ARB/21/2018

HIGH COURT OF UGANDA
COMMERCIAL DIVISION
05 DEC 2018
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THE REPUBLIC OF UGANDA

CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION

CAD/ARB/39/2016

1. KETAN PATEL
2. RAJESH PATEL
3. NALINI NARENDRA PATEL
4. NARENDRA PATEL.....APPLICANTS/CLAIMANTS

VERSUS

1. COMESA COMMERCIAL COMPANY LTD .....1st RESPONDENT
2. TUFFOAM UGANDA LIMITED.....2ND RESPONDENT

AWARD

FEES PAID: 10,000
RECEIPT NO: 18416194
HIGH COURT OF UGANDA
COMMERCIAL DIVISION
DATE: 05-12-2018

THE REPUBLIC OF UGANDA

CENTRE FOR ARBITRATION AND DISPUTE RESOLUTION
FORM NO.11

CAD/ARB/39/2016

5. **KETAN PATEL**
6. **RAJESH PATEL**
7. **NALINI NARENDRA PATEL**
8. **NARENDRA PATEL.....APPLICANTS/CLAIMANTS**

VERSUS

3. **COMESA COMMERCIAL COMPANY LTD .....1st RESPONDENT**
4. **TUFFOAM UGANDA LIMITED.....2ND RESPONDENT**

AWARD

Jurisdiction:

Under Clause 23 of the Agreement for sale of shares dated 25th September, 2014 the Parties agreed to resolve disputes by an Arbitrator mutually agreed by the parties.

Procedural Summary:

The Arbitrator's declaration of acceptance and statement of impartiality was signed on the18th November 2016.The proceedings were however delayed owing to a stay of proceedings following a preliminary objection filed by Counsel for the second Respondent objecting to the claimants application to add the 2nd Respondent as a party.

The Claimant was represented by Counsel Deepa Verma Jivram of M/s Verma Jivram & Associates and Counsel Bryan Kalule of M/s A.F Mpanga , Bowmans Advocates. The 1st

Respondent was represented by Counsel Shafir Hakeem Yiga of M/s YIGA & Co. Advocates and the 2nd Respondent by Counsel Galisonga Julius of M/s Galisonga & Co Advocates.

The Party Undertaking with the schedule of events was filed on 8th December 2016. It was agreed that normal rules of procedure with modification would be applied. The rules of evidence were adhered to and evidence was on oath. Before hearing of the matter Counsel for the 2nd Respondent objected to joining his client to the suite on grounds that the arbitration proceedings arose out of the arbitration clause in a contract entered into between the Claimants and the 1st Respondent, and that the tribunal had no jurisdiction over the 2nd respondent. Secondly that the 2nd Respondent was not a party to the contract in issue and that there was no allegation of wrong doing occasioned by the 2nd Respondent and thus no cause of action had been disclosed against the 2nd respondent.

It was ruled that it was necessary to join the 2nd Respondent as party on the grounds that there is direct commonality between the 2nd respondent and the other parties. Secondly in response to the claim the 2nd respondent had raised several important issues and allegations which had to be resolved in order to definitively dispose of the matter and avoid multiplicity of cases.

Most of the subsequent proceedings were not attended by Counsel for the 2nd Respondent despite being served with hearing notices. In his submission Counsel for the 2nd Respondent raised the same issues as in the preliminary objection, that the 2nd Respondent was improperly joined as a party to this claim. The objection was based on the same grounds. I concur with the submission of Counsel for the Claimants that the objection raised in submission is barred by the doctrine of *res judicata*. It was already adjudicated upon and determined by this tribunal. The 2nd Respondent though not a party to the agreement was at the centre of the transaction and there is direct commonality between the 2nd Respondent and other parties .The Agreement from which the dispute arose was an Agreement for sale of the 2nd Respondent as a going concern and was sanctioned through a company resolution.

Counsel for the 2nd Respondent having failed to show sufficient cause of their non - appearance during most of the hearing I have considered only the evidence adduced before the tribunal to make the award in accordance with the mandate given to the arbitrator under S.25(c) of the Arbitration and Conciliation Act.

The Claimant called four witnesses:

1. Mr.Narendra Patel [CWI]
2. Mr..Nagaraj Desh Pande [CW2]
3. Mr.Murtuzaali Dalal [CW3]
4. Mr. Kafuuko Waibi [CW4]

The 1ST Respondent called one witness:

1. Mr.Okbamicael Ymesghen [RW1]

Background Facts:

The summary of the background facts of the case may be stated thus:

On the 8th April 2014 at an extra ordinary meeting of the 2nd Respondent, the Claimants resolved to sell their shares in the 2nd Respondent to the 1st Respondent and a resolution to that effect was signed on the 27th August 2014.On the 25th September 2014, the Claimants executed an agreement with the 1st Respondent for the sale of their shares in the 2nd Respondent for a total consideration of USD 3,200,000 (US Dollars Three million two hundred thousand. Under cause 3(b) of the Agreement the 1st Respondent undertook to pay the Claimants a sum of USD 1,800,000(US Dollars One million eight hundred thousand) as part of the total consideration upon execution of the Agreement. Under Clause 3(b) the parties agreed that the balance of the consideration, USD 1,400,000(US Dollars One million four hundred thousand) was to be paid within one year from the date of execution of the agreement, that is by the 25th September 2015. The 1st Respondent agreed to provide the Claimants' an irrevocable Bank Guarantee from ECO Bank Ltd as security in respect of the balance of USD 1,400,000.

An addendum dated 12th March 2015 was executed to revive, invoke and amend the Agreement. Under clause 2(a) (i) of the Addendum, the Bank Financial Guarantee which the 1st Respondent had agreed to provide from ECO Bank Ltd was replaced with an Insurance Guarantee to be procured by the 1st Respondent from the Insurance Company of East Africa Ltd (ICEA). The guarantee was issued on 2nd March 2015 whereby the Insurance Company undertook upon default by the 1st Respondent to pay the sum of USD1,400,000 within twelve months, to make payment equivalent to the said amount upon a claim made by the Claimants to the insurance Company. The Guarantee covered the period 19th February 2015 to 18th February 2016.

The Claimants case is that the 1st Respondent failed to pay the full consideration as agreed and stopped the Insurance Company (ICEA) from paying the sums guaranteed, thus the Claim for breach of contract and recovery of unpaid shares

The Claimant prays for the following remedies:

a] An order for specific performance of the contract between the Claimants and the 1st Respondent.

b] An order for payment of US Dollars Two million one hundred thirty seven thousand one hundred eighty one (USD 2,137,181).

c) General damages for breach of contract

d) Interest on (b) and (c) above.

e) Recovery of unpaid shares in the 2nd Respondent Company

f) Costs of the suit

g) Any other relief, as ordered by the Arbitrator.

In response to the claim, the 1st Respondent denies owing the Claimants' any money and prays that the claim be dismissed entirely with costs. Under counter claim the 1st Respondent alleged misrepresentation, non-disclosure, fraud, breach of contract and unjust enrichment by the Claimants, causing the 1st Respondent to suffer loss. The 1st Respondent prayed that:

a) An order is made for the refund of the money paid in excess of the amount paid in respect to the valuations ,UGX 4,236,796,000/=
b) In the alternative and without prejudice to (a) above, an order for special damages for UGX 4,236,796,000/=
c) An order for payment of special damages of USD 254,405
d) An order for general damages.
e) Cost of these proceedings
f) Any other relief as the Arbitrator deems just and applicable

The 2nd Respondent prayed that the tribunal determines that:

a) The 2nd respondent was not party to the contract,

b) The 2nd Respondent did not owe any obligations to the Claimants and to the 1st Respondent and therefore was not in breach of any of the provisions of the contract

c) The Claimants' claim against the 2nd Respondent and subsequent prayers for orders fails accordingly;

d) The claimants pay the 2nd Respondent costs for defending this claim.

The following issues were framed and agreed upon before the tribunal:

1. Whether there was breach of the sale agreement dated 25th September 2014.
2. Whether the claimants had a duty of disclosure in respect of the land tenure and the good will of the 2nd Respondent and if so whether this duty was breached.
3. Whether the Claimants misrepresented the value of the company at the sale.
4. Whether the Claimants were fraudulent in their dealings with the 1st Respondent in the sale of the company.
5. Whether the Claimants took dividends amounting to UGX 3,000,000,000 to which they were not entitled.
6. Whether the parties are entitled to the remedies sought.

Discussion of the Issues

Before dealing with the issue, I will comment briefly on the point of law raised in the submission by Counsel for the 1st Respondent that the 4th Claimant has no cause of action against the 1st Respondent and no locus to bring this claim. On page 3 of the Record of proceedings it is recorded that a date was fixed specifically to deal with any preliminary matters before hearing the matter and the meeting was attended by Counsel for the 1st Respondent. This application is of preliminary nature, and should have been brought at the commencement of the proceedings. To raise such objection at this point is an absurdity and likely to impact on the fair dispensation of justice. The case of ***Nassan Wasswa & 9ors vs Uganda Rayon Textiles [1982-1983] HCB 137*** cited in the submission by Counsel for the Claimant provides very good precedence that is applicable to this case. In that case it was held that ***"the preliminary objection itself was misconceived as it was raised at the wrong time. That a preliminary objection by its very nature should be raised at the commencement of the proceedings since it is proper to bring to the notice of the court an alleged irregularity which must be cured before the case proceeds."***

As pointed out by Counsel for the 1st Respondent arbitration proceedings are bound by the law and its principles. However it is also true that in arbitration, whereas the law and rules of procedure are followed, there is flexibility in that where procedure inhibits the expeditious disposal of a matter such procedure will not be strictly followed provided the diversion does not in any way interfere with the disposal of the suit in a fair and just manner for all the parties. In the present case the parties agreed under **clause 9** of the Party Undertaking that the normal rules of procedure with modifications will be applicable. Thus considering that Counsel for the 1st Respondent has not only brought the application at the wrong stage of the proceedings, he has also not demonstrated how the 4th Claimant being part of the proceedings will prejudice the 1st Respondent's case. Accordingly the objection is overruled.

Issue 1: Whether there was breach of the agreement dated 25th September 2014.

The Agreement is not disputed and the Claimants' claim is premised on the belief that they discharged their obligations under the Agreement and there is no justification for the 1st Respondent's failure to pay the full consideration. Both are in agreement that a breach of contract occurs when a party to the contract fails to fulfill the obligations imposed by the terms of the contract as stated in the case of ***Nakawa trading Co.Ltd v Coffee Marketing Board [1994]11KALR 15.***

Counsel for the 1st Respondent submitted that there was no breach of contract by the 1st Respondent, and that the shareholders had no right to sell the 2nd respondent. This calls for examination the obligations of the claimants and the 1st Respondent under the Agreement and determining whether those obligations were fulfilled, and determination of the rights of the shareholders and directors in relation to the sale of the company.

I will start with the later. It is an undisputed fact that the 1st, 2nd and 3rd Claimants were the shareholders of the 2nd Respondent and the 3rd and 4th claimants were the Directors of the 2nd Respondent as seen in the company Form of Annual Return, as at May 2012. Counsel for the 1st Respondent submitted that because the company is a separate legal entity, the Claimants had no right to sell the company (2nd Respondent). It is an established principle of law that the company is a separate legal entity, but the company acts through humans, specifically through its

Directors. A company may be wound up if it is no longer viable to do business, or ownership may change through the sale of shares, mergers etc but the company being a virtual being these actions are executed by humans. Therefore the Directors of a company are mandated to act on behalf of the company through Board Resolutions. In the present case the 3rd and 4th Claimants, being Directors in the company, had mandate to sign the shareholders Resolution to sell the 2nd Respondent, as well as the Sale Agreement on behalf of the company. Therefore the argument advanced by Counsel for the 1st Respondent in submission that the claimants had no right to sell property belonging to the 2nd Respondent is misconceived in the circumstances. The fact that the sale agreement is not disputed further defeats the argument that the claimants had no right to sell.

The shareholders resolved to sell the company as a going concern on the terms spelt out in the Agreement of sale dated 25th September 2014. The consideration for the shares was agreed at US$3,200,000 and the obligation of the 1st Respondent was to pay the consideration for the sale in the following manner. Under Clause 3(a) USD1,800,000, was to be paid upon execution of the agreement. The balance, USD 1,400,000 under clause 3(b), was to be paid by the purchaser to the vendors within one year from the date of the execution of the Agreement, to be deposited in an escrow account. This amount was also to be secured by a financial guarantee.

In addition the treatment of stock of finished goods and raw material as at take over date is provided in clause 8 of the Agreement which reads that "the stock of finished goods and raw material as at the takeover date shall be sold to the purchaser at cost price and the purchaser shall accordingly pay for them within a period of six months from the date of takeover of the company. The purchaser shall account for the utilization of stock on regular basis and arrange for payment based on this utilization"

The Claimants obligations under the agreement were to provide the title in respect of the company property comprised in LRV.12 FOLIO 10 as security for the loan from Crane Bank [clause 3(g)]. The Claimants also had an obligation to hand over management of the company to the 1st Respondent upon payment of the initial deposit of USD 1,800,000,000.

Counsel for the 1st respondent contends that the claimants delayed to submit the title to Crane Bank to secure the loan to the 1st respondent which delayed the release of money and subsequently to the loss due to drop-in the value of the shilling against the dollar, and that this amounted to a breach of contract.

On this point I would like to refer to the sanction letter by Crane bank. The sanction letter is dated 13th April 2015 and refers to a loan application dated 5th April 2015. The title was submitted to the bank on the 12th March 2015 upon request as per the covering letter submitted in evidence. It is apparent therefore that the title was actually submitted even before the loan application form. It is therefore not clear how the loan facility could have been delayed by the Claimant. In re-examination, CW3 testified that he was approached by Crane Bank about the land title that the 1st Respondent had offered as security for a loan facility and the 4th Claimant had agreed that as and when Crane Bank requests it should be availed. According to the evidence on record the claimant did avail the title when the request was made. It is also noted that it was not a condition precedent to avail the title immediately upon executing the agreement because the 1st Respondent had an option to use it or not to use it. Clause 3(g) stipulates that ***".....the purchaser <u>may</u> use the land title in respect of the company's property comprised in LRV.12 as security for the loan facility."***

It is provided in clause 4 of the sale agreement that **"The Purchaser shall take over possession and Management of the company on payment of the initial deposit as herein agreed (the "Take –over date"). For this purpose, it is hereby agreed that the vendors shall avail to the purchaser Management accounts of the company as at the said take over indicating all assets and liabilities of the company as at the said date"**

Payment of the first installment was a condition precedent to hand over of the factory. According to the letter by the 3rd Claimant dated 2nd March 2016, payment was received on the 20th June 2015 and the factory was handed over on the 21st June 2016.

CW3 testified that he handed over the financial statement to the 1st Respondent and RW1 testified that he took over the factory and was operating it. Considering the Claimants handed over the factory (2nd respondent) and the land title as per agreement, the question whether there was breach on the part of the Claimants is answered in the negative.

I will now consider the obligations of the 1st Respondent. USD 1,800,000 was due for payment upon execution of the agreement. The agreement was executed on the 25th September 2014 but according to the evidence on record, only USD 1,545,547 was paid leaving a balance of USD 254,453 outstanding on the first installment. This amount is not disputed as outstanding. In cross examination RW1 testified that he paid USD 1,545,547 and that the balance is not paid yet but contends that it is not payable. Counsel for the 1st Respondent submitted that the shortage was due to fluctuating foreign exchange rate and delay by the claimant to avail the security for the bank loan. However evidence is not adduced to confirm the allegations. His argument is based on section 45(1) of the Contracts Act 2010 which provides that when a contract contains reciprocal promises and one party to the contract prevents the other party from performing his or her promise, the contract shall become voidable at the option of the party who is prevented from performing his/her promise.

I have perused the letter on record dated 17th June 2015 written by the 4th Claimant and in my understanding the letter was acknowledging information given by the bank that the loan facility would be less owing to handling charges and would therefore be short of the expected amount when converted. It does not state nor imply that the shortage was due to foreign exchange rate. The approved loan facility and the amount disbursed after deductions are shown in Uganda shillings. The letter reads ***""We understand that due to your commitment fees and expenses that you need to recover from COMESA the amount remaining out of this loan shall be approximately UGX 5.1 BILLION..This amount when converted to US 4 at the current exchange rate will be lower than US $ 1.8M".*** I am not convinced that the shortage can rightly be attributed to the conduct of the Claimant so as to render the contact voidable.

In his evidence in chief RW1 stated that the 1st Respondent applied for the loan sometime in August 2014 when the exchange rate was UGX 2650 but there is no evidence to support the assertion. On the contrary, the sanction letter by Crane Bank addressed to the 1st Respondent names the loan application date as 5th April 2015. It is also noted that on the date RW1 purports to have applied for the loan, the agreement from which this dispute arose did not exist. It is also the evidence of RW1 that the loan was approved by October 2014 but no evidence has been tendered to support the claim.

In the Agreement dated 7th September 2015 which was admitted in evidence and signed by both parties the amount short paid on the initial installment was acknowledged and the 1st Respondent agreed to the amount together with the stock value within six months from the 22nd June 2015. The Agreement was signed by RW1 representing the 1st Respondent. Under clause 19 of the sale agreement RW1 warranted that he had mandate to represent the 1st Respondent. It is also provided under clause 18 of the sale Agreement that a variation of the agreement shall be effective if reduced in writing and signed by or on behalf of a duly authorized representative of each of the parties.

It follows therefore that the amount of UDS 254,453 due and owing cannot be faulted on foreign exchange rate or default by the claimant and failure to pay the said amount would amount to a breach of contract.

Regarding the outstanding payment of USD 1,400,000 it clearly stated in the Agreement, under clause 3(b), that it shall be paid by the purchaser to the vendors within one year from the date of the execution of the Agreement that is by the 25th September 2015. Counsel for the 1st Respondent contends that the payment date was varied to 20th June 2017, at the meeting held on 7th September 2015. However in cross examination RW1 admitted that the said amount was still outstanding. It is also clear that the said amount was part of the consideration due to the vendor contrary to the assertion by Counsel for the 1st respondent that it was intended to pay for liabilities. Clause 5 of the agreement provides that the Purchaser shall not be responsible for any liabilities incurred by the company prior to the Take – over date. The money to be deposited in the escrow account was to facilitate off setting of only liabilities that were incurred before the take - over date. These outstanding liabilities are enumerated in the agreement and include under clause 5 outstanding liabilities to employees, bank liabilities. No evidence had been adduced of any such liabilities.

According to the evidence of CW1 the shares and the assets were valued separately. The value of stock was not contested by the 1st respondent. They refused to pay on grounds that the stock and materials belonged to the 2nd respondent and not to the shareholders.CW2 testified that together with Mr Kafuko(CW4), a representative of RW1 revalued the stock, materials and machinery. The report was signed by the two and the finding have never been disputed. CW2 in his witness statement paragraph 10, stated that after verification of the value of stock the sum due to the

claimant was found to be $737,181. This amount remains unpaid whereas in the agreement the 1st respondent agreed to pay for stock and materials, which amounts to a breach of contract.

Considering the Claimants handed over the factory (2nd respondent) as per agreement and RW1 having admitted that part of the purchase consideration was not paid whereas it is well past the due dates ,the issue as to whether there was a breach of the agreement on the part of the 1st Respondent is answered in the positive.

Issue 2: Whether the claimants had a duty of disclosure in respect of the land tenure and the good will of the 2nd Respondent and if so whether this duty was breached.

Non-disclosure of material facts is alleged in respect to the land tenure system and goodwill. In his witness statement RW1 testified that upon expressing interest in purchasing the company he was given documents establishing their authenticity as well as documents stating the valuation of the company including an appraisal report and valuation of specified assets of the 2nd Respondent by Associated consulting Surveyors. Clause 3 of the report states inter alia that the property is held on a lease, granted out of a mailo estate, for a term of 118 years with an unexpired term of 27 years. The information was clearly stated in the documents availed to the 1st Respondent and the1st Respondent ought to have taken time to carefully study the documents.

Counsel for the 1st Respondent submitted that he is in agreement that there is no absolute duty for disclosure and such is not the 1st respondent's claim. He argues that the 1st respondent's concern is that the price of the shares was based on a valuation summarized in a schedule of values and other documents which were presented to PKF, the transaction adviser. The same values were given to RW1 and are alleged to be misrepresentations. As testified by RW1, he relied on these values but he did so voluntarily and by so doing he neglected his duty to carry out due diligence as any prudent business man would do, which would include hiring financial advisers. In cross examination he says he was not forced to sign the agreement. I wish to rely on the case cited by counsel for the claimant **Waga B Francis v The Chief Administrative Officer,Maracha & Another HCCS No.5 of 2016** where it was held that ***".....there is no general implied duty of good faith performance in contracts.....it would create***

commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract"

CW3 testified that in addition to the documents received from the claimant they considered the general circumstances surrounding the business of the company such as goodwill, customer base and all that put together came to a value of $4million which was negotiated to $3.2 million.

The 1st Respondent further disputes the values given to the assets of the company, and contends that they are excessive but has not produced any evidence to challenge the values assessed by the vendor's consultants. He had the freedom to carry out due diligence to ascertain the value of the business, and they negotiated the price and freely entered into contract. Court cannot interfere with the agreed terms of the contract on mere allegations of misrepresentation or disclosure where consenting parties freely entered into agreement.

Regarding goodwill CW1 testified in cross examination that he was not aware of the existence of Mbale Tuffoam and did not authorize use of the name. His evidence was not rebutted by the 1st respondent. There is no evidence on record to prove the claimants new about the existence of a competitor with a similar name. There is also no evidence adduced to demonstrate any negative impact on the business due to Mbale Foam.

I find that the claimant was not in breach of any duty to disclose.

Issue 3: Whether the Claimants misrepresented the value of the company at the sale

The 1st respondent pleaded that there was a misrepresentation of the value of the company assets in valuing the shares at the price of USD 3,200,000 whereas the share capital of the company was only UGX 1,300,000,000. Share capital represents the nominal value of shares, which is distinguished from the market value or going concern value. CW3 testified that nominal value is the value of the shares that the company issues. It is the value of each share to its shareholders as defined in the memorandum and articles of association and it is assessed when the company is formed. He further testified that when selling the company as a going concern the actual valuation would differ from the nominal value based on the financial and the goodwill of the company and future potential at a particular viewing time. He said the actual assessed value in

this transaction was $4million. It was also alleged that the value of the plant and machinery, value of land, buildings was misrepresented and inflated.

It is the evidence of RW1 that he received all the documents relating to the valuation of the company and that he carried out due diligence. He testified that even after being told the price was not negotiable he still advised his Board members to proceed with the transaction. He also admitted in cross examination that land appreciates in value.

John Joseph Ogola in Business law page 137 defines a misrepresentation as "an untrue statement of fact which is made by a contracting party to the other party, before or at the time of contracting which is intended to induce and actually induces the person to whom it is made to enter into the contract". In the case before the tribunal there is no evidence adduced to prove the Respondent was induced to enter the agreement.

In cross examination RW1 testified that he chose to rely on the valuation by the Vendor's Agent. But even assuming the vendor was dishonest the vendor did not owe the purchaser a duty of honesty ***Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111***

I find that the 1st respondent lacked a clear understanding of the procedure for assessing the value of shares and the difference been the nominal value and market value thus interpreting the difference as a misrepresentation of the value of the company.

Issue 4: Whether the Claimants were fraudulent in their dealings with the 1st Respondent in the sale of the company.

The 1st Respondent pleaded the claimants and their Agent PKF made misrepresentations and non-disclosure with intention to defraud the 1St respondent and have unfair advantage over the 1st respondent in the transaction and inflate the value of the company, and that the dishonest representation and non-disclosure induced the 1st respondent to enter the agreement for purchase of shares at the exorbitant, overvalued price. However no evidence was adduced to prove fraud or fraudulent intent in the transaction from which the dispute arose.

The argument by Counsel is based on the mistaken belief that the nominal value of shs1,300,000,000 is the true market value of the company. ***Pocklington Foods Inc v The Queen of Alberta, 1998, ABQB 279, Justice K.G.Ritter*** addressed the concept of value as applies to

acquisition of shares and assets, and stated that the word value "is synonymous with market value or fair market value. He said determination of value is an art and not a science. Value cannot be determined with mathematical precision. Appraisers use their subjective knowledge in determining value of assets. Similarly share evaluators apply their subjective knowledge to the treatment of value.

In this case valuation reports were admitted in evidence that were prepared by companies with expertise in that area and the documents and capacity of the authors have not been contested. In fact it is the evidence of RW1 that he relied on these documents because he believed in their expertise.

I find that no fraud has been proved against the claimant.

Issue 5: Whether the Claimants took dividends amounting to UGX 3,000,000,000 to which they were not entitled.

The 1st respondent testified that he took over the factory in June 2015.whereas the dividend were for the financial year ending 31st May 2015.Payment for sale of the company property was received on 11th September 2014. RW1 evidence is that the 1st Respondent took over the company [2nd respondent] on the 21st June 2015 having paid the initial installation of the consideration on the 20th June 2015. It is provided in clause 4 of the sale agreement that **"The Purchaser shall take over possession and Management of the company on payment of the initial deposit as herein agreed (the "Take –over date"). For this purpose, it is hereby agreed….."** It follows that until the takeover date of 21st June 2015 the claimants were owners of the shares in the 2nd respondent company and were entitled to any dividends declared for the financial year ended May 2015.

It was held in ***Lubbock v British Bank of South Africa (1892)2 Ch.108,*** a profit which has been made on the sale of the company's fixed assets can be distributed to members by way of dividend.

In the shareholders resolution of 8th April 2014 when it was resolved to sell the 2nd respondent as a going concern it was expressly stated that the transaction was exclusive of property comprised in LRV.2399,FOLIO 23, PLOT 7 at Baskerville Avenue. CWI confirmed in reexamination that the property was not included in the sale. Ownership was premised upon payment of the first

installment. Therefore it was on the 20th June 2015 that the 1st respondent took over the business, whereas the dividend issued was for financial year ending May 2015. I find that the claimants were entitled to the dividends for the period.

Issue 6: Whether the parties are entitled to the remedies sought.

Order for specific performance

Section 64(1) of the Contracts Act 2010 provides that where a party to a contract is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract .In the present case, having found that the1st respondent breached the contract the claimant is entitled to an order for specific performance of the promise under the agreement. According to the evidence on record the amount due comprises the following:

a) USD 254,453 which is the balance on the initial deposit of USD 1,800,000
b) USD 482,728 , value of stock, materials ,plant and machinery ,less cost of wear and tear
c) USD 1,400,000 the balance on the share price

General damages

The claimant prayed for general damages of UGX 200,000,000 for the inconvenience suffered and hardship endured over a long period as a result of the respondent's conduct. In the case of **Hadley v Baxendale (1854)9 Exch**. The rule was established that where two parties have made a contract which one of them has broken the damages that the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered as either arising naturally, i.e. according to the usual course of things, from such breach itself ,or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it, per Alderson B. It was also held in the case of **Assist (U) Ltd vs Italian Asphalt & Haulage & Anor HCCS No.1291 of 1999** that the consequences could be loss of profit, physical inconvenience, mental distress, pain and suffering.

In the present case it has been illustrated that the claimant has been inconvenienced by appearing for mediation before the Insurance Regulatory Authority, appearing for arbitration,

enduring lengthy proceedings and acquiring services of legal representation as a result of the breach of contract.

On the quantum of damaged, Courts are mainly guided by the value of the subject matter, and economic inconvenience that a party may have been put through. In the case of **Haji Asuman Mutekanga vs Equator Growers (U) Ltd, SCCA No.7 of 1995, Oder JSC** held that general damages in a breach of contract are what a court may award when a court cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man.

In this case the subject matter is USD 2,137,181. Taking into consideration the value of the claim and the length of time the claimant has been deprived and the stress and suffering endured the general damages prayed for appear reasonable in the circumstances and are awarded as prayed.

Interest

The claimants have been deprived of profitable use of their money for almost three years and deserve to earn interest on it. In the case of ***Crescent Transportation Co. Ltd vs BM. Technical Services Ltd CACA 25/2000*** it was held that "….. where no interest rate is proved, the rate is fixed at the discretion of the court. In the present case under Clause 3 (c) of the Agreement it is stipulated that upon failure to pay the balance as agreed the purchaser shall pay to the vendor interest on the outstanding amount from the date when they were due to the date of payment at the rate of 2% above the average base lending rate of commercial banks per annum. I find it appropriate to use the rate that was agreed to by the parties.

Summary of award:

Having carefully considered the merits of the evidence before the tribunal judgment is entered for the Claimant in the following terms:

1. It is declared that the respondent committed a breach of contract in refusing to pay the balance of the agreed consideration for shares and stock following the sale of the company as a going concern and I hereby order specific performance of the contract.
2. Special damages of ~~UGX~~ USD 2,137,181 as prayed.

3. In the alternative, in the event that the 1st Respondent fails to pay the 1st, 2nd and 3rd claimants the outstanding sum on the shares sold to the 1st Respondent, it is ordered that the 1st, 2nd and 3rd Claimants recover from the 1st Respondent the unpaid shares in the 2nd Respondent.
4. Interest on special damages at the rate of 2% above the average base lending rate of commercial banks per annum from the date the money became due for payment till payment in full.
5. General damages of UGX 200,000,000 for breach of contract
6. Interest on general damages of 10% per annum from the date of award till payment in full.
7. Each party shall bear its own costs as agreed at commencement of proceedings in the Party Undertaking.

SIGNED:..... **Date** ....3rd October 2018....

Solome L.M.Luwaga
ARBITRATOR