AIN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

MOTION NO: FCT/HC/M/7810/2020

BETWEEN:

FEDERATIVE REPUBLIC OF BRAZIL……..APPLICANT

AND

SMART GADS LIMITED……RESPONDENT

RULING

The Applicant was engaged by the Respondent sometimes in 2008 for the construction of a Chancery Building for its Embassy at the Central Business District, Abuja. At the end of the transaction, dispute arose between parties and in line with the contract agreement parties opted for a one-man Arbitral Panel for the resolution of the dispute. At the end of the Arbitral proceedings, a Final *Award* dated 29th May, 2020 was made in favour of the Respondent. The Applicant who is dissatisfied with the *Final Award* by a Motion on Notice filed on 19th June, 2020 is seeking the following reliefs:

1. **An Order of the Honourable Court setting aside the Final Award made by Prof. Paul Obo Idornigie SAN in the Arbitration concluded between the parties in the present action, dated May 29 2020;**
2. **An Order of the Honourable Court directing a trial denovo between parties before another Arbitrator;**
3. **And for such further Order or Orders as the Honourable Court may deem fit to make in the circumstances.**

Two grounds were listed in support of the application. That is to say, error on the face of the record; and misconduct on the part of the Arbitrator.

Facts in support of the application are encapsulated in a 2-paragraphs affidavit deposed to by one Levi Ashukka Ekemma, an employee of the Applicant. Photocopies of bundles of documents marked as Exhibits "A" to "J2' were annexed to the affidavit. Mr. Eric Oba, Esq of Counsel to the Applicant also filed a written submission in line with the Rules of Court. Mr. Ekemma also filed a process christened as "affidavit of correction" which seeks to correct some errors in his main affidavit in support of this application.

The Respondent opposed the application with a counter affidavit of 55-paragraphs deposed to by one Austin Akechi, who is the

Litigation Manager in the Law Firm representing the Respondent to which some unmarked documents were annexed. Mr. Akpama Ekwe, Esq also filed a written address in obedience to the Rules. The Applicant also filed a Reply on Points of Law dated 21st October, 2020.

Now it is trite Law that once parties voluntarily submit to Arbitration, they are bound by the outcome of the exercise. On this point of Law, see **RAS PALGAZI CONSTRUCTION COMPANY LTD Vs FCDA (2001) 5 S.C (PT.II) 16** where Kalgo, JSC stated the Law thus:

> **"It is very clear and without any iota of doubt, that an Arbitral award made by an Arbitrator to whom a voluntary submission was made by the parties to the Arbitration, is binding between the parties."**

The rationale for this principle of Law is very clear. Parties cannot voluntary elect to resolve their dispute through Arbitration and in consequence appoint their own Judge and refused to be bound by the outcome. The grounds recognized by Law for setting aside an Arbitral award is very narrow.

In CELTEL NIGERIA LTD Vs ECONET WIRELESS LTD & ORS (2014) LPELR-22430(CA):

"What a Court called upon to set aside an Arbitral award and an Appellate Court called upon to adjudicate on the decision of the setting aside, Court has to decide is, whether the Arbitral award was prima facie good or right on, the face of it, not whether the reasons (whether of law or facts or both) given by the Arbitral Tribunal for the award were right or sound, unless the reason(s) form part of the award."

The Court cited the case of **COMMERCE ASSURANCE LIMITED Vs ALLI (1992) 3 NWLR (PT. 232) 710 AT 725-726** where the grounds for setting aside an Arbitral award was considered and the Court of Appeal held as captured hereunder**:**

"The underlying principle is that parties to a dispute have a choice. They may resort to the normal machinery for administration of justice by going to the regular Courts of the land and have their disputes determined, both as to the fact and the law, by the Courts. Or, they may choose the Arbitrator to be the Judge between them, if they take the latter course, they cannot, when the award is good on the face of it, object to the award on grounds of law or facts."

However by the combined provision of Sections 29(1) (2) and 30(1) of the Arbitration and Conciliation Act, CAP A18, LFN, 2004, the Court may intervene in deserving cases to set aside an Arbitral award. To facilitate ease of understanding, I shall reproduced the Sections forthwith:

> **"Section 29(1) – A party who is aggrieved by an Arbitral award may within three months –**
>
> **(a) From the date of the award; or**
>
> **(b) In a case falling within Section 28 of this Act, from the date the request for additional award is disposed of by the Arbitral Tribunal, by way of an application for setting aside, request the Court to set aside the award in accordance with Subsection (2) of this Section.**
>
> **(2) The Court may set aside an Arbitral award if the party making the application furnishes proof that the award contains decisions on matters which are beyond the scope of the submission to Arbitration so however that if the decisions on matters submitted for Arbitration, can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted may be set aside.**

Section 30(1) – Where an Arbitrator has misconducted himself, or where the Arbitral proceedings, or award, has been improperly procured, the Court may, on the application of a party set aside the award."

The Applicant in this case has alleged that the Arbitrator misconducted himself in that he did not allow the Applicant to properly join issues with the Respondent at some point. That the Arbitrator also gave wrong and distorted interpretation to one of the documents put forward during the Arbitral proceeding. That the Arbitrator is guilty of double standard in that he gave preference to the arguments of the Respondent and also misled himself when he placed the burden of establishing a particular payment which the Applicant allegedly made to the Respondent.

Before I resolve the allegation of misconduct against the Arbitrator as aforestated, let me quickly add that under Common Law the scope of misconduct is very wide and as a matter of fact not closed. In **TAYLOR WOODROW OF NIGERIA LIMITED Vs S.F GMBH (1993) 24 NSCC (PT.1) 45,** the Supreme Court (per Ogundare, JSC) quoted with approval the learned opinion expressed in Halsbury's Laws of England, 4th Edition, Vol.2 at pages 330-331 on what constitutes misconduct at common Law as follows:

1) if the Arbitrator or Umpire fails to decide all the matters which were referred to him;

(2) if by his award the Arbitrator or Umpire purports to decide matters which have not in fact been included in the agreement of reference; for example, where the Arbitrator construed the lease (wrongly) instead of determining the rental and the value of buildings to be maintained on the land; or where the award contains unauthorised directions to the parties; or where the Arbitrator has power to direct what shall be done but his directions affect the interests of third persons; or where he decided as to the parties' rights, not under the contract upon which the Arbitration had proceeded, but under another contract;

(3) if the award is inconsistent, or is ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least be clear beyond any reasonable doubt;

(4) if there has been irregularity in the proceedings, as, for example, where the Arbitrator failed to give the parties notice of the time and place of meeting, or where the agreement required the evidence to be taken orally and the Arbitrator received affidavits, or where the Arbitrator refused to hear the evidence of a material witness, or where the examination of witnesses was taken out of the parties' hands, or where the Arbitrator failed to have Foreign documents translated or where, the reference being to two or more Arbitrators, they did not act together, or where the Umpire, after hearing evidence from both Arbitrators received further evidence from one without informing or hearing the other, or where the Umpire attended the deliberations of the appeal board reviewing his award:

(5) if the Arbitrator or Umpire has failed to act fairly towards both parties, as, for example, by hearing one party but refusing to hear the other, or by deciding in default of defence without clear warning, or by taking instructions from or taking

with one party in the: absence of the other or by talking evidence in the absence of one party or both parties, or by failing to give a party the opportunity of considering the other party's evidence, or by using knowledge he has acquired in a different capacity in such a way as to influence his decision or the course of the proceedings, or by making his award without hearing witnesses whom he has promised to hear, or by deciding the case on a point not put to the parties:

(6) if the Arbitrator or Umpire refuses to state a special case himself or allow an opportunity of applying to the Court for an Order directing the statement of a special case;

(7) if the Arbitrator or Umpire delegates any part of his authority, whether to a stranger or to one of the parties, or even to a Co-Arbitrator:

(8) if the Arbitrator or Umpire accepts the hospitality of one of the parties, being hospitality offered with the intention of influencing his decision:

(9) if the Arbitrator or Umpire acquires an interest in the subject matter of the reference, or is otherwise an

interested party;

(10) if the Arbitrator or Umpire takes a bribe from either party.

Now I have considered the five grounds listed in this application in support of misconduct as summed up above and I form the view that the allegation is not established either under Common Law or the prevailing statute on Arbitration in Nigeria. For example, I have no evidence from the Arbitral proceedings that the Applicant was not given equal opportunity with the Respondent to state its case. In any case, the business of the Arbitral Panel is to create an enabling opportunity for parties to present their cases. If any of the parties failed to take advantage of the window of opportunity such party cannot complain of breach of fair hearing. See NEWSWATCH…..

On the allegation of distorted interpretation attached to the ***Third Final Account*** tendered before the Arbitral Panel, I think this allegation is mischievous. The Applicant's grouse here is simply that the interpretation adopted by the Arbitrator is the same as that of the Respondent which in the opinion of the Applicant is wrong. With due respect the fact that the interpretation in dispute is in alignment with the submission of the Respondent cannot by any stretch of imagination constitute an act of misconduct. It could be the other way round. In any case, the Arbitrator is at liberty to align with the

views of any of the party to the proceedings if convinced that such view is in the best interest of justice.

See **DUNLOP NIGERIA PLC (NOW DN TYRE & RUBBER PLC) Vs GAS LINK NGERIA LIMITED (2018) LPELR- 43642 (CA)** where it was held thus:

> **"In Arbitration proceedings, the general principle is that facts finding by an Arbitrator is not a ground for setting aside an award on the ground that it is wrong nor on the ground that there is no evidence on which the facts could be found because that would be mere error of law. In the case of BAKER MARINE NIGERIA LIMITED Vs CHEVRON NIGERIA LIMITED (2000) 3 NWLR (681) 939 @ 410. It was held that an application to set aside an Arbitral award:** ***"The lower Court was not sitting as an Appellate Court over the award of the Arbitrators. The lower Court was not therefore empowered to determine whether or not the findings of the Arbitrators and their conclusions were wrong in law. What the lower Court had to do was to look at the award and determine whether on the state of law as understood by them and stated on the face of the award, the Arbitrators complied with the law as they themselves rightly or wrongly perceived it. The approach here is***

subjective. The Court places itself in the position of the Arbitrators, not above them, and then determines on that hypothesis whether the Arbitrators followed the law as they understood and expressed it."
See also STABILINI VISINONI LIMITED Vs MALLISON & PARTNERS LIMITED (2014) LPELR-23090 (CA).”

The other grounds put forward in support of allegation of misconduct against the Arbitrator, is bias though not so captured by the Applicant. I have calmly considered this point and I form the view that there is nothing to justify this wild allegation. Bias is a very weighty allegation which must be proof with cogent and compelling evidence. On what constitutes bias Kalgo, JSC in **AZUOKWU Vs NWOKANMA & ANOR (2005) 11 NWLR (PT.937) 537** held as follows:

> **“Bias in relation to a Court or Tribunal is an inclination or preparation or predisposition to decide a cause or matter in a certain pre-arranged way without regard to any law or Rules and the likelihood of bias may be drawn or surmised from many factors such as corruption, partisanship, personal hostility, friendship, group membership or**

association and so on, towards' or involving a particular party in a case."

Apart from the bare and presumptive opinion of the Applicant that the Arbitrator was partial, I have no evidence before me to support allegation of bias. Applicant's complaint that the Arbitrator placed the onus of proof on the Applicant to lead evidence to show that it made payment to the Respondent in my view cannot be an act of misconduct. It is trite Law that once such payment is in dispute the onus is on the party who asserts to prove the facts in dispute. This is elementary and I do not see any reason why the Applicant should belabour the matter to the point of elevating it to an act of misconduct.

In **ARBICO NIGERIA LIMITED Vs NIGERIA MACHINE TOOLS LIMITED (2002) 15 NWLR (PT.789) 466** the Court of Appeal held as follows:

"I think the charges of bias and want-of fair hearing are totally misplaced. That is to say, in so far as the charges have to be made to stick, the onus of proof was decisively on the Appellant so alleging and it was not discharged. Regarding the issue of bias the question is whether there was a showing of act of impartiality by the Arbitrator - See: AKINTE Vs THE

STATE (1988) 3 NWLR (Pt. 85) 729 Per Eso, J.S.C. The Courts also are concerned with the likelihood of bias. Was there therefore bias or likelihood of bias one may ask? I agree with the Arbitrator that the allegation was left to hang in the air for want of substantiating evidence. What is bias or likelihood of bias is not measured by the subjective impression of the appellant as the aggrieved party but from objective stand point of a reasonable man. This objection has been raised in many cases, has succeeded in a few. There is no iota of evidence of bias or likelihood of bias as a misconduct against the Arbitrator, none has been made out."

This now takes me to the question of error on the face of the record. On this point, the Arbitrator has been accused of misapplication of the facts in issue, misapplication of the burden of proof, violation of the terms of reference and procedural error especially as it touches on issues for determination. I have carefully perused the facts and arguments of parties on this ground and I agree as I should with the learned Counsel for the Respondent that the allegation has no merit. There is nothing to suggest that the award was outside the contract of parties.

In all, this application is liable to be and is hereby dismissed for want of merit.

SIGNED
HON. JUSTICE H.B. YUSUF
(PRESIDING JUDGE)
18/02/2021