Uganda: Supreme Court

Fulgensius Mungereza v Africa Central (Civil Appeal No.18 of 2002) [2004] UGSC 9 (16 January 2004)

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THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

CORAM: (ODOKI, CJ, ODER, TSEKOOKO, MULENGA, AND KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL NO.18 OF 2002

BETWEEN
FULGENSIUS MUNGEREZA :: APPELLANT
AND
PRICEWATERHOUSECOOPERS
AFRICA CENTRAL:: RESPONDENT

{(Appeal from the judgment of the Court of Appeal at Kampala (Okello, Mpagi- Bahigeine and Engwau, JJA) in Civil Appeal No. 34 of 2001)}

JUDGMENT OF ODOKI, CJ.

This is an appeal from the judgment of the Court of Appeal whereby the decision of the High Court (Commercial Division) staying the appellant's suit was upheld.

The appellant, who was a certified Public Accountant, became a partner in the firm of Coopers and Lybrand in January 1986. On 20th November 1996, the partners of Coopers and Lybrand, including the appellant, together with other partners of Coopers and Lybrand in Africa Central, comprising of Kenya, Tanzania, Uganda, Zambia, Mauritius and Ghana, entered into an agreement to create a single regional entity called Coopers and Lybrand Africa (CALA), with effect from 1st September 1997.

In September 1997, the global organisations of Coopers and Lybrand and the firm of PricewaterhouseCoopers wherever they existed in various countries merged to form professional

partnerships known as PricewaterhouseCoopers in those respective countries, with effect from 1st July 1998. The Uganda chapter was accordingly registered as PricewaterhouseCoopers, with the appellant as one of the partners.

The members of PricewaterhouseCoopers in the Central Region signed on 1st July 1998, a regulatory Framework Agreement - Annexture D - for the conduct of the business in their respective countries. Pursuant to the Framework Agreement, the parties whose names appeared in Schedule I of the Agreement formed an association known as PricewaterhouseCoopers Africa Central. However, the individual members remained partners in their respective countries.

On 28th April 2000, the Chief Executive Officer of PricewaterhouseCoopers Africa Central from Nairobi informed the appellant that the partners in PricewaterhouseCoopers (Uganda) had lost confidence in him and were no longer interested in working with him. After protracted negotiations by the Chief Executive Office for an amicable withdrawal, the appellant eventually left PricewaterhouseCoopers Uganda. The appellant consequently filed a civil suit against PricewaterhouseCoopers Africa Central, claiming special damages of US$ 6200 as leave passages for 1998, US $ 106,000 as refund on his tax account held by the respondent, and general damages for breach of contract.

The respondent pleaded, in its written statement of defence, that the appellant had no cause of action against it. It maintained that PricewaterhouseCoopers Africa Central was not a partnership but an association of all the partners in the seven country firms in the Africa Central region. It stated that it was never registered nor did it carry out any business in Uganda. The respondent, however, pointed out that the only monies owed to the appellant was US $ 289. It contested the jurisdiction of the High Court to try the matter asserting that the issues in dispute were the subject of a Mediation and Arbitration under Clause 29 of the Framework Agreement, for which procedure the respondent intended to seek stay of the proceedings in the suit. The respondent counter-claimed US $ 56,596, general damages for breach of contract, and sought an injunction restraining the appellant from interfering in any way, with respondents business and employees.

Subsequently, on 8 September 2000, the respondent by chamber summons, brought under Sections 40 and 41 of the Arbitration and Conciliation Act No.7 of 2000 , applied for orders staying the proceedings in the High Court civil suit, and referring the matter to arbitration in accordance with Clause 29.2 of the Framework Agreement.

The respondent contended that according to Clause 29.1 of the said Agreement, disputes arising in respect of the said agreement had to be submitted by the executive committee to the Board of Governance Entity for mediation, and if the Board failed to come up with a mutually agreeable settlement, then the matter would be resolved by arbitration. The appellant further contended that the respondent had, in fundamental breach of the Agreement, dismissed him from the partnership and denied him leave passage, the refund of balance on his tax account as well as his capital contribution to the firm. Therefore, the appellant concluded, he could not afford going to London for arbitration and/or to pay his lawyers to represent him at the arbitration. The learned trial judge allowed the application, holding that the alleged impecuniosity did not render the Agreement incapable of being performed, so as to bring it within the exceptions under Section 41 of the Arbitration and Conciliation Act. She ordered that the civil suit between the parties be stayed and the matter referred to arbitration in accordance with Clause 29 (2) of the Agreement. The appellant appealed to the Court of Appeal where his appeal was dismissed; hence this appeal.

The appellant has appealed to this Court on three grounds. They are as follows:

> ***1. The learned Justices of Appeal erred in law in holding that plaintiffs' poverty was not sufficient ground for exercising any discretion by the High Court to refuse to order a stay.***
> ***2. The learned Justices of Appeal erred in law in posing the following question in respect of Clause 29.1 of the frame work Agreement, namely***

"I think the question is whether non observance of the above stipulation as to mediation resulted in the appellant's poverty, (per Mpagi-Bahigeine, JA.)"

> ***3. The learned Justices of Appeal erred in law in failing to consider grounds 2 and 3 of the Memorandum of Appeal and to decide them in favour of the appellant."***

The main argument of Dr. Byamugisha, learned counsel for the appellant on ground one, was that the Court of Appeal ignored considering the exceptions to Section 41 of the Arbitration and Conciliation Act. Learned counsel submitted that Mpagi-Bahigeine, JA, misdirected herself in her lead judgment after considering the case of ***Fakes vs Taylor Woodrow Construction Ltd*** (1973) I All E.R 670 when she held that the respondent was not responsible for the poverty of the appellant. Dr. Byamugisha also criticised the concurring judgment of Okello, JA, when he held that there was no sufficient evidence of the appellant's poverty. It was the appellant's case that he was rendered too poor to afford the cost of travel to London, which included the cost of lawyers. It was submitted that the appellant's evidence that he was too poor was not controverted. Therefore, learned counsel contended, the arbitration agreement was incapable of being performed due to the poverty of the appellant.

Learned counsel for the appellant referred to the decision of ***Slessen L J in Smith vs Pearl Assurance Co. Ltd*** (1939) I All E.R. 95 where it was held that the discretion could not be used to interfere with the contractual agreement arrived at between two principal parties. Dr. Byamugisha submitted that this was a hardline approach which was contrary to the Arbitration and Conciliation Act which gives exceptions in Section 41.

In reply, Mr. Masembe Kanyerezi, learned counsel for the respondent, submitted that incapacity to perform an agreement does not include the means to contest the arbitration. He relied on ***Halsburys Laws of England,*** paras 616 and 630.

He also cited the case of ***The Rena K*** (1979) I QB 377 at pages 378 and 393, where it was held that inability to satisfy the award did not make the agreement incapable of being performed. He referred to the cases of ***Smith vs Pearl Assurance Co. Ltd*** (supra) and ***Home Overseas Insurance Co. (UK) Ltd*** (1989) 3 All E. R. 74 , and ***Shell (U) Ltd vs Agip (U) Ltd.*** SCCs No. 49 of 1995 (unreported) which emphasised the need to enforce arbitration agreements.

Mr. Masembe Kanyerezi sought to distinguish the case of ***Fakes vs Taylor*** (supra) on the ground that this was a case of insolvency and not poverty. There was bad faith because the defendant wanted to go to Court to stop the arbitration. There was legal aid available unlike in the present case. There was also proof that fakes had no means because he was insolvent and therefore his money had to go to creditors. In the present case, counsel contended, the appellant did not show how much the arbitration would cost. There was no evidence in his affidavit to raise a triable issue that poverty was caused by the respondent. It was the learned counsel's submission that ground one should fail as the Court of Appeal was alive to the exception and the scope of the law, and that in those circumstances, it was a proper case in which to order a stay.

In their judgments both Mpagi-Bahigeine, JA, and Okello, JA, addressed the issue of whether the appellant came within the exceptions to Section of 41 of the Arbitration and Conciliation Act 2000 . Section 41 provides as follows:

> ***"When seized of an action in a matter in respect of which the parties made an arbitration agreement referred to in Section 40 , the Court shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed."***

Clause 29.1 of the Framework Agreement, which provided for mediation of disputes between members before submission to arbitration stated,

> ***"Mediation: If any dispute or difference in respect of this Agreement other than an unresolved Matter (as defined in the Merger Agreement) (a Dispute)" shall arise between the members, any and all such Disputes (including the validity, scope and enforceability of this clause) whenever arising shall first be submitted (by the Executive Committee) to the Board of the Governance Entity for Mediation. If the Board of the Governance Entity fails to negotiate mutually acceptable settlement of the Dispute within 30 days of such Dispute having been submitted to such Board, such Dispute shall be finally settled by the binding arbitration procedures set forth in Clause 29.2 unless the Board of the Governance Entity recommends any other binding arbitration procedure in which case the***

> ***parties agree to submit such Dispute to such arbitration so recommended."***

Clause 29.2 provided for reference of disputes between members to arbitration, as follows:

> ***"Arbitration:** Any dispute arising out of or in connection with this agreement including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of Arbitration which Rules are deemed to be incorporated by reference into this Clause. The tribunal shall consist of a sole arbitrator. The place of arbitration shall be London and the language of arbitration shall be English."*

The question is whether the appellant's poverty brought him within the exception of the agreement ***"being incapable of being performed"*** under section 41 of the Arbitration ad Conciliation Act. The answer to this question depends on the construction placed on the words ***"incapable of being performed;"*** which have been a subject of judicial interpretation.

In her judgment, Mpagi-Bahigaine, JA, considered both the cases of ***Fakes Vs Taylor Woodrow Construction Ltd*** (Supra) and ***Smith V. Pearl Assurance Co. Ltd. (supra).*** In relation to ***Fakes V. Taylor Woodrow Construction Ltd***

(supra) she said,

> ***"in Fakes V. Fakes V. Taylor Woodrow Construction Ltd. (supra) on which Dr. Byamugisha relied, Mr. Fakes claimed that his misfortunes especially his insolvency had been brought about by Taylor Woodrow's breaching of contract, in that they did not give him the work as and when they should, so they did not pay him as and when they should. By braking their contract they made him insolvent. It was held that although in general the poverty or insolvency of a plaintiff would not per se justify the court in refusing a stay, the rule was not applicable in circumstances where the plaintiff showed that his insolvency had been caused by the defendant's breach. If the action were stayed there would be a denial of justice.***
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> ***This case is distinguishable from the instant case on its facts in that there is no guarantee that mediation if it had taken place would bear fruit. Moreover, what he claimed he had not been paid and what rendered him poor were terminal benefits as he states in paragraph 8 of his affidavit in reply dated 4th September 2000."***
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> > ***"That the applicant/defendant has, in fundamental breach of the of the agreement dismissed me from the partnership and denied me my leave passage, the refund of balance of my tax account as well as my capital contribution to the firm. I therefore cannot afford going to London for arbitration and/or pay my lawyers to represent me at the arbitration."***
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> ***"In Fake's case, the appellant had been denied work and therefore was not paid. Stay was therefore granted on that ground that the respondent was responsible for his poverty though generally, poverty per se is not a ground for refusing to order a stay."***

The learned Justice of Appeal also considered the case of ***Smith V Pearl Assurance Co. Ltd.*** (supra) where it was held that the plaintiffs poverty was not a sufficient ground for exercising any discretion by the court to refuse to order a stay. She also referred to the observation in that case that the parties had contracted without any condition as to the poverty of the appellant or anyone claiming through him and that all differences were to be submitted to arbitration.

Justice Mpagi-Bahigeine, JA, then concluded:

> ***"In view of the above two authorities it becomes clear that the appellant's impecuniosity would not stand him in good stead. In Paczy v Hoendler and Notermann Gmbh (supra), it was held that the court must grant a mandatory stay where there is a non-domestic arbitration agreement unless it is satisfied that either the arbitration agreement is null and void, inoperative or incapable of being performed which is not the case within the agreement in question. The Supreme Court in Shell (U) Ltd. V***
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> ***Agio (U) Ltd. Civil Appeal No. 49 of 1995 followed the above authorities and ordered HCCS No.326/95 to be stayed pending the result of a reference of the dispute to arbitration."***

Justice Okello, JA, also held that poverty per se does not justify refusing to order stay of proceedings. He said,

> ***"According to Halsbury's Laws of England, Vol.2, page 630, an arbitration agreement is only incapable of being performed even if the circumstances are such that it could no longer be performed if both parties were ready willing and able to perform it. For example where the named arbitrator is unable or refuses to act and the Court has no power to alter the situation: see Paczy vs Hoendler and Notermann Gmbh H (1981) I Lloyds Rep. 302 (CA)***

The learned Justice of Appeal agreed with the judgment of the trial judge that the appellant's self-induced poverty was not a sufficient reason for bringing the agreement within the exceptions in Section 41 of the Arbitration and Conciliation Act. He observed,

> ***"The alleged respondent-induced poverty of the appellant is no good reason for bringing the agreement between the parties within any of the exceptions in Section 41 of the Act. The failure of the CEO to follow the mediation procedure first could not have rendered the appellant too poor to afford a travel cost to London for arbitration. The entitlements which the appellant claimed the respondent did not pay as a result of that failure were his leave passage, balance on his tax account as well as his contribution to the firm, following his wrongful dismissed. These are terminal benefits which could be determined by the arbitration since it is a dispute arising out of the agreement. There is therefore no sufficient evidence that the appellant's poverty, if any, was brought about by the respondent."***

In my judgment, the Court of Appeal came to the correct conclusion that the appellant's poverty did not bring him within any of the exceptions in Section 41 of the Arbitration and Conciliation Act, to justify the exercise of discretion to refuse to order a stay of the proceedings. The Court duly considered the law and facts and came to the right conclusion that poverty of the appellant was not a sufficient reason for exercising discretion to refuse to stay proceedings on the ground that the agreement has been rendered incapable of being performed. In order to justify the exercise of the discretion in favour of the appellant, it had to be established that the appellant's impecuniosity was caused by the respondent. In this case there was no sufficient evidence to prove this. The only allegation was that the respondent had not paid the appellant his terminal dues which consisted of leave passage, refund of balance on his tax account and capital contribution to the firm. He did not allege that he had not been paid his emoluments while he was still working nor did he indicate how much it would cost to undertake the arbitration. The evidence the appellant adduced was insufficient to prove that he had been rendered too poor to pursue his rights under the agreement.

The respondent had not denied the appellant work as was in the case of ***Fakes vs Taylor Woodrow Construction Ltd*** (supra). The appellant had worked till the dispute arose, and it is assumed he earned his due emoluments. What he was claiming were his terminal benefits. In these circumstances I agree with the Court of Appeal that the arbitration agreement was freely and voluntarily entered into by the appellant and the respondent, and to depart from it required sufficient reason to be shown by the appellant which he failed to do. Therefore I find no merit in ground one, which should fail.

The complaint in the second ground of appeal is that the learned Justice Mpagi-Bahigeine erred in law in

posing the following question in respect of Clause 29.1 of the Framework Agreement:

> ***"I think the question is whether non observance of the above stipulation as to mediation, resulted in the appellant's poverty."***

Dr. Byamugisha submitted that the Court of Appeal confused poverty with mediation. It was wrong, he contended, not to separate the two issues. He submitted further that Clause 29.1 of the Framework Agreement required the Chief Executive Officer to refer the matter to the Board for mediation before arbitration, but in this case the dispute was not referred to the Board first.

Mr. Masembe Kanyerezi, for the respondent, submitted that the learned Justices of Appeal did not confuse the two issues relating to poverty and mediation. He contended that the exception of the agreement being ***"incapable of being performed"*** went to the issue of poverty, while the exception relating to the agreement being ***"inoperative"*** went to the issue of mediation. It was his submission that the exception of ***"inoperative"*** was not argued in the lower Court.

Mr. Masembe Kanyerezi submitted further that Clause 29.1 and Clause 29.2 were independent of each other. Clause 29.2 applied to arbitration for former members, and was not restricted to members. It was his contention that mediation did not therefore apply to the appellant because he was not a member at the material time. Moreover, he argued, it was the appellant who sued the respondent instead of applying for mediation first.

It appears to me that the learned Justice of Appeal misdirected herself in the manner in which she posed the question relating to mediation. The proper question should have been ***"whether the non observance of the stipulation in Clause 29.1 relating to mediation rendered the agreement inoperative."*** The confusion seems to have been caused by the manner in which the issue was argued in the Court of Appeal. Dr. Byamugisha did argue that Clauses 6.5 and 29.1 made it a condition precedent to arbitration that the Executive Committee first refers the dispute to the Board of Governance Entity for mediation. But there is nothing in the proceedings in the lower Court to show that the point whether the agreement was rendered inoperative by the failure to submit the dispute to mediation, was raised as an exception to Section 41 of the Act.

It seems to me that while mediation and arbitration are distinct procedures, they seem to be connected under Clause 29 of the Framework Agreement, in that members are entitled to pursue mediation first before proceeding to arbitration, in the event of mediation failing. It is not clear whether any attempts were made in this case to refer the dispute to mediation. The appellant alleged that the Board of Governance failed to do so.

In her judgment, Mpagi-Bahigeine, JA, held that the question whether the Chief Executive Officer was in breach of the agreement should be referred to arbitration. She concluded:

> ***"in view of the clear provisions of Clause 29.1 of the framework Agreement, the agreement whether the Chief Executive Officer was in breach thereof by not submitting the dispute first for Mediation is part of the "Dispute arising within the framework Agreement" between the parties, as stipulated in the Clause and therefore the forum for its resolution would be arbitration in Clause 29.2."***

I am unable to faulter this conclusion. It is not clear why the dispute was not referred to mediation, and if the appellant felt that the dispute ought to be referred to mediation why he did not insist on it but instead filed a suit to recover his terminal benefits. There is nothing to stop the parties referring the matter to mediation if there is a chance of its being resolved amicably. Otherwise, the dispute should be referred to arbitration for its final resolution. The appellant was a party to the Framework Agreement and he was entitled as a member to have this dispute resolved in accordance with the Framework Agreement. In my opinion ground 2 should fail.

The third ground complains that the learned Justices of Appeal erred in law in failing to consider grounds 2 and 3 of the memorandum of appeal and to decide them in favour of the appellant. The second and third grounds of appeal in the Court of Appeal were:

> ***"2. The learned judge erred in law in not holding that the***

defendant was in fundamental breach of the contract and could not rely on the arbitration Clause.

3. The learned judge erred in law in not holding that by its pleadings in paragraphs 2 and 5 of the written statement of defence, defendant had repudiated the existence of a partnership and could not be allowed to reprobate and approbate the contract at the same time."

In her judgement Mpagi-Bahigeine, JA, declined to consider the two grounds. She stated,

"The parties clearly voluntarily and willingly subscribed to the arbitration agreement as a means of solving their differences. I therefore do not consider it necessary to discuss the remaining grounds.

They all concern disputes arising out of the Framework Agreement."

Okello, JA, concurred with Mpagi-Bahigeine, JA, observing:

"Ground 2 to 4 concern disputes arising out of the Agreement to be determined by arbitration under Clause 29.2. That is the tribunal of the parties' choice."

I am unable to accept the submission of Dr. Byamugisha that the learned Justices of Appeal erred in failing to consider the two grounds of appeal. I agree with the learned Justices of Appeal that the two grounds concerned disputes arising out of the Framework Agreement to be determined by arbitration and it was therefore unnecessary to consider them. Ground 3 should also fail.

In the result, I find no merit in this Appeal. I would dismiss it with costs here and in the Courts below.

As the other members of the court agree, this appeal is dismissed with costs here and the courts below.

Date at Mengo this 16th day of January 2004

B J Odoki
CHIEF JUSTICE
