

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2021] SCCA 23

SCA 39/2018

(Appeal from Civil Side MA 321 of 2015 [arising in MC 36/2014])

In the matter between

CIVIL CONSTRUCTION COMPANY LIMITED

(Rep. by Edith Wong)

Appellant

and

VIJAY CONSTRUCTION (PROPRIETARY) LIMITED

(Rep. by Bernard Georges)

Respondent

Neutral Citation: *Civil Construction Company Ltd. v Vijay Construction (Proprietary) Ltd.*
(SCA 39/2018) [2021] SCCA 23 11 June 2021

Before: **Fernando President**, Tibatemwa-Ekirikubinza; Dingake, JJA.

Summary: Arbitral awards- Essentiality of cogent reasons in arbitral decisions.

Heard: 26 May 2021.

Delivered: 11 June 2021

ORDER

Having carefully studied the arbitral award, Court finds that the arbitrator gave cogent reasons for each of the contested items. In reaching the final award, the arbitrator systematically dealt with each item of the claim according to the parties' agreements.

JUDGMENT

TIBATEMWA-EKIRIKUBINZA, JA

Brief facts

1. The Appellant, Civil Construction Company Limited (hereinafter 'Civil Construction'), is a company registered in Seychelles. Its objects include carrying on business as a quarry owner and a supplier of quarry construction materials. On the other hand, the Respondent, Vijay Construction (Proprietary) Limited (hereinafter 'Vijay'), is a building contractor.
2. In 2008, Civil Construction and Vijay entered into two agreements: "the Agreement" and "the Finance Agreement", both of which were drafted by Vijay. Pursuant to those agreements, Vijay took over the operations of the quarry for approximately three years. Both agreements contained a clause which stated that in case of any disputes, the parties would resolve their differences through an arbitrator.
3. In an email dated 3 April 2013, Vijay submitted an account to Civil Construction in which it claimed USD 1,499,615 for quarry machinery and equipment. In July 2013, Vijay also returned the quarry to Civil Construction.
4. In its response, Civil Construction claimed that it was in fact Vijay which owed it USD 663,933. This difference in positions is what occasioned the dispute between the parties.
5. In April 2014, Vijay applied to the Supreme Court for the appointment of an arbitrator. In October, the Court appointed Mr. Joe Pool as arbitrator.
6. In June 2015, the arbitrator delivered an award in favour of Vijay for the sum of USD 1,438,185. In September 2015, the arbitrator also accepted a claim by Vijay for interest on this sum.
7. Dissatisfied by the arbitral award, Civil Construction lodged an application in the Supreme Court before Judge Fiona Robinson challenging the award. In particular, Civil Construction argued that the arbitrator failed to state their reasons for considering that the agreements executed by the parties were not legally binding documents and were instead *guidelines as to an arrangement between friends*.
8. In its judgment, the Supreme Court stated that arbitral awards should not be vitiated on the basis of *fine points* and that, 'the modern approach is in favour of sustaining awards where that can be done fairly rather than destroying them.' Robinson J. then read the entire award as a whole and concluded that:
 1. The arbitrator did not treat the agreements as not legally binding;
 2. The arbitrator did provide reasons for his award.
9. Robinson J. found that Civil Construction had failed to make out a proper case for the setting aside of the arbitral award and therefore dismissed Civil Construction's application with costs.

10. Dissatisfied with the decision, Civil Construction appealed to this Court on 6 grounds which I have set down verbatim:

1. **The trial Judge erred when she found at paragraph 23 of her judgment that the arbitrator “did not treat the Agreement and the Financial agreement as not legally binding documents.” Moreover, it is noteworthy that Joe Pool did not state in the Award that the Agreement and the Financial agreement are not legal documents. This court accepts the submission of counsel for Vijay that the finding of Joe Pool was a perfectly reasonable finding in the circumstances and context of the arbitration” and then went on to say that “in addition Joe Pool gave as a reason for his finding that this was clear from reading the Agreement and the Finance Agreement.”**
2. **The learned trial Judge erred in her finding in paragraph 26 line 1 to 4 on page 14 of her judgment after the Arbitrator had failed to give reason for rejecting the figures supplied by CCCL which had the necessary expertise and experience in the field of blasting rocks.**
3. **The learned trial Judge erred when she failed to apply the principle she quoted with approval from paragraph 63 of the judgment in the New Zealand case of Ngati Hurungaterangi [2017] to the effect that the reasons that “are not coherent and do not comply an elementary level of logic of adequate substance to enable the parties to understand how and why the arbitrator moved in the particular circumstances from the beginning to the end points ... are not reasons.” when she considered, on page 15 and 16 of her judgment, the last findings, paragraphs 24 to 29, of the arbitrator.**
4. **The learned trial Judge erred in paragraph 32 of her judgment when she dismissed the Appellants grounds for challenging the arbitrator’s decision on the ground that ‘they are devoid of merit and do not fall under the category of Article 134 of the Commercial Code and all findings which are in the province of Joe Pool who was asked to give a ruling on the dispute.’**
5. **The learned trial Judge erred when despite accepting the principles set out in the Ngati case went on to consider the grounds on which CCCL had applied to the Supreme Court under a totally different light that of the “modern approach” “in favour of sustaining the awards where it can be done fairly and as a whole rather than destroying them.”**

Prayer

11. That the whole judgment, and the award made against the appellant be set aside, with costs.

Appellant's submissions

12. The appellant elected to argue the grounds of appeal under two issues:

- (i) The law that the learned trial Judge applied; and
- (ii) The lack of reasons for the arbitral award made.

13. The appellant submitted on grounds 3 and 5 under issue (i) above as follows:

The Appellant sought to have the arbitral award set aside under Article 134 of the Commercial Code which provides *inter alia* that:

“1. An arbitral award may be attacked before a court only by way of an application to set aside and may be set aside only in the cases mentioned in this article.

2. An arbitral award may be set aside:

(i) if the reasons for the award have not been stated.”

14. Counsel for the appellant stated that setting aside an arbitral award is not an exercise that the courts in Seychelles have regularly undergone. She therefore submitted that it would be proper to look at persuasive authorities in other jurisdictions when doing so. Counsel relied on the Australian case of **Westport Insurance Corporation vs. Gordon Runoff Ltd**¹ wherein it was stated that, “*arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly, why in the light of what happened, they have reached their decision and what that decision is.*”

15. Counsel also relied on the New Zealand case of **Ngati Hurungaterangi vs. Nahai Wahiao**² which underscores the importance of an arbitrator providing reasons which must be cogent and logical. Counsel submitted that although the learned trial Judge relied on the Ngati case in her judgment, she erroneously stated that “... *the modern approach is in favour of sustaining awards where that can be done fairly rather than destroying them.*”

16. Counsel submitted that the foregoing statement was not what the **Ngati case** stated and therefore the Judge incorrectly applied the principles espoused in the said case.

17. In Counsel's view, the Judges in the **Ngati case** faulted the arbitrators for not providing reasons as to why they had discounted some of the witnesses' evidence. That this was the

¹ (2011) HCA 37, High Court of Australia.

² CA 415/2016, C54/2017 [2017] NZCA 429.

same issue being contested in the present appeal- that the Arbitrator did not give reasons as to why he did not consider Civil Construction's figures for the blasting costs and instead accepted those of the Respondents (Vijay construction). That the Arbitrator ought to have given an explanation as to why the Civil Construction's figures were not accurate. That the Arbitrator simply stated the sum claimed as being generous which explanation was not cogent in any form. Similarly, counsel also submitted that the Arbitrator did not give any reasons why clause 6 of the Finance Agreement was not applicable to the materials from the quarry.

18. In light of the above, counsel argued that had the learned trial Judge applied the principles in the **Ngati** case, she would not have come to the conclusion that reasons were given. Furthermore, that the learned trial Judge would also not have come to the conclusion that she was satisfied that the parties had engaged the Arbitrator on the different values which were properly evaluated.

19. Grounds 1, 2 and 4 of the Notice of Appeal were addressed under issue (ii) above as follows:

Although the Learned trial Judge correctly came to the conclusion that an award may be set aside for lack of reasons, she did not address her mind to the same in the present case. That the learned Judge stated at paragraph 23 that the Arbitrator gave a reason as to why the agreements were not legally binding and that is because *they were not drafted as legal documents but rather guidelines to an arrangement between friends*. Counsel argued that the foregoing statement does not help a reader know the reason which led to the Arbitrator to state the aforementioned words. Counsel therefore submitted that the learned trial Judge erred in stating the Arbitrator had given reasons. Counsel relied on the same argument for contesting the blasting costs made by the Arbitrator.

Respondent's submissions

20. The respondent made his submissions under the following two headings:

- (i) The nature of the arbitration did not require detailed reasoning on every issue.
- (ii) Sufficient reasons were given by the arbitrator for his decisions.

21. Under the first heading, the respondent submitted that the mode of settling the dispute was agreed upon by both parties. That it was purely opportunistic of the appellant to seek to complain about the procedure to which it voluntarily agreed to. That the appellant was therefore estopped from complaining about the manner in which the dispute was resolved.

22. Under the second heading, the respondent submitted that the Arbitrator gave reasons for his decision. In respect to the contested blasting costs, the respondent argued that the Arbitrator was a civil engineer acquainted with the subject matter at hand and the costs involved. That

where the Arbitrator rejected the figures supplied by the appellant, reasons had been given. Counsel further submitted that in the mandate of the arbitrator as an amiable compositor on the principle of *ex aequo et bono*, he does not consider himself as bound by the law but to do what is fair and just between the parties. That indeed the arbitrator used similar phrasing calling it a just and final account.

23. Regarding the sum awarded by the Arbitrator, counsel submitted that the arbitrator gave reason for preferring the figures presented by the respondent. That it made no sense for the respondent to equip and rehabilitate the quarry, operate it and then on top of that pay a royalty to the appellant for the material which itself produced with its own equipment and labour. That such an interpretation would render the agreements an absurdity. Furthermore, that the trial Judge accepted as a fact that no claim for the materials was ever made during the three years of operation of the quarry. That the first time the appellant made a claim was when the present dispute arose and this was due to the fact that the Arbitrator directed the appellant to pay the respondent. Counsel therefore argued that raising the claim for cost of material at that late stage was an attempt at clawing back the payment due to the respondent by inventing an interpretation which run counter to the common intention of the parties at the time they entered into the agreements.
24. In respect to the award of interest, the respondent submitted that interest at the rate of 12% had been claimed in the statement of claim. However, after the arbitration process only 5% interest was awarded.

Court's Determination

25. As stated above, the appellant elected to argue the grounds of appeal under two issues:
- (i) The law that the learned trial Judge applied; and
 - (ii) The lack of reasons for the arbitral award made.

The law that the learned trial Judge applied

26. At the beginning of **analysis of the case**, the trial judge stated that: *“This court has considered all documents on file. The role of this court is not in the nature of a qualitative analysis of a particular reason or reasons in the way an appellate court would determine an appeal.”* The judge then cited Article 134 of the Commercial Code and then followed it by stating that: *“In considering and determining the grounds of challenge, the following case law is used as persuasive authority by this court.”* The judge then went on to analyse at length the case of **Ngati Hurungaterangi vs. Nahai Wahiao (Supra)** and the legal

principles enunciated in that authority. The judge then reproduced what in her view were the salient provisions of the agreements between the parties. What then followed was a statement in these words: “*This court interposes to state that it agrees with the case law. The modern approach is in favour of sustaining awards that can be done fairly rather than destroying them. In consideration of this ground of challenge concerning (the Arbitrator’s) failure to give reasons, this court is of the opinion that the Award should be read fairly and as a whole.*”

27. It was thereafter that the judge went on to make findings regarding the two main issues raised by CCCL.
28. The appellant contends that although the learned trial Judge relied on the **Ngati** case in her judgment, she erroneously stated that “... *the modern approach is in favour of sustaining awards where that can be done fairly rather than destroying them.*” It was counsel’s submission that the foregoing statement was not what the **Ngati case** stated and therefore the Judge incorrectly applied the principles espoused in the said case.
29. A reading of the judgment of the Supreme Court clearly shows that the judge was guided by/adopted the **Ngati** principles in arriving at her decision to dismiss the appellant’s application to have the award set aside and more specifically in arriving at her finding that the Arbitrator’s findings were reasonable in the circumstances and context of arbitration.
30. Be that as it may and as submitted by Counsel for the appellant, the **Ngati** case does not espouse the principle that “*the modern approach is in favour of sustaining awards where that can be done fairly rather than destroying them.*” Nevertheless it must be noted that the Trial Judge did not categorically state that the principle in issue is derived from the **Ngati** case. But what is even more important is that indeed persuasive authority exists to the effect that *the modern approach is in favour of sustaining awards where that can be done fairly rather than destroying them.*” For example in **Islamic Republic of Pakistan vs. The National Accountability Bureau**³, an application to challenge part of an arbitral award made by a tribunal was brought before the England and Wales Commercial Court. The Court had to determine the following three issues:
 - (i) Can “inadequate reasons” found a challenge under the S.68 of the Arbitration Act?
 - (ii) Were “adequate” reasons given?

³ [2019] EWHC 1832 (Comm)

- (iii) If “inadequate reasons” were given, does this amount to a serious irregularity and a substantial injustice?

31. In dismissing the case, the Court *inter alia* held that:

“The importance of upholding arbitration awards has been repeatedly stressed: ... as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it.”

I am persuaded by the principle that courts must strive to uphold arbitration awards if they result into fair outcomes.

The lack of reasons for the arbitral award made.

32. Challenging an arbitral award is governed by **Article 134** of the **Commercial Code of Seychelles**. The relevant part of the provision is to the effect that a court may set aside an award **if the reasons for the award have not been stated**. The appellant contended that the arbitrator failed to provide reasons for his award and where reasons were given they were not cogent. In calling for cogent reasons, the appellant relied on the **Ngati case (Supra)**.

The need to provide reasons for an arbitral decision is so that the resulting decision is soundly based on evidence presented. In the **Ngati case**, the New Zealand Court of Appeal stated the rationale as follows:

“... the reasons explain how the adjudicator progressed from a particular state of affairs to a particular result. The reasons are the articulation of the logical process employed by a person whose particular skills, expertise or qualification the parties have chosen to decide their dispute. The reasons expose to the parties the disciplined thought pattern of the specialist adjudicator, thereby dispelling any suggestion of arbitrariness. A requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.”

33. Furthermore court noted that the standard of providing reasons for an arbitral award partly depends on the context. This context involves a consideration of the circumstances, including the subject matter being arbitrated, its significance to the parties and the

interests at stake. There is no singular and universal standard for the extent to which an arbitrator should provide reasons for a decision. There is no *quantitative* measure of adequacy. However, the reasons given should be able to lead to a logical conclusion of the decision or award made.

34. From the persuasive case law above, the pertinent question to be addressed therefore is whether the arbitrator in the present matter not only gave reasons but that the reasons for his decision were logical.

35. The appellant contended that the Arbitrator did not provide reasons in the following three aspects of decision:

- (i) That the agreements were not intended to be legally binding
- (ii) Rejection of the blasting figures provided by the appellant (CCCL).
- (iii) Rejection of the daily rate for the blaster and lump sum award of SR 25,000.

36. I will determine the first aspect. The appellant contended that the Arbitrator considered the agreements as a guideline to an arrangement and were therefore not legally binding documents but did not provide any reasons for this conclusion. The complaint is based on a statement in the award document to wit: *“In compiling this ruling I have taken into consideration the spirit of the initial agreement. Looking at text of the agreement it is obvious that these were not drafted as legal documents but rather as guidelines to an arrangement between friends whereby each would benefit whilst not profiting on the other.”*

37. In spite of the above statement in the Arbitrator’s ruling, I am in agreement with the Learned Trial Judge that the Arbitrator did not treat the agreements as not legally binding. As a matter of fact the arbitrator’s decisions were based on interpretation of the clauses contained in the two agreements. In reaching the final award, the arbitrator systematically dealt with each item of the claim according to the parties’ agreements. As pointed out by the Trial Judge, the Arbitrator discussed each party’s claims with them *“in light of the Agreement and the Finance Agreement ...”* Consequently, since there is no

evidence that the statement which is the subject of contention was acted upon by the Arbitrator, it cannot be a basis for setting aside the Award.

38. My decision is also in line with the principle that courts should in examining applications or motions challenging arbitral awards deal with them with a less stringent legal lens. The court should not subject the award to evaluation as if it were dealing with evidence in any ordinary civil or criminal matter. Furthermore, the Arbitrator justified his opinion by indicating that he was interested in a just and fair settlement of the dispute and removing any profit element included in the claims on either side.

39. I now move on to discuss the two items over which the appellant and the respondent failed to reach agreement and which the Arbitrator made decisions: the blasting costs and the meaning or relevance of Clause 6 of the Finance Agreement.

The blasting costs.

40. In the court below the appellant contended that the Arbitrator failed to explain clearly his calculations as to the blasting costs. In his ruling the Arbitrator justified his adopting the rates by Vijay (the respondent) “as these rates are substantially more generous than that being claimed by CCCL.” In specific reference to the cost of the Blaster, the appellant had claimed a monthly rate of Rs. 30,000 – a daily rate of approximately 1,000 Rs. On the other hand, Vijay was prepared to accept a daily rate of Rs. 2000. For the Blaster’s Assistant, the appellant claimed Rs. 16,000 per month – approximately at Rs. 1,300 daily. On the other hand the respondent offered a daily rate of Rs.1000. On the whole, the respondent indeed offered more generous rates. For the security escort as well as for the explosives used the Arbitrator accepted what CCCL submitted as the costs. For the cost of food and transport the Arbitrator again accepted figures presented by Vijay because he “found them to be generous”.

41. Following from the above detailed analysis I find no reason to depart from the finding of the trial judge that Arbitrator engaged at length with the parties’ competing claims. I also

find that he gave *cogent* reasons for his decisions. The appellant has not made out a case for setting aside the Arbitrator's decision on this particular item.

Interpretation of Clause 6 of the Finance Agreement.

42. The appellant contended that the Arbitrator did not give any reasons for his interpretation of clause 6 of the Finance Agreement as not being applicable to the materials from the quarry during the period that the quarry was under the control of the respondent. Several clauses in the "Agreement" are essential for resolving this dispute. Under Clause 3 CCCL agreed to let Vijay operate the quarry for a period of 3 years. Under clause 7 of the "Agreement", Vijay would pay a price of RS 15.00 per ton of stone crushed (and used by Vijay). Vijay would also pay CCCL 5% of the invoice value of stones sold to the public (Clause 8). Clause 6 of the Finance Agreement provided that CCCL will agree to a favourable price at which to supply quarry products to Vijay taking into account the assistance given to CCCL by Vijay. Examples of assistance by Vijay was that Vijay would arrange finance up to \$ 2 million to enable CCCL to procure machinery and equipment to upgrade the quarry; Vijay would not charge any interest for finances up to 2 million USD.
43. In a claim letter to the Arbitrator, CCCL sought to recover a price for materials from the quarry during the period the quarry was in the control of Vijay. The claim was based on Clause 6 of the Finance Agreement cited above. This would be in addition to the RS 15.00 per ton of stone crushed (and used by Vijay – Clause 7) and the 5% of the invoice value of stones sold to the public (Clause 8). The claim was disputed by Vijay. The Arbitrator ruled in favour of Vijay. The Arbitrator came to the conclusion that the meaning of the clause in issue was to the effect that, if after the quarry was handed back to CCCL, Vijay wanted to purchase quarry products, in light of the assistance rendered to CCCL by Vijay during the lease of the quarry, it would be at a favourable price.
44. In considering the claim the Arbitrator stated as follows:

"This item first became a claim in a letter from CCCL to Vijay Construction dated 20th September 2013. It was as a result of the interpretation of the Agreement and the Finance Agreement both of which was drafted by Vijay Construction and in particular to clause 6 of the Finance Agreement. The purpose of this clause according to Vijay Construction was to aide CCCL with the repayment of the investment by allowing CCCL to stretch payment over a longer period of time and by sales of quarry products to Vijay if they

chose to. For which privilege, Vijay Construction would be expected to pay an agreed favourable price for the materials. CCCL claims that this is not the case and that Vijay should have to pay for the materials taken under this clause.”

45. In rejecting CCCL’s claim the Arbitrator observed as follows:

“It is worth noting that this claim was first presented many months after the quarry had been handed over to CCCL. For the three plus previous years there had not been any mention of this sum owed to CCCL. Furthermore, I do not believe that any rate was discussed or agreed ... I believe that clause 6 of the Finance Agreement could not be considered applicable to materials from the Praslin quarry during the period that the quarry had effectively been ceded to Vijay Construction under clause 3 of the Agreement. Looking at the dispute in the spirit of fairness and mutual benefit, I find it very difficult to believe that one party should be asked to finance an interest free loan, operate the quarry, pay royalty or levy and later sell the machinery and equipment to the other party at a depreciated rate of 10% over three years and still be asked to pay for the materials taken during the time that the quarry was under their control. This just too one sided. I cannot therefore in all fairness, entertain this claim and therefore rule it to be invalid.”
(My emphasis)

46. It is clear from the above excerpt that the Arbitrator’s interpretation of the two agreements was on the premise of fairness. Further reliance was on the fact that the said price had never been agreed upon by the parties during the three years and that this claim was brought many months after Vijay had ceded the quarry to CCCL.

47. I find the above reasons and explanations plausible as to why the Arbitrator declined to grant CCCL’s claim.

48. Regarding the issue of interest, the appellant contended that the award of interest at a rate of 5 % by the arbitrator was an afterthought.

49. The Arbitrator stated that in calculating the rate of interest due, he took into consideration the spirit of the initial agreement. Therefore, no consideration was made for commissions and fees due. That however, when he made enquiries from two commercial banks regarding interest rates on a foreign exchange loan, both offered a rate of 5% excluding commissions and processing fees.

50. It should be noted that the Vijay had made a claim of interest on the amount due at a commercial rate of 12%. However, the Arbitrator kept hindsight of the fact that both the appellant and the respondent did not take advantage of each other in the dispute by presenting figures which would lead to either party making a profit and reduced the rate

to 5%. This was in line with the Chartered Institute of Arbitrators practice guideline 13 which gives guidance on how Arbitrators should approach an award of interest. The guideline *inter alia* provides that, an award of interest should be compensatory and not penal in purpose. The best approach is to attempt to assess the commercial rate of interest that someone in the position of the claimant would have had to pay to borrow the money which is to be awarded to him as a debt or damages. Furthermore, that Interest may be awarded for the period up to the award and also for the period between the issue of the award and payment.

51. I therefore find no fault with the rate of 5% commercial interest awarded by the Arbitrator.

Conclusion

52. Having carefully studied the award, I find that for each of the contested points, the arbitrator gave cogent reasons premised on the parties' agreements as to what rates were applicable in reaching the arbitral award. The arbitrator systematically dealt with each item of the claim.

Orders

53. Consequently, this appeal is dismissed with the following orders:

1. The arbitral award and the lower court's judgment affirming it are upheld.
2. The appellant is ordered to pay to the respondent the arbitral sum together with interest from the date of the award to the date of this judgment.
3. Since costs follow the event, the respondent is awarded costs of this suit.

Dated and signed on this 11th day of June, 2021.



Tibatemwa-Ekirikubinza, JA.

Fernando President

Dingake JA