conditions for setting aside an award. He also cited the cases of ***NIGERIAN TELECOMMUNICATIONS LTD V. ENGR. EMMANUEL C. OKEKE (2017) 9 NWLR (PT. 1571) P. 444 and ATOJU V. TRIUMPH BANK PLC (2016) NWLR (PT. 1505) P. 262***. It is Counsel's contention that there is no evidence by the Applicant that the award in this case contains decisions on matters which are beyond the scope of the submission to arbitration or that the sole arbitrator misconducted himself throughout the proceedings. He posited that the Applicant failed to establish this by its affidavit and merely tried to misrepresent actual proceedings at the arbitral tribunal. He relied on the case of ***NITEL V. OKEKE (supra***) on what amounts to misconduct on the part of an arbitrator. He argued that the award in this case was not inconsistent or ambiguous but was in conformity with the provisions of the Arbitration and Conciliation Act. He contended that the valuation report is not relevant to the case and the sole arbitrator did make a finding on this objection of the Respondent's after considering the parties' final address on the issue. It is the Respondent's Counsel's further submission that the sole arbitrator presided over the proceedings, listened to the parties and their Counsel, visited the locus in quo, considered the development agreement between parties as well as their submissions before arriving at his final award (i.e. Exhibit A10

attached to the affidavit in support of this application). He stated further that the parties in this case voluntarily submitted themselves to arbitration in line with their agreement and the Applicant's instant application before this Court is an attempt to frustrate the Respondent from reaping the benefit of the arbitral award. Counsel finally urged this Court to recognize the award and dismiss the instant application with substantial cost.

Responding in his reply address learned Senior Counsel to the Applicant mostly repeated his arguments already on record. He reiterated that the sole arbitrator's conduct in awarding the Applicant a paltry sum of ₦7,000,000 as damages on quantum meruit, having refused to place reliance on the valuation report before him and in the absence of any expert evidence, amounts to misconduct which makes the award bad on the face of it and liable to be set aside. He urged this Court to disregard the Respondent's arguments and proceed to grant the instant application.

In a nut shell, that is the arguments of both Counsel in their respective written addresses. I have earlier adopted the issue formulated by the Applicant's Counsel to resolve the present application. I therefore proceed to resolve same.

The fact doesn't seem to be in dispute amongst parties to this suit that they (parties to this suit) entered into a property development agreement (Exhibit A2 to the Affidavit in Support). It is not contested that dispute arose and pursuant to an arbitration clause in the said development agreement, the Applicant and the Respondent submitted their dispute to arbitration which proceedings was conducted by a sole arbitrator appointed by said parties. At the end of the arbitral proceedings in which the Applicant and the Respondent participated, the sole arbitrator (in the person of Dr. Alex A. Izinyon, SAN) made his final award on 6th November,2019. The Applicant is now before this Court seeking, through the instant application, an order of this Court setting aside that award or remitting it for reconsideration on further arbitration.

It is a well settled principle of law that parties who have both consensually chosen to go to arbitration are bound by the arbitral award. – see the case of ***TRIANA LTD. V. UTB PLC (2009) 12 NWLR (PT. 1155) P. 313 at P. 343***. See also the case of ***IEKA V. TYO (2007) 11 NWLR (PT.1045) P. 345 at P. 398 paragraph H*** where the Court of Appeal held thus:-

> *The law is well settled on the issue of customary arbitration or any arbitration for that matter. Where a body of men be they chiefs or otherwise sat as arbitrators over a dispute between two parties, their decision shall have binding effect if it is shown that both parties submitted to the arbitration.*

Thus, where parties have chosen their own arbitrator to be the judge in the dispute between them, they cannot, when the award is good or otherwise, object to its decision either upon the law or the fact. That is the general rule. See the case of ***COMMERCE ASSURANCE LTD V. ALLI (1992) 3 NWLR (PT.232) P. 710***.

This sanctity of an arbitral award is also well protected by statute. Consequently, a Court of law has no power or jurisdiction to interfere with an arbitral award except in circumstances as provided by law. Under **Section 29(2) of the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria 2004**, upon application to it, the Court has power to set aside an arbitral award if the party making the application proves that the award contains decisions on matters which are beyond the scope of the submission to arbitration. Also, under **Section 30(1)** of the same Act, the Court(upon application of a party) may set aside the award where an arbitrator has misconducted himself or where the arbitral proceedings (or award), has been improperly procured. The onus is however on the party seeking to set aside an award (the Applicant in this case) to establish the grounds recognized by law upon which the Court can exercise jurisdiction to interfere and set aside the award.

In the instant case, the sole ground upon which the Applicant has applied to this Court to set aside the award made on 6th

November, 2019 by Dr. Alex A. Izinyon, SAN the sole arbitrator in the arbitration involving the Applicant and the Respondent, is based on allegations of misconduct.

I have already highlighted that misconduct of an arbitrator is a ground for setting aside an arbitral award. See again **Section 30(1) of the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria 2004**. The term 'misconduct' itself is not defined in the Act. The Supreme Court in the case of ***TAYLOR WOODROW (NIG) LTD V. SUDDEUTSCHE ETNA-WERK GMBH (1993) LPELR-3139(SC*)** however set out the following as some conduct that would amount to misconduct within the law.

(1) Where the arbitrator fails to comply with the terms, express or implied, of the arbitration agreement;
(2) Where, even if the arbitrator complies with the terms of the arbitration agreement, the arbitration makes an award which on grounds of public policy ought not to be enforced;
(3) Where the arbitrator has been bribed or corrupted;
(4) Where the arbitrator or umpire fails to decide all the matters which were referred to him;
(5) Where the arbitrator or umpire has breached the rules of natural justice;
(6) If the arbitrator or umpire has failed to act fairly towards both parties, as for example:-
 (a) By hearing one party but refusing to hear the other; or
 (b) By deciding the case on a point not put by the parties.

See also the case of ***A. SAVOIA LIMITED V. A. O. SONUBI (2000) LPELR-7(SC)*** *and****REVENUE MOBILIZATION, ALLOCATION & FISCAL COMMISSION V. UNITS ENVIRONMENTAL SCIENCES LTD (2010) LPELR-9205(CA*)**.It is also settled that where there is error of law on the face of an Arbitral award it may amount to 'misconduct'. See again the foregoing cases as well as the case of ***BUA INTERNATIONAL LTD V. SKETCHYZ CONSULTING LTD (2019) LPELR-47374(CA*)** where the Court of Appeal held as follows:-

"It is also settled principle of law that although a Court is not meant to sit on appeal over an award reached from an arbitration proceedings, where there is an error on the face of the award, such would constitute misconduct of a nature that can necessitate an overturn of the award."

In alleging misconduct on the part of the sole arbitrator in this case, the Applicant specifically alleged that despite breach of the contract by the Respondent, the sole arbitrator proceeded to grant some of the Respondent's claims. The Applicant specifically alleged that the sole arbitrator (in his award) refused to consider a valuation report tendered and admitted in evidence before him because it was not addressed to the Applicant. That the Sole arbitrator also failed to call expert evidence to determine the amount of work done by the Applicant and amount due to the Applicant for the construction on the site before arbitrarily awarding the paltry sum of ₦7,000,000 on quantum meruit to the Applicant. Learned Counsel to the Applicant submitted that all these amount to an error on the face of the award and misconduct on the part of the sole arbitrator requiring the setting aside of the award.

Now in the case of ***OPTIMUM CONSTRUCTION & PROPERTY DEVT CO. LTD & ORS V. PROVAST LTD (2018) LPELR-43689(CA)***, the Court of Appeal per Ogakwu JCA held as follows:-

"By all odds, an arbitral award can be set aside for misconduct where there is an error of law discernible on the face of the award. However, a Court before which there is an application to set aside an arbitral award does not sit as an appellate Court over the award of the Arbitrator. It can therefore not determine whether or not the findings of the Arbitrator and the conclusions reached were wrong in law. See ***BAKER MARINE (NIG) LTD vs. CHEVRON (NIG) LTD (2000) 12 NWLR (PT 681) 397****. But what is an error in law on the face of an award which will constitute misconduct? This question was answered by the apex Court*

in ***TAYLOR WOODROW OF NIGERIA LTD vs. SUDDEUTSCHE ETNA-WERK GMBH*** *(1993) LPELR (3139) 1 at 20-22. In the words of Ogundare, JSC:*

> *"To determine whether there has been misconduct, one must necessarily first answer the question: What is an error in law on the face of an award? As was decided by the Privy Council in* ***CHAMPSEY BHARA & CO. V. JIVRAJS BALLOO SPINNING & WEAVING CO.(1923) A.C. 480; (1923) ALL E.R. REP. 235, per Lord Dunedin at pp. 487 - 488*** *of the former Report, the expression was thus defined:-*
>
> > *"An error in 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 parties' rights depend to see if that contention is sound."*

Where it is impossible to say, from what is shown on the face of the award, what mistake, if any, the arbitrator has made, or that the arbitrator has tied himself down, on the face of his award, to some special legal proposition which is unusual the award will stand. The learned authors of Halsbury's Laws of England 4th Edition at paragraph 623 on page 334 have the following to say on the subject:-

> > *"An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by*

means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the Court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles or construction which the law does not countenance, there is error in law which may be ground for setting aside the award. But the Court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award; it must take the award at its face value."

I have carefully read through the final award made by the sole arbitrator on 6th November, 2019 (Exhibit A10 to the affidavit in support) in the arbitration between the Applicant and the Respondent. The claims of the Respondent and the counter-claims of the Applicant at the arbitration are copiously reproduced by the sole arbitrator at pages 3 and 4 of the award. The facts alleged, evidence in support and arguments of both parties were also set out by the sole arbitrator in ensuing pages of the award. Of great consideration was the Development Agreement between parties which was marked in evidence as exhibit C1. It is

instructive to note that the sole arbitrator found in his award that the Respondent was in breach of a clause 3.1 of the development agreement having failed to deliver a certificate of occupancy to the Applicant to enable it secure loans immediately upon execution of the agreement by parties. The sole arbitrator likewise found the Applicant itself to be in breach of development agreement having failed to fully carry out the agreed construction on site. The sole arbitrator further found as follows at page 15 of the award:-

> *"However, I have held at the earlier part of this Award that the Claimant breached Exhibit C1 by not releasing the Certificate of Occupancy at the time of the execution of Exhibit C1. Also the Respondent/Counter Claimant breached his part by not executing the contract as per Exhibit C1 till date."*

It is on this premise that the sole arbitrator, in his award, directed the termination of the development agreement between the Applicant and the Respondent and further ordered the Applicant to return the Respondent's certificate of occupancy in the Applicant's possession to the Respondent. This so happens to be two of the Respondent's seven reliefs sought in its claim. It is noteworthy that the sole arbitrator also awarded the sum of ₦7, 000,000 to the Applicant as damages on quantum meruit in view of the Applicant's counter-claim for damages against the Respondent. I shall come to the issue of this sum awarded to the Applicant later as it also forms part of the Applicant's allegation of misconduct against the sole arbitrator. Suffice it to say at this stage that the sole arbitrator found breach of the development agreement against both parties to it and not just against the Respondent as is being suggested by the Applicant. In the circumstances, I cannot find any apparent error committed by the sole arbitrator in awarding part of the Respondent's claim before him. The Applicant itself did not say how this amounts to an error. Nor can I see how this decision is patently unfair to either party. Taking the Award at its face value, I therefore find that the sole arbitrator's decision to award part of the Respondent's claim

does not constitute an error of law (having found both parties in breach), in an attempt to return both parties as much as possible to a situation had there been no breach.

It would also appear from the award that the sole arbitrator refused the Applicant's claim of ₦1, 865,062,293.33 as costs incurred by it in the construction of the Kaura Bus Terminal under the development agreement between parties. The sole arbitrator found that there was no evidence to support this claim. He particularly refused to rely on a valuation report tendered and admitted in evidence before him. He found at page 12 of his Final Award as follows:-

(i) The claim of ₦724,207.00 for the valuation report is refused. The valuation report is a stranger to the dispute. It is not addressed to the Respondent/Counter Claimant or the Claimant. It is addressed to First Bank of Nigeria Plc not a party to this dispute and no link.

The sole arbitrator then found that from the visit to the locus in quo conducted during the arbitral proceedings with parties, there was no evidence that there was construction of 496 shops agreed under the development agreement to be built by the Applicant on the Respondent's property. The sole arbitrator found that the construction of an alleged 124 shops on the site were at DCP level with nothing on them and therefore total construction was not up to 30% as required by clause 2.4 of the development agreement between parties. In this regard the sole arbitrator found the Applicant to be in breach of the development agreement.

The sole arbitrator further found as follows at pages 16 and 17 of the Award:-

> *"I have also observed that the Respondent/Counter Claimant is not claiming for full agreed price since the work was not completed. I have noted that the Respondent/Counter*

Claimant's claim for general and punitive damages were refused.

I have also noted that the Respondent/Counter Claimant did not get any mobilization or deposit from the Claimant as shown in the evidence before me. This means that the Respondent/Counter-Claimant funded from his own pocket the expenses for the preliminary works which were not in dispute.

It is in this regard that going by the maxim of 'in paridelecto' which I have invoked earlier, the Defendantshould be put in a better side. See Essentials of Contract Law by Phyllis H. Frey, Martin A. Frey (West Thompson Learning 2001) pg. 190, the learned author put it thus:-

> *"Where the parties are in pari delicto (in equal fault), the Court will find for the Defendantand leave the parties in the position they were prior to litigating. As between two equally guilty parties, the concept makes sense because there is reason to shift the loss from one guilty party to another."*

It is in this circumstance that I award ₦7, 000,000.00 (Seven Million Naira) as damages against the Claimant in favour of the Respondent/Counter Claimant.

This amount is in the nature of quantum meruit which the law allows in the circumstances of this reference. See the case of ***SAVANNAH BANK OF NIGERIA PLC VS. OLADIPO OPANUBI (2004) 15 NWLR (PT. 896) 437 at 456 paragraphs D-G PER UWAIFO JSC*** *(As he then was)."*

As mentioned earlier in this Ruling, part of the Applicant's grouse with the sole arbitrator's decision in the final award is that, in the Applicant's opinion, the sole arbitrator ought to have relied on the valuation report and/called expert evidence on the issue of value and level of construction actually done by the Applicant on the

Respondent's land pursuant to the development agreement. It is the Applicant's position that the sole arbitrator was under duty to do this instead of arbitrarily (and without any basis) concluding that the level of construction on the site was not up to 30% of the agreed construction and awarding ₦7,000,000 as value of actual construction to the Applicant. This, in the Applicant's opinion, amounts to misconduct on the part of the sole arbitrator.

Now, if the dispute between Applicant and the Respondent were to be submitted to three different sole arbitrators (or even panel of arbitrators) for arbitration, it is more than likely that three fundamentally different awards will be made by these three arbitrators. Hence, it must be noted that the instant Award is not bad or unfair simply because the Applicant or even this Court feels (in its opinion) that the decision in the Award should have gone differently. This Court in an application to set aside the award on allegation of misconduct (such as the instant one) is not sitting on appeal over the award. This Court, in the exercise of such jurisdiction, is therefore limited to simply perusing the Award itself to discern if there are decisions (material to the dispute submitted by parties to the arbitrator) which are obviously and apparently erroneous, being in conflict with basic fundamental and universally established principles of the law.

The question is: did the sole arbitrator have a duty to rely on the valuation report tendered in evidence before him and/or call expert evidence in the circumstances of this case? I must refer to provisions of the Arbitration and Conciliation Act which I find most relevant. **Sections 15, 20 and 21** of the Act provides as follows:-

> *15.(1)The arbitral proceedings shall be in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to this Act.*
> *(2) Where the rules referred to in subsection (1) of this section contain no provision in respect of any matter related to or connected with a particular arbitral proceedings, the arbitral tribunal may, subject to this*

Act, conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure a fair hearing.

(3) The power conferred on the arbitral tribunal under subsection (2) of this section shall, include the power to determine the admissibility, relevance, materiality and weight of any evidence placed before it.

20. (1)Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether the arbitralproceedings shall be conducted:-

(a) By holding oral hearings for the presentation of evidence or oral arguments; or

(b) On the basis of document or other materials; or

(c) By both holding oral hearings and on the basis of documents or other materials as provided in paragraphs (a) and (b) of this subsection, and unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings if requested so to do by any of the parties.

(2) The arbitral tribunal shall give to the parties sufficient advance notice of any hearing and of any meeting of the arbitral tribunal held for the purposes of inspection of documents, goods, or other property.

(3) Every statement, document or other information supplied to the arbitral tribunal shall be communicated to the other party by the party supplying the statement, document or other information, and every such statement, document or other information supplied by the arbitral tribunal to one party shall be supplied to the other party.

(4) Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

(5) The arbitral tribunal shall, unless otherwise agreed by the parties, have power to administer oaths to or take the affirmations of the parties and witnesses appearing.

(6) Any party to an arbitral proceedings may, issue out a writ of subpoena ad testificandum or subpoena ducestecum, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

22.(1) Unless otherwise agreed by the parties, the arbitral tribunal may-

(a) Appoint one or more experts to report to it on a specific issue to be determined by the arbitral tribunal;

(b) Require a party to give to the expert any relevant information or to produce or provide access to, any documents, goods or other property for inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, any expert appointed under subsection (1) of this section shall, after delivering his written or oral report, participate in a hearing where the parties shall have the opportunity of putting questions to him and presenting expert witnesses to testify on their behalf on the points at issue.

(3) The arbitral tribunal shall not decide ex aequo et bono or as amiable compositeur unless the parties have expressly authorised it to do so.

(4) The arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade application to the transaction.

In line with the foregoing provisions of the Act, the **Arbitration Rules** set out in the **First Schedule of the Arbitration and Conciliation Act** further provides as follows:-

ARTICLE 24

1. *Each party shall have the burden of proving the facts relied on to support his claim or defence.*

ARTICLE 25

6. *The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.*

ARTICLE 27

1. *The arbitral tribunal may appoint one or more experts to report to it in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.*

It would therefore appear from the Act (and the Rules) that the sole arbitrator expressly possessed the requisite power and authority to, in his final award, decide on the relevance of the valuation report admitted in evidence before it. He thus had the express authority in law to decide that the said valuation report had no relevance to the arbitration before him and consequently refuse to rely on it in deciding the issues before him in that arbitration. In the case of ***NITEL V. OKEKE (2017) LPELR-46284(SC)***where the Court held per Aka'ahs JSC; thus:-

> *"It is not just any evidence produced in a proceedings that must be acted upon by a Court or tribunal but how relevant it is to the proceedings. This includes arbitral proceedings. See:* ***K S.U.D.B. V. FANZ LTD. (1986) 5 NWLR (Pt. 39) 74."***

This position finds staunch support in the general principle of the law that admissibility and weight of a piece of documentary evidence are two different things and as such, the mere fact that

a document is admitted in evidence does not *ipso facto* mean that any amount of evidential weight must be attached to such document. See the case of ***AHEMBE ACHO V. IORYINA UKAGYE(2013) LPELR-21181(CA*)** where the Court of Appeal held thus:-

> *"The trite law is that, even where a document has been admitted in evidence the weight to be attached to it is an entirely different consideration. Such considerations such as whether it was validly admitted or whether the document was authentic and whether the facts contained therein constitute and satisfy the law on the existence or creation of the right(s) asserted or denied are the essentials for the attachment of weight thereto."*

Thus, having found that the sole arbitrator had the authority in law to decide on the relevance of the valuation report, his decision to refuse to rely on it on grounds that it was not addressed to either of the parties to the arbitration does not breach basic fundamental principles in the exercise of this authority as to constitute misconduct. That ought to put an end to that issue as this Court's jurisdiction ought not to extend to a re-consideration of the reason(s) given by the sole tribunal for refusing to rely on the valuation report in the exercise of his authority. This would amount to sitting on appeal over the decision of the sole arbitrator and this is not the duty of this Court in an application of this nature to set aside the arbitral award on allegations of misconduct (particularly contending errors of law on the face of the award).

In any event, for the avoidance of doubt, let me quickly address the issue of the relevance of the valuation report which is annexed as Exhibit A8 to the Applicant's affidavit in support of the instant application. From Exhibit A10 (Final Award), the sole arbitrator's reason for finding the valuation report irrelevant to the arbitration is that it was not addressed to either of the parties to the arbitration. The sole arbitrator thus refused to rely on the

valuation report in consideration of costs of actual construction done by the Applicant on the site.

A look at Exhibit A8 shows that it is a valuation certificate/report on a property located at Plot No. 1156, Cadastral Zone B11, Kaura District, Abuja prepared by one JideTaiwo& Co. (Estate Surveyors and Valuers) for and on behalf of First Bank Plc. The opinion expressed in the valuation report estimates the open market value of the entire property as at 15thMay, 2012 at the sum of ₦723, 380,207 while the forced sale value is estimated to be ₦507, 066,144.90. The valuation report therefore does not indicate the value of the construction on the land but the value of both the construction and the land itself. The opinion of value expressed in the valuation report cannot therefore be relevant to prove just the value of the constructions made on the land which is the sole purpose for which the Applicant had tendered it at the arbitral proceedings. Moreover, the said valuation report clearly indicates at page 17 thereof that the valuation certificate is for the purpose of the person to whom it is addressed i.e. First Bank Plc only. It is therefore not for the purpose of either of the parties to the arbitration before the sole arbitrator. From all these, it follows therefore that the valuation report was not relevant to the issues before the sole arbitrator and I accordingly endorse his findings and decision not to rely on same in his Award. His decision in this respect is sound and cannot be impugned even if this Court were to sit on appeal over that decision.

On the issue of failure to call expert evidence, from a reading of **Sections 15(2) and 22(1)(a) & (b) of the Arbitration and Conciliation Act** and **Article 27(1) of the Arbitration Rules**, it is clear that the decision whether or not to call for expert opinion on any issue is at the discretion of the arbitrator. Thus, the mere fact that the sole arbitrator in this case did not call for expert opinion on the issue of the level of actual construction on the site and the value thereof does not automatically mean he exercised his said discretion wrongly. The law certainly does not place a duty on the sole arbitrator to call for expert evidence/opinion. Neither did the Applicant point to any specific

clause in the development agreement between parties to indicate that parties had agreed that expert evaluation of the property or construction thereon by a quantity surveyor or estate valuer was necessary such as to place a duty on the sole arbitrator to call for the opinion of one specially qualified in that field during the arbitral proceedings. The Applicant's contention that from the nature of the proceedings before him, the sole arbitrator ought to have called expert evidence is too vague, watery, insufficient and cannot avail the Applicant in establishing that the sole arbitrator had such duty (and not just a discretion) to call expert evidence.

Now, **Article 24(1) of the Arbitration Rules** places the burden of proving the allegation of costs of construction actually done on the site on the Applicant who alleged the fact. The Applicant itself did not call an expert witness specially qualified in the field of quantity survey and estate valuation to give expert opinion on the level of construction and value thereof. It would appear that parties (including the Applicant) wilfully appointed the sole arbitrator (knowing that he probably was neither a qualified quantity surveyor nor estate valuer), participated fully at the arbitral proceedings without calling expert witnesses and particularly made use of the process of 'visit-to-the-locus-in-quo' by physically inspecting the construction and site to determine relevant issues before the sole arbitrator. Even if the sole arbitrator had a duty under the Rules to call for expert evidence, the parties' full participation without insisting on the calling expert witnesses is a clear indication of waiver on their part. See **Article 30 of the Arbitration Rules** which provide as follows:-

ARTICLE 30

> *A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.*

Consequently, the parties, indeed the Applicant, cannot now be heard by this Court to complain that the sole arbitrator conducted a visit to the locus in quo to determine issues such as level of

construction on the site and value of same instead of calling for expert witnesses to testify on these issues. Hence, the decision of the sole arbitrator not calling the expert evidence cannot be faulted and I endorsed same.

I now come to the sum of ₦7,000,000 awarded by the sole arbitrator on principle of quantum meruit to the Applicant as compensation for the actual construction done by it on the site.

The doctrine of quantum meruit normally comes into play when, for some reason, the contract for service cannot be completed. In such a case, the value of the services rendered up to the point where the contract failed is assessed and paid to the contractor. The expectation of the law is that the person would be paid reasonable remuneration for the value of the actual work done or service rendered to avoid unjust enrichment. See the cases of ***EGBE & ANOR V. ODU (2014) LPELR-23805(CA), PANAR LTD. V. WAGBARA (1999) LPELR-6731(CA) and OLAOPA V. OAU, ILE-IFE (1997) LPELR-2571(SC)*** to mention but a few.

In the case of ***TRIOVERSAL DESIGN ASSOCIATES V. COMMISSIONER FOR HEALTH AND HUMAN SERVICES, YOBE STATE & ANOR (2019) LPELR-47072(CA)***, the Court of Appeal held as follows:-

> *"The Appellant did not lead sufficient evidence to establish that it was entitled to the sum of ₦17, 364,984.69 as the fee for the production of the sketches and bill of quantities. This, ordinarily, should not be the end of the matter. This Court had found that the Appellant was engaged by the Respondents to prepare sketches and bill of quantities for intended contract works and that there was an understanding that the Appellant would be paid for them and that the Appellant did produce and submit the sketches and bill of quantities to the Respondents. The failure of the Appellant to prove that the sum of ₦17,364,984.69 claimed is the actual sum due to it for the job should not deny the Appellant payment for the services rendered. The law is that, in such circumstances, the Appellant should be*

compensated on a quantum meruit basis - ***ABURIME VS NIGERIAN PORTS AUTHORITY(1978) 4 SC 111, OYO VS MERCANTILE BANK (NIG) LTD (1989) 3 NWLR (Pt 108) 213."***

Now, it doesn't appear to be in dispute that the Applicant did not complete the construction required on the site under the development agreement. The sole arbitrator found that there was indeed construction on the site but it was not up to 30% of the works required under the development agreement. He found that some of the actual construction were not part of the required works under the agreement of parties. I believe the sole arbitrator could competently come to such conclusions without expert opinion as the development agreement and proposed designs were before him and he had inspected the construction site in the company of parties in a visit to locus. He was thus in a position to simply compare both the required works as per the contract documents and the actual constructions which he physically perceived.

Having found in his award that the Applicant failed to prove the actual value of the cost of constructions which it carried out on the site, I believe the sole arbitrator's application of the doctrine of quantum meruit to the case was proper. This is to avoid unjust enrichment which is the main purpose of the doctrine. The sole arbitrator's assessment of₦7,000,000 as fair compensation for the Applicant's construction has not been impeached by the Applicant in the instant application. The sole arbitrator did physically inspect the structures on the construction site during the arbitral proceedings and his opinion of the value of the construction cannot be easily dismissed with the waive of the hand even though he might not be an expert quantity surveyor or estate valuer andJuxtaposing with the fact that the Applicant in this application has still not presented any form of evidence admissible to show that the construction was grossly undervalued by the sole arbitrator in awarding ₦7,000,000.00 as compensation, there is nothing to show that this decision is unfair to both or either of the parties (such as the Applicant) or it is an error of law.

In **NITEL V. OKEKE (supra)**, the Supreme Court held per Peter-Odili JSC that:-

> *"It is a very wrong notion to equate arbitration proceedings as if it was formal proceedings at superior Court of records. In arbitration proceedings the rules are more relaxed. There is no doubt the purpose of arbitration will be defeated if subjected to the same rules of Court to which by necessary implication it is inferior. This Court in* ***Ebokan v. Ekwenibe& Sons Trading Co. (supra)*** *stated the benefits of submission to arbitration thus:-*
>
> > *"Parties who make a submission to an arbitrator often do so in an order to adopt a quick, inexpensive and technicality free procedure to resolve their dispute. A Court should not therefore upset the expectation of the parties except for the clearest evidence of wrong doing or manifest illegality on the part of the arbitrator. In the view of the above therefore arbitration is a fast, cheap and efficient method of resolving conflict between parties without having to follow the rigid procedures of normal Court of laws. Besides the recourse to arbitration was a conscious decision of the parties and they ought to be bound by the result save in situation of clearest evidence of wrong doing or manifest illegality on the part of the arbitrator."*

In this instant case, the sole arbitrator considered relevant propositions of the law and applied same to the facts before him in arriving at his Award. He gave detailed reasons for his decisions in his Award. I am not convinced that the Applicant has shown any error of law or fact on the face of the Award or any other act of misconduct as alleged by it against the sole arbitrator. It would seem that the Applicant is simply dissatisfied with the Award because it is not the outcome it had expected or hoped for. Mere dissatisfaction with the Award by any of the parties is however insufficient to make an order setting aside the Award. Having failed to establish any alleged act of misconduct

against the sole arbitrator in his award, the Award made on 6th November, 2019 in the arbitration between the Applicant and the Respondent must stand. There is absolutely no reason to interfere with same by setting it aside or remitting it for reconsideration on further arbitration. The instant application to this Court to do so must fail in its entirety.

Consequently, the issue for determination must be resolved against the Applicant and in favour of the Respondent. The instant application is refused and it is accordingly dismissed. Parties to therefore proceed to adopt their processes in respect of motion no. FCT/HC/CV/5159/2020.

_____

HON. JUSTICE D.Z. SENCHI
(PRESIDING JUDGE)
23/09/2020

Parties:- Plaintiff/Applicant present in Court
Respondent:-Absent.
AkinlabiAkingbade:- With me is Mark ChidiAgbomadu, Joe KyariGadzama, Amazing IkpalsAdedapoAdewuyi and Ademola A. Seriki for the Applicant.
Olaibitoye:-For the Respondent.
Ibitoye:-I have a motion on notice dated the 7th February,2020 and filed on the same date. The motion is pursuant to the Rule-s of this Court. The motion on notice is supported by a 10 paragraphs affidavit. We rely on all the paragraphs. We have filed a written address and urge the Court to grant the application. We have also attached exhibits to the affidavit in support we have also filed a further and better affidavit on 2nd March, 2020 with one exhibit marked exhibit A.
Akinlabi:-In opposition we filed a counter affidavit with six (6)

exhibits. We have also filed a written address and we adopt same. We urge the Court to refuse the recognition of the award.

Court:- Ruling stand down for 3 Pm today.

Sign
Judge
23/09/2020