IN THE COURT OF APPEAL OF SIERRA LEONE

CIVIL DIVISION

CIV.APP. 61/2017

IN THE MATTER OF SECTION 12 (2) OF THE ARBITRATION ACT (CAP 25 OF THE LAWS OF SIERRA LEONE, 1960)

AND

IN THE MATTER OF AN AWARD/DECISION OF THE ARBITRATION PANEL OF THE SIERRA LEONE INSTITUTE OF ARBITRATORS DATED 27TH DAY OF MARCH, 2017 IN THE MATTER BETWEEN VITAFOAM MANAGEMENT AND LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES FOR WITHHOLDING OF PAYMENT

AND

IN THE MATTER OF AN APPLICATION BY VITAFOAM (SL) LTD FOR AN ORDER SETTING ASIDE THE AWARD/DECISION/ORDER OF THE ARBITRATION PANEL OF THE SIERRA LEONE INSTITUTE OF ARCHITECT DATED THE 27TH DAY OF MARCH, 2017 IN THE MATTER BETWEEN VITAFOAM MANAGEMENT AND LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES AFORESAID.

BETWEEN

VITAFOAM (SL) LTD - APPELLANT/APPLICANT

AND

LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES - RESPONDENT

CORAM

1. HON. MR. JUSTICE DESMOND B EDWARDS-CHIEF JUSTICE-PRESIDING
2. HON. MR. JUSTICE SENGU M KOROMA- JSC
3. HON. MR. JUSTICE REGINALD S FYNN- JA

61/2017

VITAFOAM(SIERRA LEONE) LTD- PLAINTIFF/APPELLANT

AND

LEONE CONSTRUCTION AND GENERAL ENGINEERING SERVICES

DEFENDANT/RESPONDENT

JUDGMENT DELIVERED ELECTRONICALLY BY HON.MR JUSTICE SENGU M KOROMA JSC

ON THE 24th DAY OF JUNE, 2020.

JUDGMENT

1. This is an appeal from the Judgment of Hon. Justice Miatta Samba J. (as she then was) dated the 20th day of July, 2017 on the following grounds:
2. a. That the Learned Judge erred in law and in fact in failing to appreciate that the crux of the Plaintiff/Appellant's submissions is that the arbitral award "was procured amidst serious irregularities', to wit: that the Arbitrators had heard the evidence of the case in advance and in the absence of the Plaintiff, thereby denying the Plaintiff the invaluable opportunity of cross-examining the Defendant and/or its witness(es)" At page 7 of the Judgment/Ruling the Learned Judge stated that:

> "….Counsel for the Plaintiff/Applicant refers to the supporting affidavit … and submits that the arbitration herein is improperly procured ….the award ought to be set aside. Counsel referred to the case of London Expert Corp Ltd vs. Jubilee Coffee …. It is not in contention that the

Defendant/Respondent stated his case on the 20th day of March, 2017. The contention rather is whether or not the Plaintiff/Applicant was given notice of the hearing of 20th March, 2017….." (5ee paragraph 5.1.2 at page 7 of the Judgment/Ruling dated the 20th day of July, 2017.

At page 8 of the Judgment/Ruling the Learned Judge stated that:

"Counsel says he disagrees with counsel for the Defendant/Respondent when he told the court that arbitration proceedings do not have to copy what happens in courts. My understanding of what counsel for the Defendant/Respondent said to the Court is that arbitral proceedings…are more flexible and this I must hold is correct…."

(See paragraphs 5.1.4 of page 8)
In Lines 6-8 of paragraph 5.1.5 at page 8 of the Judgment/Ruling the Learned Judge stated that:

"To my mind therefore, an Arbitrator is not bound by the stringent rule as they apply to the Courts for as long as he dispenses justice"

Further still, in paragraph 6.1.3 at page 9 of the Judgment/Ruling the Learned Judge stated that:

"….the issues for determination, it seems to me are whether or not the award was procured wrongly; whether the Plaintiff/Applicant was refused an opportunity to be heard ….to which I have made my comments."

In consequence of the above, the Learned Trial Judge erred in construing and applying the facts and submissions before her to the conclusions of her judgment/Ruling, which could have been otherwise but for the at error.

b. That the Learned Judge erred in law and in fact in holding that:

i. Because arbitral hearings are informal an Arbitrator is not bound by the stringent rules as they apply to the

Courts for as long as he dispenses justice" (see lines 6-8 of paragraphs 5.1.5 at page 8 ante);

ii. "….the issues for determination, it seems to me are….whether interjections made by representatives of the Defendant/Respondent had any negative effect on the testimony of representatives of the Plaintiff/Applicant…"

iii. "…I have addressed the informality of arbitration proceedings ….. It seems to me that utterances made by contractor who I suppose represents the Defendant/Respondent, were clarifications of points made by the representatives of the Plaintiff/Applicant. I find nothing condescending in those utterances…" (See paragraph 7.14, at page 11 of the Judgment/Ruling)

In consequences of the above Learned Judge erred in construing and applying the facts and submissions before her to the conclusions of her Judgment/Ruling, which could have been otherwise but for that error.

c. That the Learned Judge's findings and Decision that:

i. The "parties on their own volition chose arbitration" (Sic: the Arbitrators in question) is against the weight of the evidence before the Court below;

ii. That the cost imposed by the arbitrators in what they deemed just is against the weight of the evidence before the court below.

d. That the cost of Le 35,000,000/00 awarded to the Defendant/Respondent by the Learned Judge is prohibitive, punitive and unreasonable in the circumstances and an arbitrary exercise of discretion.

e. RELIEF SOUGHT FROM THE COURT OF APPEAL:

a. That the Judgment/Ruling of the Fast Track Commercial Court dated 20th day of July, 2017 aforesaid be set aside

b. That the Court makes any Order(s) consequent upon the setting aside of the aforesaid judgment/Ruling

c. That the Defendant/Respondent bears the costs of this Appeal as well as the costs of the action in the court below.

f. TAKE FURTHER NOTICE that at the hearing of this Appeal leave may be sought to file amended and/or additional grounds of appeal for and on behalf of the Plaintiff/Appellant.

3. The Appellant did not however file any further grounds of appeal:

PROCEDURAL HISTORY:

4. By an Agreement dated the 5th day of April, 2012, the Appellant herein, VITAFOAM (SIERRA LEONE) LIMTIED ("the employer") and the Respondent herein, LEONE CONSTRUCTION & GENERAL ENGINEERING SERVICES ("the contractor"), the parties herein agreed that for the consideration of the sum of US$2,780,000/00, the "Contractor' constructs for the "Employer" an Industrial Complex comprising: Factory and Warehouse, Maturing block, Max foam plan, Administrative Building, Canteen, Toilet block, General and Engineering Block and paved areas, Hastings Village, Eastern Rural District, Western Area, Republic of Sierra Leone.
5. By sub-clause 4(in the recitals) of the said Agreement, it is provided that: "the Quantity Surveyor" appointed in connection with this contract shall mean: EBEN ELLIOT ASSOCIATES or in the event of his death or ceasing to be Quantity Surveyor for this purpose such other person as the Employer nominates for the purpose".
6. I am in doubt about the effectiveness of this sub-clause. The Quantity Surveyor mentioned here is a body corporate-EBEN ELLIOT ASSOCIATES so the expression "or in the event of death" is inappropriate in the circumstance. It is important for Contracts to be drafted with care.
7. Clause 4 of the said Agreement sets out the arbitration clause (which I shall refer to in detail in this appeal)
8. Due to some misunderstanding regarding the performance of the contract, to wit: that the Appellant herein was withholding payment in the sum of US$290,577.28 which the Respondent claims is a sum due and owing under a contract for the construction of an Industrial complex aforesaid, the Respondent referred the dispute to arbitration as provided for in Clause 4 of the principal agreement.
9. On the 18th November, 2016, the Respondent herein requested the SLIA in writing to arbitrate a dispute between them and the Appellant regarding the matter set out in paragraph 8 above.

10. On the 27th March, 2017, the Arbitration Panel heard evidence and upheld the Respondent's claim and made the following Order against the Appellant: 'We therefore ask the amount of USD290, 577.28 to be paid in full plus 15% cost of the amount to the contractor(the Respondent herein) and also Le.4, 000.000.00 to SLIA within 14 days with effect from 27/3/17 by Vitafoam'

11. The Appellant being filed an Originating Summons dated the 25th day of April, 2017 seeking the following orders which have been clearly set out in the Judgment of Miatta Samba J, (as she then was) at page 290 of the Records.

12. The Appellant stated the following as the grounds of the Application:

a) That the aforesaid Award/Decision was procured amidst serious irregularities to wit:

i) That the Arbitrators had heard evidence of the case in advance and in the absence of the Plaintiff, thereby denying the Plaintiff the invaluable opportunity examining the Defendants and/or its witness(es);

ii) That during the hearing the Arbitrators gave a carte blanche to the Defendant who interrupted the flow of the testimony of the Plaintiff at will without any regard for judicial or quasi-judicial procedure, thereby preventing the Plaintiff the invaluable opportunity of presenting its case fairly;

iii) That the Arbitrators failed to take relevant matters into consideration in making their award etc, i.e.-

- Their deliberate refusal to have an even cursory glance at the Plaintiff's documentary evidence to show the inconsistencies in its Project Manager's presentation and implied bias on his part as well as to substantiate the Plaintiff's claim regarding the Defendant's breaches and defective works;
- Their refusal to visit the said construction site to assist them in their deliberations, thereby preventing the Plaintiff the invaluable opportunity of presenting its case fairly;

iv) That the Arbitrators took irrelevant matters into consideration in making their Award etc- the issue of the Plaintiff's absence at the scheduled hearing of

20th March, 2017 and the complaint by the Project Manager regarding his remuneration etc

v) That the Arbitrators were bias ab initio from their letter dated the 15th March ,2017 addressed to the Plaintiff as well as the Arbitrators conduct during the hearing(as stated above)

b) That the Arbitrators did not exercise their discretion judiciously and reasonably in awarding costs and levying fees, having regard to the current financial climate.

13. Judgment was delivered by Samba J(as she then was) on the 20th July, 2017 against the Plaintiff(now Appellant) and the following Orders were made:

i) That the application to set aside the Award/Decision/Order by the Arbitration Panel of the Sierra Leone Institute of Architects adjudicating on the matter between Vitafoam Management and Leone Construction and Engineering Services dated 27th March, 2017 is refused.

ii) That the application to set aside the costs awarded is refused.

iii) That the application to set aside the fees imposed on the Plaintiff in favour of the Arbitrators on the ground that they are excessive and unreasonable is refused.

iv) Costs against the Applicant at Le. 35,000,000.00(Thirty-five Million Leones).

14. The Appellant applied for stay of execution of the judgment which was refused.

15. As a result thereof, the Appellant has appealed to this court by Notice and Ground of Appeal dated 31st day of July, 2017 2017 on the grounds hereinbefore stated.

SUBMISSIONS OF COUNSEL

A) The Appellant.

16. Counsel for the Appellant, Gibril K. Thorley ESQ. prefaced his submissions on the distinction between facts and law in order to set the stage for his submissions on the errors of law and questions of fact in this and other grounds of Appeal. For this he relied on the definition given by the Learned Authors, Aaronson, Dyer and Groves in their book, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (3rd Edition page 184). He submitted that for the purpose of the law with regard to Section 12(2) of Cap

25, there should be a determination of whether or not there is evidence before the court below from which it can ineluctably conclude that:

i. The arbitrators misconducted themselves during (the submission); or
ii. The arbitration was improperly procured; or
iii. The award itself was improperly procured

17. Mr. Thorley submitted that there was an error law on the part of the Judge with respect to certain instances he stated which to my mind do not merit mentioning here. Suffice it to say that the Appellant's complaint was that the Learned Trial Judge (LTJ) failed to take relevant matters into consideration in coming to a decision. In support of this, Counsel cited the case of ASSOCIATED PROVINCIAL PICTURE HOUSES (LIMITED) -V- WEDNESBURY CORPORATION (1948) 1 KB 223.

18. Mr. Thorley further submitted that the Arbitration Act, Cap 25 is an off shoot of Arbitration Act, 1927 of the United Kingdom. (It therefore follows that the decisions and commentaries there under could be applied by this court). He specially mentioned the following authorities -

i. Russell on the Law of Arbitration, 19th Edition at Page 225`DUTY TO ACT FAIRLY'
ii. Russell on Power and Authority and Duty of an Arbitrator and the Law of submissions and awards. Etc.at page 371` DUTY TO ACT FAIRLY TO BOTH PARTIES', 11th Edition.

19. Mr. Thorley narrated a number of irregularities in the Arbitration proceedings - a) the Arbitrators were not appointed by the parties; no Notice of the arbitration proceedings was given to the Appellant. He argued that the Arbitration clause was clear on the point that whenever a dispute arises, the complaining party must make a reference but in this case, no such reference was made. Mr. Thorley contended that the fact that the

Arbitration panel heard evidence in the absence of the Appellant on the first day of hearing makes the process irregular.

20. Another irregularity complained of by Mr. Thorley is that the Plaintiff did not have an opportunity to participate in choosing the panel. This was deposed to by Ola Ogunfayitimi in his affidavit sworn to on the 24th day of April, 2017 in support of the Originating Notice of Motion dated the 24th day of April, 2017. This means that the Arbitration proceeded when the Plaintiff/Appellant was yet to "agree on the panel", its composition and modus operandum. He submitted that like other tribunals performing judicial functions, an arbitrator is duty-bound to act in accordance with the essential rules of natural justice. Accordingly, the courts will readily review and set aside an award where it is made to appear that in the course which the arbitrator had pursued he had acted unfairly to either party, however well-intentioned (See HAIGH -V- HAIGH (1861) 5 LT 507 Per Turner LJ)

21. On the second ground of Appeal -
"that the Learned Trial Judge erred in law and in fact at page 297 of the Records, lines 6-8 of paragraph 5.1.5 (page 8 of the Judgment etc)in holding that "because arbitral hearings are informal an arbitrator is not bound by the stringent rules as they apply to the courts for as long as it dispenses justice"

22. Mr. Thorley submitted that the LTJ's statements and conclusions as contained in paragraph 5.1.5 (page 297 of the records) do not only represent an inaccurate legal proposition but they are also a clear misunderstanding or misconstruction or misapplication of the applicable law to the facts of this case. In support of this, (rather unfortunate use of words to refer to a Judges' reasoning in a matter), he cited the case of ATTORNEY-GENERAL V. DAVISON (1825) M' CI 8 Y 160. In this case as narrated by the Appellant's counsel in his synopsis, the gravamen of the Plaintiff's claim, is that evidence was taken ex-parte, the court upheld an application to set aside the award holding that:

"I never understood that arbitrators, like other judges were at liberty to deviate from those rules which govern the

superior courts…. I agree…..that this is not legal evidence, and, if it was not legal evidence, then it ought not to be received"

23. The second limb of this ground of appeal has been sufficiently dealt with in previous submissions in respect of the first limb.

24. On the third ground of Appeal, Learned Counsel for the Appellant submitted that the finding of the Learned Trial Judge that the "parties on their own volition choose arbitration" (Sic: the Arbitrators in question) is against the weight of evidence. This was because there was nowhere in the records that provides evidence this statement. He referred to the Agreement dated 5th April, 2012 between the parties herein - Page 6 of the Records.

25. The submission of Counsel for the Appellant on the fourth ground of Appeal related to costs which he described as prohibitive, punitive and unreasonable in the circumstances and an arbitrary exercise of discretion…."

26. Mr. Thorley submitted that best practice dictates that where the court pronounces its Judgment in the absence of the party against whom it is made, especially in cases involving huge sums of money, as is in this case, it is prudent for the court to refer the costs thereon to the taxing master in the light of the High Court Rules, 2007.

B) The Respondent:

27. In his synopsis, Counsel for the Respondent, Yada H Williams ESQ. firstly dealt with the jurisdiction of the Court Appeal in regard to setting aside an arbitral award. In his opinion, the extent of this jurisdiction is limited under Section 12(2) of Cap.25 of the Laws of Sierra Leone, 1960. He submitted that this court despite its wide powers must be very reluctant to interfere with a regularly procured award in so far as an application for the setting aside of an arbitral award is concerned.

28. In support of this submission, counsel referred to the Nigerian case of ARBICO NIGERIAN LIMITED -V- NIGERIAN MACHINE TOOLS LTD (2002) NWLR 789, C.A

29. Mr. Williams also mentioned a string of authorities in support of the statement of the Learned Judge in the afore-mentioned case to wit: AYE-FENUS ENTERPRISE LTD V. SAIPEN NIGERIA LTD (2009) 2 NWLR 483 AT 513, C.A; BAKER MARINE NIGERIA -V- CHERVRON NIGERIA LTD 2000 12 NWLR 393 AT 406-412

30. In all of these cases, Mr. Williams submitted are established authorities for the finality of arbitral awards. To further buttress this point, counsel cited another Nigerian Supreme Court case of COMMERCE ASSURANCE LIMITED -V- ALHAJI BURAIMOH ALLI (1992) 3 NWLR (pt.232) 710

31. On the first ground of Appeal, Counsel for the Respondent, argued that the Appellant was given an opportunity to present its case before the arbitral panel, it is therefore misleading and unrepresentative of the context of the facts for the Solicitor for the Appellant to submit and make it a ground of Appeal.

32. In response to the allegation of the Appellant at page 139-140 of the Court of Appeal records and paragraphs in stating that:

> "... The Arbitrators had heard evidence of the case in advance and in the absence of the Plaintiff, thereby denying the Plaintiff the invaluable opportunity of cross-examining the Defendant and/or his witnesses...."

Counsel for the Respondent referred to the affidavit of Ibrahim Keita, Managing Director of the Respondent, at page 76 of the Court Records and specifically paragraphs 3 to 9 of the said affidavit;

> "3: that the Plaintiff failed to show up at the scheduled date of the 20th March, 2017, the first day of the proceedings;
>
> 4: That our side was asked to explain our side of the case which we did before the panel adjourned to the 27th March, 2017 giving the Plaintiff another opportunity to attend and present their case;
>
> 5: That the Plaintiff was represented on the second day of the proceedings by OLA OGUNFEYITIMI and gave excuses for the

absence of the Plaintiff on the first day of the proceedings.

33. Mr. Ibrahim Keita further averred that hearings were held in the presence of the Appellant who also called two witnesses.

34. Mr. Williams submitted that none of the facts deposed to by Ibrahim Keita were denied by the Appellant at any stage of the proceedings. In fact, the Chief Executive Officer of the Appellant stated as follows:-

> "…..We are sorry for not attending the last meeting. I was actually out town; I came on Wednesday and I saw that the meeting would have been held on Monday. I checked the letter inviting us and I placed a call to the number. I learnt that according to the schedule not that we deliberately disappointed the Institute" (page 82 of the Court Records)

35. This to Mr. Williams is evidence that the Appellant was given an opportunity to be heard and the Chief Executive at the later hearing date of the 27th March, 2017 in which he was present; clearly had an opportunity to cross-examine the Respondents but did not. This cannot be blamed on the Arbitrators.

36. In support of this submission, Mr. Williams relied on the Canadian case of CORPORACION TRANSNACIONAL DE INVERSIONS S.A.C. -V- STET INTERNATINAL SPA 1991 Canlii (1489) ON SC at paragraphs 65 and 73, in which the case stated, amongst others, "(65) …..It is clear that when a party refuses to participate in arbitration, it is deemed to have deliberately forfeited the opportunity to be heard.

37. Mr. Williams further referred to the following authorities and cases:-

(i) Commercial Arbitration Law and Practice in Nigeria through the cases - Adedoyin Rhodes - Vivour at page 330;

(ii) Russell on Arbitration 23rd Edition at page 260, chapter 5 at paragraph 5 - 192 under the rubric "hearing in the absence of one of the parties"

(iii) Continental sales Ltd V R. Shipping INC (2012) LPELR - 7905 C.A per Ogunwumiji JSC - on Audi alteram Patem as it relates to arbitral proceedings.

38. Mr. Williams concluded on this point by submitting that once the Appellant attended the subsequent hearing of the 27th March, 2017 and continued to make submissions at the arbitral tribunal, he is estopped from raising that question, and has waived whatever perceived irregularity he has and cannot set aside the award on the ground for this, he relied on the case of SIERRA FISHING COMPANY & OTHERS -V- FARRAN & OTHERS (2015) E W H C 140.

39. On the second ground of appeal, that the lower court erred in holding that "because arbitral hearings are informal, an arbitrator is not bound by the stringent rules as they apply to the courts for as long as he dispenses justice, Mr. Williams stated that this was crystal clear position of the law. In support of this, he referred to the case of CHEVRON NIGERIA LTD (FORMERLY TEXACO OVERSEAS NIGERIA PETROLLEUM UNLIMITED -V- MAX-MILLER INTERNATIONAL LTD (2009) 3 CLRN 347 (F H C)

40. On the case of ATTORNEY-GENERAL -V- DAVIDSON (1825) relied on by the Appellant, Mr. Williams after citing in full the dictum of HULLOCK B therein submitted that in this case, the Judges were adamant that what was required was an "opportunity" having been given to the Appellants to appear and examine or cross-examine a witness.

41. Mr. Williams further submitted that reference to the case of HAIGH V HAIGH (1861) 3 DE GF & J, 157,166-167 by the Appellant is of no assistance to him as the evidence before the court do not show or give the slightest indication as to any maladministration or miscarriage of justice on the part of the arbitrators in respect of any violation of the basic and ordinary rules of fair hearing or any applicable rule.

42. On the third ground of appeal, Mr. Williams submitted that it was ingenious for the Appellant to submit that it was wrong for the Judge in the lower court to state that the "parties on their own volition chose arbitration". The agreement for referral to the tribunal is unequivocal and straight-forward.

43. On the appeal against costs, Mr. Williams submitted that an arbitrator is empowered to award costs against an unsuccessful party. For this, he referred to the case of BELLVIEW AIRLINES LTD -V- ALUMINIUM ITY LTD (2005) 7 CLRN 143 (HC). He further submitted that the arbitrators power to award costs are entirely discretionary in

respect of the party that shall bear the costs of an arbitral proceeding and also in what proportion. He referred to Section 4 of the Arbitration Act, Cap 25 of the Laws of Sierra Leone, 1960; RUSSELL on Arbitration, 23rd Edition at page 322 chapter 6 at paragraph 6-133 under the rubric "power to award costs"; also Russell at pages 324, 325.

44. On the final ground of appeal - costs awarded of Le 35,000,000/00 by the High Court was excessive - Mr. Williams submitted that it is trite law that costs follow the event and courts are empowered by the rules and case law to award costs. In respect of the foregoing, he referred to the Sierra Leone Supreme Court case of DANIEL K. CAULKER -V- KOMBA KANGAMA (unreported) delivered on 18th June, 1975. He further submitted that the superior courts do not lightly interfere with the discretion of the Courts in exercise of its jurisdiction to award costs.

ISSUES FOR DETERMINATION

45. The issues in dispute herein could be gleaned from the Grounds of Appeal and the response thereto.

46. The Appellant filed six grounds of Appeal however in reality; the following are germane to the determination of the issues in dispute:

a. Did the Learned Trial Judge take all the facts and law into consideration in arriving at her decision that the Arbitration by the Institute of Architects was conducted and concluded in compliance with laid down procedure in the Arbitration Act, Cap 25 of the Laws of Sierra Leone, 1960.
b. Was the costs awarded firstly by the Arbitrators and secondly by the Judge in favour of the Respondent unjust and an arbitrary exercise of discretion.

47. In determining the first issue; I have considered the Judgment dated 20th day of July, 2017, the submissions of Counsel in this Appeal and any other relevant authority.

48. A proper point of departure here is a review of the Arbitration Agreement/Clause itself.

THE ARBITRATION AGREEMENT/CLAUSE.

49. The arbitration agreement forms the basis of the arbitral process and the foundation of the jurisdiction of the arbitral tribunal to conduct proceedings and render an award. An agreement to refer disputes is essential and the intention to arbitrate must be clear and unequivocal. Let us now look at the agreement.

CLAUSE 4 OF THE AGREEMENT DATED 5TH APRIL, 2012 provides as follows:

"if any dispute or difference concerning this contract shall arise between the Employer or the Project Manager on his behalf and the contractor such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be appointed on the request of either party by the President or a Vice President for the time being of the Sierra Leone Institute of Architects."

50. This clause clearly spells out the steps to be taken in the appointment of an arbitrator. For the avoidance of doubt, the steps are as follows:

i. Both parties are to agree on an arbitrator.
ii. If they fail to agree, then after 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, either party may request the President or Vice President of the SLIA to appoint an Arbitrator.
The decision of the arbitrator appointed shall be final.

51. Looking at this clause as drafted, it would be proper to conclude that there is an effective arbitration clause that had been properly agreed by the parties. This would be so even if the main contract had ceased to exist. In a High Court case of MADAM ABI HARUNA C/T/A MONZA FISHING COMPANY CO. LTD -V- DALIAN SHENGAI OCEAN FISHING CD. LTD FTCC.122/15, I stated that '...the current position of our law is that a party cannot enjoy the benefits of a subordinate clause in a contract that has ceased to exist. This was laid down by the Sierra Leone Court of Appeal in the case of KABIA V. KAMARA (1967-68) ALR S.L series

where Sir Bankole Bright said "A party to an alleged contract who wholly repudiates it by declaring that it does not exist cannot avail himself of an arbitration clause in it. This principle was recently applied in the Sierra Leonean case of RIGA SHIPYARDS -V- JOWNERS AND/OR PERSONS INTERESTED IN THE VESSEL M/V RED COAT CC.105/2012.While this may be the existing law(which I doubt and will address in a more appropriate case), it is out of touch with reality. In the leading English House of Lords case of FIONA TRUST &HOLDINGS CORPORATION- V- PRIVALOV & ORS (2007) 2 ALL E R 1053, it was held that the main agreement and the arbitration agreement should be treated as having been separately concluded and that the arbitration clause could only be invalidated on a ground which related to the arbitration agreement and not merely a consequence of the invalidity of the main agreement. The doctrine of separability required direct of the arbitration agreement before it could be set aside'.
To my mind, this is the proper approach in the treatment of arbitration clauses/agreement.
52. Be that as it may, there is no conceptual reason why the parties who have agreed to submit any dispute arising out of their contractual relationship to arbitration should not be allowed to do so.

IS THE CLAUSE WELL DRAFTED?
53. The existence of a binding arbitration agreement should be supported by a clear and concise drafting. For an award to be enforceable, it will encompass both the agreement to arbitrate disputes, and an effective procedure by which this can be done- TACKABERRY, MARRIOT QC AND BERNSTEIN, BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE(4TH EDN, 2003)PARA.2-110.
54. If the arbitration agreement does not lay any procedural requirements, and does not incorporate any body of Rules which lay such requirements, that should be the first issue to agree on before the commencement of the arbitral proceedings.
55. The arbitration agreement in the instant case does not provide for the use of any institutional Rules and from the records of proceedings, no ad hoc Rules were agreed on or used. I shall comment on the effect of this lapse in due course.

THE ARBITRATION PROCEEDINGS:

56. Learned Counsel for the Appellant submitted that the arbitration was procured amidst serious irregularities, to wit: that the Arbitrators had heard the evidence of the case in advance and in the absence of the Plaintiff, thereby denying the Plaintiff the invaluable opportunity of cross examining the Defendant and or its witnesses.

57. Counsel for the Respondent countered that the Appellant was given an opportunity to present its case before the arbitral panel. In support of this submission, Counsel referred to the affidavit of IBRAHIM Keita, Managing Director of the Respondent, at page 76 of the Court of Appeal records and specifically paragraphs 3 to 9 of the affidavit in which he averred

> "3: ….that the Plaintiff failed to show up on the first day of the proceedings on the 20th March, 2017 and his side were asked to present their case which they did. The Plaintiff was represented on the 2nd day of the proceedings by Ola Ogunfeyitimi who apologized for his absence at the first day of hearing. The proceedings commenced and the Plaintiff called two witnesses -Mr. Eben Elliot, the Project Manager employed by the Plaintiff and the Managing Director of the Plaintiff Company.

58: The Learned Trial Judge had this to say in respect of these submissions of both Counsel. Para.6.1.4

"….My understanding of what transpired in respect of the proceedings of the 20th March, 2017 is that even thought the Plaintiff was aware of the date of the hearing, the Plaintiff absented itself with no reason and excuse as aforesaid. There is nothing on record to show that he asked that he cross-examines the Defendants representative who stated that the Defendant's case on the 20th March, 2017. In actual fact, the Plaintiff's representative never made any of such requests. The Learned Trial Judge cited in the support of this the case of CORPORICON TRANSNACIONAL DE INVERSIONES SA de CV -V- STET INTERNATIONAL SPA ans STET INTERNATIONAL NETHERLANDS (1999) 45 OR (3d) 183''

59. To my mind, this ground constitutes the gravamen of this Appeal. In determining this Ground, a suitable starting point should be Section 12(2) of the Arbitration Act, Cap 25 of the Laws of Sierra Leone, 1960 which provides as follows:

12(1): Where an Arbitrator or umpire has misconducted himself,

the court may remove him.

(2): Where an arbitrator or umpire has misconducted himself, or an arbitration award has been improperly procured, the court may set the award aside.

60. This provision sets out on the grounds on which an arbitral award can be set aside. As between the two provisions, Sub section (2) of Section 12 is more appropriate in this case. The reason is easy to discern; the Arbitration has been concluded and so the question of removing the Arbitrator is now merely academic. There are two expressions we are about to explore which clearly state the pre-conditions for setting aside an arbitral award: Arbitrator misconduct and improper procurement.

61. RUSSELL on Arbitration, 16th Edition at page 302, states the position of the law on conduct of the arbitration process as follows:-

> **"The main pillars on which an arbitral award can be successfully set aside, is where the arbitrator through his own actions conducts an arbitration ex-parte without substantial reason, or where the parties who are entitled to be present are excluded, or the rejection or acceptance of a testimony and the improper passing of duties.**

62. **HALSBURY LAWS OF ENGLAND (4th Edition) Vol.2 paragraph 622 sets out further examples or arbitration misconduct, including "if the arbitrator or umpire has failed to act fairly towards both parties, as for example, by hearing one party but refusing to hear the other, or deciding in default of defence without clear warning". It has also been confirmed that inadequately justified arbitral award amounts to arbitration misconduct.**

63. **In the persuasive Indian Supreme Court decision in COCHIN SHIPYARD V APPLEJAY, it was held that as far as legal misconduct is concerned, same must be manifest or palpable from the**

proceedings before the arbitrator. To elaborate, a person urging the ground of legal misconduct has to satisfy the court from the records of the arbitral proceedings that there has been a legal misconduct on the part of the arbitrator as a result of which the award becomes vitiated. In other words, what the court needs to concern itself with is the proceedings itself and not any extraneous activity.

64. I will adopt this reasoning and determine the conduct of the arbitrator based on the records of proceedings.

THE PROCEEDINGS

65. I should state that the nature of the agreement between the parties and choice of arbitrators makes the arbitration clause more consistent with construction arbitration. Almost all construction and engineering disputes concern time, cost and/or quality, which collectively underpin performance on any contract. It is noteworthy that these disputes trigger specific considerations that may not be relevant in other commercial arbitrations, such as difficulties in isolating the chain of causation for specific heads of claim, technically complex factual scenarios and the types of and volumes of contemporaneous documents. In construction contracts, contractors commonly assert claims for additional time and money for delays, disruption, variation, force majeure or other events that have caused than to suffer loss. Likewise, employers often claim for contractor delays, defective works or back charges for works they have performed for the contractors.

66. I have endeavoured to make this clarification because both Counsel in their submissions treated this arbitration as though it was purely commercial in nature which is not so. There are specific issues that are unique to only construction arbitration. Perhaps the most important is the technical content of disputes, leading to the use of arbitrators skilled in technical disciplines. This explains why I paid scant attention to most authorities cited by both of them.

67. Consistent with the case of COCHIN SHIPYARD case, I have perused the transcript of the recording made of the proceedings and the report of the arbitrators. My first observation is that the arbitrators proceeded without any existing Rules or adhoc Rules

made by themselves. There was no meeting between the parties to agree on the mode of proceedings. It is therefore not surprising that the said proceedings were not properly organised creating the impression that it was not in conformity with laid-down practice. Agreed that arbitration proceedings are supposed to be informal but arbitrators, like any other adjudicating body have an obligation to adopt or develop procedures that are suited to a particular case. This is a procedural flaw that could undermine the effectiveness of arbitral process.

68. In the instant case, the arbitration did not have a formula for the calling and examining of witnesses as each party and consultants jumped in at any stage to ask questions.

69. Furthermore, 'witnesses' testified without complying with the provisions of Section 4 of Cap 225 which provides that:

> **"A submission, unless a contrary intention is expressed therein, shall be deemed to include provisions set forth in the schedule to this Act so far as they are applicable to the reference under the submission"**

70. Paragraph (f) of the schedule provides that:

> **"The parties to the reference, and all parties claiming through them respectively shall subject to any legal objection submit to the examined by the arbitrators ....on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators...all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrator....may require".**

71. This procedure was not followed giving credence to the Appellant's claim that the entire proceedings were disorganised.

72. The next issue relates to the fairness of the proceedings. In this, I will refer to the transcript of recordings at page 8 at which the Appellant requested that an inspection team visits the site and determine work done to which the Chairman of the Arbitral Tribunal replied that "Mr. Elliot, the Project Manager has already certified that the job is completed". The Appellants

Managing Director stated that if the Project Manager says that the work has been completed, will he indemnify the Appellant for any liability incurred? These exchanges were treated by the Tribunal, the Respondent and the Learned Trial Judge as acceptance of liability. I do not agree with them. That statement was full of sarcasm signifying a denial of that claim.

73. In construction Arbitration, one of the advantages the Arbitrators have is their technical knowledge. Where there is a dispute, they are competent to visit the construction site, making observations and arrive at a professional decision. By merely relying on the certificate of the Project Manager is not enough. In the persuasive English decision in the case of NORTHERN REGIONAL HEALTH AUTHORITY -V- CROUCH (1984) A.B. 644. This case deals with the power of a Tribunal to Revise Project decisions, certificate etc. It was held that Arbitration had the power by the standard forms of construction contract the express power to "open up, review and revise certificates, decisions etc". This decision is important particularly in the instant case where the Project Manager and the Appellant have a dispute of their own which clearly manifested itself during the arbitral proceedings. The arbitrators ought to have gone beyond the certificate and determine the dispute based on their own independent professional assessment. This is particularly so when the conduct of the said Project Manager is in itself inconsistent. In paragraph 15 of the affidavit in support of the Originating Notice of Motion, the deponent avers that: 'That it is evident from exhibit 008a-b that as far back as January, 2015, the Project Manager recommended to the Plaintiff's management that the contract be terminated at the instance of the Plaintiff on the ground that, 'The contractor has displayed beyond all reasonable doubt that, that they cannot perform the above contract reasonably well and in reasonable time'. It was therefore surprising that soon thereafter; the said Project Manager forwarded a certificate for the sum of USD$250,000 to the Appellant for payment, allegedly from the M & E Engineer. The Appellant clearly contested this. Even in the face of this, the M & E Engineer was not called nor was a technical assessment of the work done.

74. I hold that failure of the Arbitral Tribunal to inspect the construction and draw their own conclusions as expected in

construction arbitration amounts to procedural unfairness which falls under Section 4 of Cap 225. The LTJ ought to have taken these issues into consideration in arriving at her decision.

75. Finally in the conclusion of the Arbitration Report, the Arbitrations made reference to an obligation owed by the Appellant to the Project Manager, Eben Elliot. Quite astonishingly, the Arbitrators used the following words: 'During the deliberations, it was disclosed by the Consultant/Project Manager Eben Elliott that Vita Foam refused to settle his fee of USD 20,000.00. This paints a picture of Vita Foam refusing to meet their obligations''

76. This was a clear case of bias. The claim of the Project Manager was not part of the submission. His alleged claim against the Appellant had not been proved and so the use of it to determine the Appellants' credibility is highly irregular. The duty of an arbitrator is to confine himself to the facts before him. In fact the existence of such an issue between the Project Manager and the Appellant should have raised a red flag as to former's veracity as witness for the latter.

77. In view of these procedural irregularities, the LTJ should not have upheld the award made by the arbitrators. This is without prejudice to the applicability of the arbitration agreement. The LTJ should have gone beyond the applicability of the arbitration agreement and looked at the issues of procedural fairness raised by the Appellant. The existence of an arbitration agreement does not ipso facto mean that the proceedings were fair.

78. For completeness, I shall now dispose of some other issues closely related to the foregoing grounds of appeal before determining the final ground of appeal relating to costs.

79. The Appellant argued that the Arbitration clause is inapplicable. As I have already stated, I disagree with this contention and hold that the clause is valid and enforceable. The fact that the arbitrators did not conduct a proper process should not invalidate the arbitration agreement which I hold is still binding on the parties notwithstanding the status of the principal agreement.

80. I also do not agree with the Appellant that the arbitration was conducted in the absence of the said Appellant. The records clearly show that the Appellant attended and was given an opportunity to explain albeit in a procedurally questionable

environment. I however disagree with the LTJ that the Appellant absented itself without any reason and excuse as aforesaid. As clearly averred in the affidavit of Ibrahim Keita, the Appellant though absent on the first day, was present at the subsequent hearing and apologised for his previous absence. This does not amount to refusal to participate. The case relied on by the LTJ (CORPORACION TRANSNACIONAL ETC- V- STET INTERNATIONAL SPA ETC) is therefore unfortunately inapplicable here.

81. I shall now proceed to determine the ground of Appeal relating to costs ordered by the arbitrators to be paid to themselves and the Respondent. The power to order costs is to be found in the following provision:

Section 16 of Cap 25 provides as follows:

"Any order made under this Act may be made on such terms as to costs as the authority making the Order thinks just".

82. This provision may also cover the Ground of Appeal relating to the costs awarded by the Learned Trial Judge. I shall, as far as reasonably convenient treat both of the grounds together.

83. **The general principle regarding costs as provided in Section 16 herein is that costs are at the discretion of the arbitrator. In the HANDBOOK OF ARBITRATION PRACTICE (Sweet and Maxwell, 1998) Bernstein & Ors (3rd Edition), the Learned Authors stated that: "But although the discretion is wide, it is a judicial decision and must be exercised according to the rules of reason and justice, not according to the private opinion of the arbitrator, or from notions of benevolence or of sympathy". (Paragraph 2-809, page 237).**

84. At paragraph 2-810, the Learned Authors stated as the starting point, costs follow the event:-

> **"There is a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, and that it is necessary to show some grounds for exercising the discretion of refusing an order which would give them to him, and the discretion must be judicially exercised. Those words "judicially exercised" are somewhat difficult to apply, but they mean that the arbitrator must not act capriciously and must, if he is going to exercise his**

discretion (to depart from the usual practice show a reason connected with the case and one which the Court can see is a proper reason". Per LORD GODDARD L.C.J. in LEWIS -V- HAVERFORD WEST RURAL DISTRICT COUNCIL (1953) 2 ALL E R 159.

85. At paragraph 2-811

"In most litigation or arbitration, the claimant claims a sum of money, whether liquidated or unliquidated. If he recovers the whole or a substantial part of what he claims, he has 'won". If he does not, "he has lost". Applying the general principle that costs follows the event" the "event" is that the claimant or Respondent "wins". If the claimant succeeds, the Respondent is ordered to pay the cost of the arbitration; if the claimant fails, the claimant is ordered to pay the costs of the arbitration".

86. The principles enunciated here are of general application. In this arbitration, the arbitrators presided in a Tribunal agreed by the parties. The Tribunal was properly constituted with the parties attending. There were procedural issues but that did not negate the fact that proceedings were held. In such a situation, it will only be fair for this court to uphold that the Arbitrators' fee of Le 4,000,000/00 be upheld. The work was done albeit irregularly probably because the SLIA had not developed any guidelines to follow in Construction Arbitration arising out of their standard form agreements. This provision can also be applied to the cost of Le 35 Million awarded by the Learned Trial Judge. Section 16 provides amongst others that "Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just".

87. This provision gives power to the Learned Trial Judge as it did to the Arbitrators, to award costs. The words "as the authority making the Order thinks just" are instructive. Here the Appellant is claiming the Le 35,000,000/00 awarded to the Defendant/Respondent by the Learned Trial Judge is prohibitive, punitive and unreasonable in the circumstances and an arbitrary exercise of discretion". The Respondent argued, citing the Sierra Leone Supreme Court decision in DANIEL K. CAULKER V. KOMBA KANGAMA S.C. CIVIL APPEAL.8/79 (unreported)

"I now turn to the question of costs. It is trite law that costs should follow the event and that the appellant having succeeded in his appeal should have his costs".

88. It is an accepted principle in our jurisdiction that an appellant court should not lightly interfere in the Trial Judge's exercise of discretion. Here the Learned Trial Judge ordered the payment of costs on the basis that the Appellant failed to provide sufficient grounds to set aside the arbitral award. If this decision is reversed in favour of the Appellant, then the issue of costs would be merely academic.

89. Before concluding, I would briefly mention the issue of additional 15% of USD$290,000 awarded to the Appellant. It is not clear whether it was awarded as interest or cost. If the latter was intended, the following principle should apply.

90. It is implicit in every submission that the Arbitral Tribunal is given power to award interest as if the matter in difference were litigated in a court of law. The arbitral tribunal's jurisdiction is derived from an implied term by the submission to arbitration that it should have power to decide issues on the subject of the reference. Successful claimant (including a respondent who succeeds in a counter claim) in arbitration is entitled to have included in the award an amount in respect of interest on the principal sum awarded in his favour from the date the cause of action arose and such interest on the award is allowed to accumulate until the date of payment. No exception should be made to this except for good reason - PNCHAND FRERES SA -V- PAGNAM & FRATELLI (1974) 1 Lloyds Rep.394). This is especially so in the light of the Act of 1934 which is enshrined in the laws of Sierra Leone by the Law Reform (Miscellaneous Provisions) Act No.19 of the Laws of Sierra Leone, 1960. Whilst I may agree that the Arbitration Tribunal had the right to award interest, the issue of rate of interest applicable would have to be considered. The Tribunal awarded 15 percent. The current judgment debt rate is 5 percent and the Bank of Sierra Leone lending rate for local currency is about 15-20 percent. The prime lending rate for the US Dollars in its home country is 3.5 percent. It follows that an interest of 15 percent on the sum of $290,000/00 is excessive by any standard. As Lord Wilberforce puts in GENERAL TIRE & RUBBER

CD. LTD -V- FIRESTDNE TYRE & RUBBER CD. LTD (1975) 2 ALL ER 173 at 192,

> "Interest is not awarded as punishment against a wrongdoer for withholding payments which should have been made. It is awarded because it is only just that the person who has been deprived of the use of the money due him should be paid interest on that money for the period during which he was deprived of, its enjoyment"

91. In my view, in determining the rate of interest in construction arbitrations, the appropriate rate of interest to award should be in the context of a dispute between two businesses and it should more accurately reflect those commercially available to the parties. For example, difference in the cost of building materials at the time they ought to have been purchased and the time the award is made.

92. If the said 15& of the USD$290.000 is awarded as costs, I still hold that it is unconscionable. Costs of the arbitration include the arbitral tribunals fees and expenses, legal fees and expenses, expert fees and expenses, party's own direct costs(cost of employees travelling and attending meetings or hearings) and the party's own indirect costs. The arbitrators have already awarded costs of Le. 4,000,000.00 to themselves which I have upheld. To award another USD$43,500 as costs to the Respondent is unfair and do not satisfy the requirement of fairness in any exercise of discretionary power. The proceedings were held twice, no expert witness was called nor a visit made to assess work on the site. The costs or interest of 15% on the sum awarded can therefore not be upheld.

93. For the reason given above, I will uphold the Appeal and Order as follows:

i) The Judgment of the Fast Track Commercial Court dated the 20th day of July, 2017 is hereby set aside

ii) The costs awarded by the Arbitration Tribunal and the Learned Trial Judge are hereby set aside

1. The parties bear the costs of Arbitrators' fees of Le 4,000,000.00 in equal proportions

iii) That the matter be remitted to the Arbitration Panel as provided for in Clause 4 of the Agreement between the Parties dated 5th day of April, 2017 with the proviso that a fresh Panel be constituted comprising of members agreed on by the said parties.

iv) That the cost of this Appeal shall be taxed if not agreed.

HON. MR. JUSTICE SENGU MOHAMED KOROMA
JUSTICE OF THE SUPREME COURT.

----------HON. MR JUSTICE DESMOND B EDWARDS
CHIEF JUSTICE-PRESIDING

----------HON. MR JUSTICE REGINALD FYNN
JUSTICE OF THE COURT OF APPEAL