

HYDROBATEL Ltd v. KAREKEZI

[Rwanda SUPREME COURT – RCOMA 0007/13/CS (Mukanyundo, P.J., Rugabirwa and Gakwaya, J.) February 06, 2015]

Arbitration Law – Agreement on terms of reference of arbitration – Tacit extension of agreement on terms of reference of arbitration – The agreement on terms of reference of arbitration is considered to be tacitly extended when its period of validity expires; but the parties continue to take part in arbitral proceedings.

Arbitration Law – Award of the arbitrators – Removal of award of arbitrators – Where one of the parties who referred a dispute to arbitration does not exercise his/her right to object to any point he/she disagrees with in the arbitral award, he/she cannot apply for its setting aside – Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, article 6.

Commercial procedure – Moral damages – Being involved in the court proceedings for no ground – A party who claims damages resulting from being involved in the court proceedings cannot be awarded them in case the court finds that the other party had the right to appeal – Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 162.

Fact: Karekezi, Katarwa André and Katarwa Aimé have found the company named HYDROBEL Ltd. Article 51 of the Articles of association of this company provided that in case a dispute may rise, it shall be settled by one or more arbitrators agreed on by all parties and in case no settlement can be reached, it shall be settled by the competent Rwandan courts.

Karakezi has resigned from that company due to its bad management, and seized the arbitral tribunal made up of three arbitrators where he claimed payment of the dividends from shares he owned in that company and various damages.

On 29 January 2013, both parties drew up the document defining the terms of reference whereby they gave arbitrators the period of 60 days to decide on the dispute between them.

On 10 April 2013, the arbitral tribunal delivered its award and condemned HYDROTEL Ltd to pay Karekezi 60,000,000Frw of dividends on shares he had in that company, 20,000,000Frw for the moral damages, 3,700,000Frw for the arbitration fees he has paid in advance, 1,850,000Frw for outstanding arbitration fees and 3,925,000Frw for the advocate's fees.

HYDROBATEL appealed against that award before the Commercial High Court requesting the removal of the award since it has been taken by the arbitral tribunal after the period of 60 days it has been given has expired and therefore no longer had jurisdiction.

During the hearing, Karekezi raised the objection of inadmissibility of the claim due to lack of jurisdiction by the Commercial High Court since it was in the jurisdiction of Commercial Court to hear the case because it is the latter which would have heard it. He has also raised another objection of inadmissibility of the claim of HYDROBATEL because, during the hearing, it has not informed the arbitral tribunal that it delivered its award after the expiry of 60 days it was given to deliver it.

The Commercial High Court has decided that the objection raised by Karekezi as to its lack of jurisdiction is baseless since it is within the jurisdiction of this Court to hear the case it was

seized with. Moreover, it declared the claim of HYDROBATEL Ltd inadmissible since it has been lately lodged because during the hearing by arbitral tribunal it has never raised any objection as to the expiry of the period of 60 days the arbitral tribunal was given to decide.

HYDROBATEL Ltd appealed before the Supreme Court stating that the Commercial High Court should have admitted its claim since the objection of irregularity of the arbitration terms of reference was not tardily raised. During the hearing Karekezi raised an objection of inadmissibility of the claim of HYDROBATEL Ltd since the Commercial High Court lacked jurisdiction to hear its appeal; it is rather within the jurisdiction of the Commercial Court to hear his appeal since it is the one which would have heard that case shouldn't the parties have referred the dispute to arbitration.

The Supreme Court decided that the objection of lack of jurisdiction of the Commercial High Court raised by Karekezi has no grounds since that Court is the one which had jurisdiction to hear the appeal of HYDROBATEL Ltd which requested the vacation of the arbitral award of 10 April 2013.

During the hearing on merits, Karekezi filed a cross appeal requesting damages for being involved in court proceedings without reasonable ground and advocate fees. HYDROBATEL Ltd stated that it cannot give him those damages because he was awarded them in the judgment on merits, but if the court finds that it should award them, it should do so basing on the law governing bar.

Held: 1. A party to arbitration process cannot request the court to annul the award of arbitration while he/she has participated in arbitral proceedings as well as the award delivery hearing and signed minutes thereof without objecting to them.

2. A party to arbitration process who attended arbitral proceedings including the award delivery and signed minutes thereof cannot allege that the decision was taken after the expiry of time limit for the terms of reference because his/her silence is considered as implying that the time limit for the terms of reference of arbitration was tacitly extended.

3. A party who claims damages resulting from being involved in the court proceedings cannot be awarded them in case the court finds that the other party had the right to appeal.

**Appeal lacks merit;
Arbitral award is sustained;
Court fees to the appellant.**

Statutes or statutory instruments referred to:

Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, article 6.

Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, article 162.

Authors cited:

Philippe DE Bournoville, Droit Judiciaire-L'Arbitrage, Larcier, Paris, 2000, p.183.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Karekezi François Xavier together with Katarbarwa André, Katarbarwa Aimé and Kalisa Evariste found the company named HYDROBATEL Sarl which became later HYDROBATEL Ltd with the capital share of 5,000,000Frw which is equal to 100 shares; which means that each one has invested 50,000Frw for his share. Under article 51 of the company's Articles of association it is provided that in case disagreement may arise within the company, it shall be settled by one or more arbitrators agreed upon by all parties and in case no settlement can be reached, it shall be settled by the competent Rwandan courts.

[2] Karekezi François Xavier states that he has withdrawn from that company because its management was not good, and basing on provisions of the aforesaid article 51 of the Article of association of HYDROBATEL Ltd, he seized the Arbitral Tribunal composed of three arbitrators claiming payment of the dividends on his shares in that company and various damages.

[3] On 29 January 2013, both parties drew up a document defining the terms of reference whereby they have given arbitrators the period of 60 days to decide on the dispute referred to them.

[4] On 10 April 2013, the arbitral tribunal rendered its award, and condemned HYDROTEL Ltd represented by Katarbarwa André to pay to Karekezi 60,000,000Frw for the dividends resulting from the shares he owned in that company, 20,000,000Frw as the moral damages, 3,700,000Frw for the advanced arbitration fees, 1,850,000Frw for the outstanding arbitration fees and 3,925,000Frw for the advocate's fees.

[5] HYDROBATEL appealed against that award before the Commercial High Court requesting its removal since it has been taken by the arbitral tribunal which no longer had jurisdiction since the period of 60 days it has been given to render it had expired.

[6] At the beginning of the hearing, Karekezi François Xavier raised the objection of lack of jurisdiction of the Commercial High Court since it was rather the Commercial Court that had jurisdiction to hear this case because it is the latter which would have heard it., Karekezi François Xavier has also raised another objection aiming at inadmissibility of the claim of HYDROBATEL since it has delayed to lodge its claim because it lodged the claim before the said Court while , during the hearing, it has never informed the arbitral tribunal that the period of 60 days it was granted to take its decision had expired.

[7] The Commercial High Court has decided that the objection of its lack of jurisdiction raised by Karekezi François Xavier is baseless since it is the one which has jurisdiction to hear the case on the basis of article 13, paragraph 4 of the Organic Law N° 06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts which provides that "the Commercial High Court shall have appellate jurisdiction over the decisions rendered by arbitrators".

[8] In addition, the Commercial High Court decided that the claim of HYDROBATEL Ltd is inadmissible since it has been belatedly lodged since during the pleadings it never showed the arbitral tribunal that rendered its award on 10 April 2013 that the period of 60 days which it was given, in the terms of reference, to render it had expired.

[9] HYDROBATEL Ltd appealed before the Supreme Court arguing that the Commercial High Court should have admitted its claim since it has not been belatedly lodged.

[10] At the beginning of the hearing, Karekezi François Xavier raised an objection of inadmissibility of the claim of HYDROBATEL Ltd since the Commercial High Court lacked jurisdiction to hear its appeal requesting the setting aside of the award taken by the arbitral tribunal and that it is rather the Commercial Court that has competence since it is the one which should have heard that case shouldn't the parties have referred the dispute to arbitration.

[11] After the hearing on that objection, the Supreme Court rendered the decision on 24 October 2014 whereby it decided that the objection of lack of jurisdiction of the Commercial High Court raised by Karekezi François Xavier is baseless since the aforesaid court is the one which was competent to hear the appeal of HYDROBATEL Ltd requesting the setting aside of the arbitral award of 10 April 2013 and decided that the trial of the case on merits would be held on 16 December 2014.

[12] On that date, the case was heard on merits, HYDROBATEL Ltd represented by Rusanganwa Jean Bosco, the counsel while Karekezi François Xavier was assisted by Mucyo Donatien, the counsel.

II. LEGAL ISSUES IN THIS CASE AND THEIR ANALYSIS

1. Whether the arbitral award can be set aside since it was rendered after the expiry of the time-limit set in the terms of reference.

[13] Rusanganwa Jean Bosco, the counsel for HYDROBATEL Ltd states that the Court decided that its claim was inadmissible because it has been belatedly lodged since the latter did not inform the arbitrators that the time limit set by the Arbitration terms of reference of 29 January 2013 which conferred them competence to resolve the dispute had expired on 25 March 2013 ignoring the fact that this was not possible during the hearing since those terms of reference were still valid while they were no longer valid on 10 April 2013, when the arbitrators rendered their award, since their validity expired on 25 March 2013.

[14] He explains that the case was finally heard on 13 March 2013 when the arbitral tribunal notified the parties the award would be rendered on 3 April 2013. On that date HYDROBATEL Ltd appeared; but the award was not pronounced since one of the arbitrators was not present and pronouncement of the award was postponed on 8 April 2013 and minutes thereof were taken and signed by HYDROBATEL. On that date, the award was not delivered and no minutes postponing its pronouncement on 10 April 2013 were taken. It was, however, notified of this date only on telephone and the award was delivered on the same date. He requests setting aside the award rendered by the arbitrators on 10 April 2013 since it has been rendered by the arbitrators who no longer had jurisdiction because the terms of reference of 29 January 2013 which conferred them jurisdiction expired on 25 March 2013 and their validity period was not extended as the date of award pronouncement has not been agreed upon by counsels for both parties.

[15] Asked by the Court why, during the hearing or at the time of postponement of the award delivery, HYDROBATEL Ltd did not inform the arbitrators that the terms of reference had expired on 25 March 2013; Rusanganwa Jean Bosco, the counsel responded that it had not yet discovered the contradiction within those terms of reference with regard to

the period of 60 days they were meant to last and 30 days within which the award was to be rendered; but that HYDROBATEL Ltd appealed because the arbitrators rendered their award on 10 April 2013, when that agreement was no longer valid since its period was never extended.

[16] He argues, moreover, that the fact that the arbitrators disregarded the provisions of the aforesaid terms of reference with regard to the time frame they had to perform their functions and render the award, shows that they breached article 64 of Law n° 45/2011 of 25/11/20011 governing contracts, which provides that the contract made in accordance with the law shall be binding between parties and that they shall be performed in good faith.

[17] Mucyo Donatien, the counsel for Karekezi François Xavier stated that, in principal, he realizes that the arbitral tribunal had jurisdiction on 10 April 2013 when it rendered its award since 60 days it was given by the parties to render its decision had not lapsed since it only used 54 days because in calculating 60 days it has been given, official holidays must be excluded as provided for in article 369 and 370 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, except that if the last day is an official holiday, the expiry of the time limit is extended to the next working day. In addition, the court cannot ignore that the aforesaid terms of reference provides that the period of 60 days could be extended provided that it does not go beyond the time limit provided for by the law relating to the arbitration.

[18] He added that, though this is not how Karekezi François Xavier views the matter, in case the Court may find that 60 days of time limit of arbitration have expired, in the alternative, the Court should decide that this time limit was extended by the agreement of both parties because HYDROBATEL Ltd attended the adjournments of the hearing which were mainly caused by its failure to produce requested evidence. Moreover, it has been attending the award delivery adjournments agreed on by both parties which took place on 3 April 2013, 8 April 2013 and on 10 April 2013 respectively and signed minutes thereof. It cannot therefore claim that, on the 10 April 2013, when the award was delivered the arbitration agreement was no longer valid since it did not bring this to the arbitrators' attention at that time.

[19] He explains that the case was heard on 13 Mach 2013 and the arbitral tribunal notified parties that the award will be rendered on 3 April 2013 and both parties left after signing for this. On this date, the delivery of the award was postponed on 8 April 2013 but it was not delivered on this date since it concurred with an unanticipated day off related to the mourning in remembrance of the Genocide Perpetrated against Tutsi. Its delivery was thus postponed on 10 April 2013 but representatives of both sides were notified of this date on the telephone and on this date the award was delivered in the presence of all parties. Therefore, he finds that the award rendered by the arbitral tribunal on 10 April 2013 cannot be set aside because the terms of reference were still valid.

THE VIEW OF THE COURT

[20] Article 6 of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters provides that “a party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement that has not been complied with and yet proceeds with the arbitration without stating his objection to

such a non-compliance without undue delay or, if a time-limit is provided therefore, within such a period of time, shall be considered to have waived his or her right to object”.

[21] With regard to this case, the Court finds that the appeal of HYDROBATEL Ltd aims at requesting setting aside the award rendered by the arbitral tribunal on 10 April 2013 because it was illegally rendered because it was rendered when the terms of reference of 29 January 2013 were no longer valid since they expired on 25 March 2013.

[22] Article 6 of the terms of reference made between Karekezi François Xavier and HYDROBATEL Ltd provides that the arbitral tribunal is given a period of 60 days starting to run from 24 January 2013 to complete its functions and 30 days starting to run from the agreement’s effective date which is 29 January 2013 to render its award . However, that period may be extended but cannot exceed the time limit provided for by the law relating to arbitration.

[23] Minutes available in the file show the hearing was closed on 13 March 2013 where the arbitral tribunal notified counsels for both sides that the award would be delivered on 3 April 2013 and they left after signing for that date. On this date, all the parties appeared, but the court notified them that the delivery of the award is adjourned on 8 April 2013 since one arbitrator was not present and counsels for both sides signed for it. On this date no award delivery adjournment minutes are available in the file; but counsels for both sides have admitted, during the hearing, that they were notified on telephone that no award delivery was going to take place on this date and that it would instead be rendered on 10 April 2013. On this date, the award was delivered in presence of all parties, HYDROBATEL Ltd represented by Katarbarwa André and Karekezi François Xavier. In addition, both parties left after signing the delivery minutes confirming the award was delivered in their presence. Nonetheless, as it can be seen from the award delivery minutes available in the file, HYDROBATEL Ltd noted nothing in the same minutes criticizing the award.

[24] Basing on the foregoing statements, the Court finds that the fact that HYDROBATEL Ltd continued to participate in arbitral proceedings including the pronouncement of the award which has been postponed on several dates and signed the minutes, while it says that the time-limit of the terms of reference has expired without saying anything in this regard, its silence implies that it tacitly agreed to extend the period for the Terms of reference. Thus its argument for the appeal requesting vacation of the award rendered by the arbitral tribunal on 10 April 2013 is baseless.

[25] This is confirmed by the explanations of arbitration law scholars including Philippe DE Bournoville who explains, in his book titled “Droit Judiciaire - L’arbitrage”¹, that the period provided in the terms of reference may be extended expressly or tacitly by the parties and that the judge trying the case on merits is the one who is competent to appreciate this at his discretion depending on the nature of the case he is seized with. He goes on explaining that case laws demonstrate that the period which was provided for in the terms of reference is

¹Philippe DE Bournoville, “Droit Judiciaire-L’Arbitrage”, Larcier, 2000, p.183, explains “Les parties peuvent proroger, soit expressément, soit tacitement, le délai fixé dans la convention d’arbitrage, leur accord dit être exempt de toute ambiguïté et bannir toute imprécision quant au nouveau délai. Il appartient au juge de fond, sur base des faits qu’il constate, d’apprécier souverainement s’il y a prorogation tacite du délai. La jurisprudence induit généralement une prorogation du délai de la participation de toutes les parties à l’instance, se traduisant par des actes positifs et sans équivoques, sans protestation ni réserve. Il en est ainsi si les parties assistent librement à une phase de l’arbitrage après expiration de délai initialement convenu”.

extended by all parties if, after the expiry of that period, they proceed with attending arbitral proceedings and unequivocally perform the functions thereafter.

[26] Basing on the law and scholars' explanations mentioned above, the Court finds that the appeal of HYDROBATEL Ltd lacks merit.

2. Whether the cross appeal made by Karekezi François Xavier has merit.

[27] Mucyo Donatien, the counsel, states that his client Karekezi François Xavier lodged a cross appeal requesting that HYDROBATEL pays him 10,000,000Frw of moral damages for having involved him in court proceedings for no ground and 500,000Frw for the lawyer's fees which make in total 10,500,000Frw.

[28] Rusanganwa Jean Bosco, the counsel for HYDROBATEL Ltd states that the latter cannot pay Karekezi François Xavier the damages he claims because he was awarded them in the judgment rendered on merits, but in case the court may find that his advocate deserves the lawyer's fees, it may award them basing on provisions of the rules governing advocates.

THE VIEW OF THE COURT

[29] Article 162 of the Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure provides that "any person who was a party to the proceedings in the first instance may appeal the judgment if he/she has an interest therein, except when the law provides otherwise".

[30] Basing on the provisions of the aforesaid article, the Court finds that HYDROBATEL Ltd may not pay to Karekezi François Xavier moral damages he claims since; it did not involve him in the court proceedings for no ground as he argues because it is its right to appeal against the court decision since it is not satisfied with.

[31] Therefore, the Court finds that, on the basis of 258 of the third book of the civil code which provides that "any act of a person which causes damage to another person obliges the one whose fault caused damage to make good the loss". Therefore, HYDROBATEL Ltd owes to Karekezi François Xavier 500,000Frw for the lawyer's fees since it has been necessary to hire an advocate to assist him at this instance.

III. THE DECISION OF THE COURT

[32] Decides that the appeal of HYDROBATEL Ltd is without merit;

[33] Condemns HYDROBATEL Ltd to pay Karekezi François Xavier 500,000Frw for the lawyer's fees;

[34] Decides and orders that the award rendered by the arbitral tribunal on 10 April 2013 is sustained;

[35] Orders HYDROBATEL Ltd to pay the court fees amounting to 100,000Frw.