Need to Strictly Plead, Particularize and Prove Special Damages – Whether Applicable in Arbitral Proceedings

In The Federal High Court of Nigeria
In the Lagos Judicial Division
Holden at Lagos
On Friday, the 27th Day of October, 2023

Before His Lordship:

C.J. Aneke
Judge, Federal High Court

Suit No: FHC/L/CS/1542/2020

Between:

Nigeria National Petroleum Corporation Limited (NNPCL) - Applicant

And

Chevron Nigeria Limited - Respondent

(Judgement delivered by Honourable C.J. Aneke, J.)

Facts

The Respondent (Chevron Nigeria Limited (CNL)) and Addax Petroleum Development (Nigeria) Limited (Addax) (substituted with Nigeria National Petroleum Corporation Limited) had executed a Crude Handling Agreement (CHA) prescribing the allocation methodology of their comingled crude oil between the parties. A dispute arose on the allocation methodology applied by Addax. The dispute was submitted to regulatory authorities for resolution. Dissatisfied with the outcome, Addax invoked the arbitration clause in the agreement, and a three-man Arbitral Tribunal was constituted to resolve the dispute, namely, (i)Mr. Abdul-Lateef Jinadu; (ii) Dr. Tunde Ogowewo; and (iii) Babajide O. Ogundipe (Chairman). After hearing submissions of parties, the tribunal made a Partial Final Award on 2nd September 2020 and Final Award dated 8th October 2020, and awarded the sum of $170,799,382.00 to CNL, being monetary

value for the 1,290,265 barrels of crude oil claimed by CNL as its alleged loss to Addax, among other reliefs in its Counter Claim.

Dissatisfied, the Applicant filed an Originating Motion dated 5/11/2020, seeking *inter alia*, an Order setting aside the Partial and Final Awards on twelve grounds . The Respondent filed a Notice of Preliminary Objection dated 23/11/2020, challenging the jurisdiction of the court to review the two awards in the Originating Motion.

Issues for Determination
Issue in the Preliminary Objection –

> *Considering the grounds that the Applicant/Respondent (Addax) has relied on to predicate its application to set aside the partial award dated 3rd November 2020, whether the Honourable Court has the jurisdiction to hear Addax's application to set aside the partial award in the light of Sections 29, 30 and 34 of the Arbitration and Conciliation Act.*

In the substantive application, the trial court distilled five (5) issues from the twelve grounds in support of the Applicant's application for its determination, thus*:*

1. *Whether the tribunal misconducted itself by committing an error in law on the face of the award and did not apply basic and elementary principles representing the minimal standard of justice when it awarded to Chevron ("CNL") the sum of $170,799,382.00 as monetary value for the recovery of 1,290,265 barrels of crude oil it allocated to CNL without CNL producing any evidence or proving this claim strictly or with any credible evidence.*

2. *Whether the tribunal misconducted itself by repeatedly arriving at material inconsistent and directly contradictory and/or ambiguous findings and decisions on central points of the dispute upon which the parties joined issues, throughout the award.*

3. *Whether the tribunal misconducted itself when it dealt with questions and points NOT submitted to it by the parties.*

4. *Whether the tribunal misconducted itself and committed an error in law on the face of the award when it pronounced that CNL's counter-claim was not statute barred based*

on very wrong principles of law, upon which it ruled that CNL's counter-claim was not statute barred and proceeded to grant CNL's reliefs.

5. *Whether the tribunal misconducted itself by committing an error of law on the face of the award in its application of Article 40 of the First Schedule of the Arbitration and Conciliation Act in the Final Award dated 8th October 2020 and by not complying with the specific terms of the CHA.*

Arguments

In support of its Preliminary Objection, the Respondent argued that from the particulars of the twelve grounds of the Applicant, the grounds complaining of misconduct and errors on the face of the awards are not misconducts and errors but mere dissatisfaction with the merit of the awards and outside the scope specified by Sections 29 and 30 of the ACA. Responding to the submissions, the Applicant emphasized the trite position of law that once a Defendant has decided to challenge an action by way of Preliminary Objection before filing his defence, he is taken as having conceded all questions of facts as contained in the Statement of Claim as correct – **OMNIA (NIG.) LTD v BYKTRADE (2007) LPELR-2641(SC).** It posited that the Respondent having taken all its twelve grounds for applying to set aside the award as true and correct for all purpose of its Preliminary Objection, it is not allowed to argue as did on the Applicant's allegations of misconduct and error in law on the face of the awards or that the tribunal exceeded the scope of the arbitration agreement.

Arguing the substantive application, the Applicant submitted on ground one that the tribunal granted special damages in favour of the Respondent when the Respondent did not meet the requirements for the grant of special damages. It argued that the Respondent did not place before the tribunal, verifiable evidence of how the 1,612,837 barrels of crude oil claimed was calculated. The figure and the sum of US$170,799,382.00 awarded were neither specifically pleaded with particulars, nor supported with credible evidence to merit these awards. Relying on the decision in **KLIFCO v NNPC (2004) VOL. 3 WRN 135,** the Applicant submitted that where there is a misapplication of the principles underpinning the grant of special damages, the award is likely to be set aside. On ground two, the Applicant highlighted various inconsistencies in the awards and concluded that the tribunal was inconsistent and/or ambiguous in material aspects of the award. On ground three, the Applicant highlighted the instances of how the tribunal misconducted itself when it dealt with points not submitted to it by the parties. Arguing ground four, the Applicant demonstrated that the Tribunal mischaracterised, misrepresented and misconstrued very important and central

points of dispute between the parties. On ground five, the Applicant challenged the decision of the tribunal that limitation law can be waived or defeated by estoppel, as amounting to an error of law on the face of the award. On ground six, it was argued that the tribunal misconducted itself by committing an error of law on the face of the award when it based its decision on a point that the Respondent did not raise or materially plead and did not emanate from its Defense and Counter Claim, but which materially affected the Partial Award in ways adverse to the Applicant's interest. On ground seven, the Applicant challenged the Partial Award on the ground that the Tribunal misconducted itself when it overlooked, ignored, or failed to consider or/and apply very material evidence on the central points in the dispute between the parties. In the process, the Tribunal failed to apply basic principles of minimal standard of justice and arrived at perverse, unjust, unfair and wrong decisions and committed an irregularity. On ground eight, the Applicant posited that the Tribunal misconducted itself by committing an error of law in the face of the award by misstating and misapplying a fundamental legal principle on mitigation. The argument on ground nine is to the effect that the action of the tribunal in awarding against the Applicant the Respondent arbitration costs and applying Article 40 of the First Schedule of the ACA, when the Applicant was partially successful at the arbitration, amounted to misconduct. On ground ten, it was submitted that clause 19 of the CHA provided that a party can only be compensated for the gross negligence or willful misconduct of the other party, and that having found that Addax is not guilty of the above, the tribunal had no basis to award 1,612,837 barrels of crude oil to the Respondent, and make the Applicant solely bear the expenses of the non-residential arbitrator. Submissions on grounds eleven and twelve are to the effect that the tribunal misconducted itself when it failed to act fairly towards both parties and that the tribunal made an award which is perverse, unconscionable and against public policy. The Applicant's complaint in ground eleven is that the Tribunal gravely misconducted itself when it did not treat the parties equally and failed to act fairly towards each party. The Applicant provided instances of the Tribunal acting unevenly and unfairly to the parties and applying double and different standards to them. Finally, in ground twelve, the Applicant complained that the Tribunal has misconducted itself in rendering the award which is perverse, unconscionable and against public policy.

The Respondent opposed the application to set aside the award and argued conversely on the twelve grounds raised by the Applicant, that: there was considerable evidence including that of an expert to establish the requisite aspect of its claim; the complaint about several inconsistencies did not establish a substantial miscarriage of justice; complaint about "error of law on the face of the

award" is no longer available as a ground to set aside an award and there was no substantial miscarriage of justice; Addax admitted that it unilaterally suspended the CHA allocation formular; the tribunal applied the correct principles in relation to estoppel and waiver; on agreement about the non-contractual sharing formular, the Respondent argued that the complaint is against the tribunal's evaluation of evidence and same must fail; on mitigation of loss, it argued that the tribunal applied the correct legal principles; that the findings on ground nine did not affect the Tribunal's central findings as to liability; the High Court cannot conduct an appellate review of the tribunal's evaluation of evidence; "perverseness" is not a ground for setting aside an award under the ACA.

Court's Decision and Rationale

In determining the Preliminary Objection, the court considered the twelve grounds put forward by the Applicant in urging the court to set aside the arbitral award, and came to the conclusion that some of the grounds were premised or framed to include the allegation of misconduct of the arbitrators and that the arbitrators went beyond the scope of the matters submitted to arbitration. Referring to the ground of the Respondent in support of its Preliminary Objection, where it stated that *"although Addax couched the grounds in support of its Originating Motion so as to ostensibly bring them within the limited scope provided by Sections 29 and 30 of the ACA, a closer reading of the particulars of the grounds show that the grounds are outside the limited scope provided by Sections 29 and 30 of the ACA",* the court found that this amounts to an admission by the Respondents that the grounds as couched by the Applicant come within the provisions of Sections 29 and 30 of the ACA. More so, contrary to the Respondent's arguments, *it is the grounds that should control the Particulars. The particulars of these grounds cannot control the grounds, they should support the grounds and any particular that is inconsistent with its ground ought to be struck out.*

The Preliminary Objection was accordingly struck out.

Deciding the first issue, the court highlighted the findings of the tribunal in paragraphs of the Partial Award where it held that the evidence as to the extent of the Respondent's losses is limited to the period between the installation of the surge vessel in 2010 and the reversion to the contractual allocation formula and is to be found in the witness statement of Eddie Agbongiator. In paragraph 28 of the said witness statement, *he stated that he applied the contractual formula for the period 17 May 2004 to 1st May 2012 and by his calculation, CNL is owed approximately 1.6 million barrels.* The tribunal found that the evidence above is the only direct

testimony on the volume of crude oil claimed. There was also the DPR-NAPIMS Report of 2014 where the loss to the Respondent was stated as 1,612,837 bbls.

In this case, the Respondent pleaded in paragraph 132 of its Amended Statement of Defence and Counter-claim that it lost 1,612,837 barrels of crude oil between May 2004 and June 2012. After this paragraph, the Respondent went on to seek reliefs in paragraph 133, where it claimed US$170,799,382. The Court observed that ***The principle of law that special damages must be pleaded with particulars and strictly proved applies equally to Arbitration Tribunal. – NNPC v KLIFCO NIG. LTD (2011) 4 SC (PT. I) 108 AT 144.*** Juxtaposing the facts and findings of the tribunal with law, the court relied on the decision of the Supreme Court in **TRADE BANK PLC v PHARMTECK IND. P. LTD (2020) 8 NWLR 124 AT 154,** to hold that ***relief(s) claimed in a statement of claim (or pleading) does not constitute facts pleaded. Put in another way, reliefs claimed is not part of pleadings.*** The Respondent herein did not plead the sum US$170,799,382 awarded in its favour as it only pleaded 1,612,837 barrels of crude oil. Further, the evidence of Eddie Agbongitor, who testified for the Respondent, did not show the list or particulars of the daily production figures from 17th May 2004 to 1st May 2012 which it relied on in calculation of the Respondent's loss, just as his calculation was not shown in his witness statement on oath. Further, his testimony that the Respondent is owed approximately 1.6 million barrels of crude oil is not strict proof of 1,612,837 barrels as pleaded by the Respondent.

On the reliance of the tribunal on the Executive Summary of DPR-NAPIMS Report of 2014 to hold that the Respondent lost 1,612,837 barrels on the strict application of the CHA allocation factor, the court found that the said report was not before the court. In anyway, it is the duty of the Arbitral Tribunal to show how using the particulars or subordinate facts provided by the Respondent, it reached the conclusion that CNL lost a total of 1,612,837 barrels of crude oil to Addax. It is not enough for the tribunal to say it adopted the figure reached by DPR-NAPIMS. *It is a claim for special damages and the Plaintiff must give full particulars and other facts as may be necessary to enable the court calculate as best as accurately as it can, the actual amount of the Plaintiff's loss* – ***OSEYOMON & ANOR. v OJO (1997) 7 SCNJ 365 AT 386.*** Regarding the expert report of Jeff D. Makholm Ph. D exhibited as A13, the court found that the tribunal's acceptance of the evidence because Addax could not contradict it, is beside the point. By the decision of **NNPC v KLIFCO**, even if Addax admitted Dr. Makholm's evidence, it does not relieve Dr. Makholm of providing those values expected of him nor does it relieve the Respondent from pleading them.

Given the above, the court held that the Respondent neither specifically pleaded how it arrived at the sum of 1,612,837 barrels of crude oil as due to the Respondent from Addax nor strictly proved same. The court also held that the sum of US$170,799,382 claimed by the Respondent was neither pleaded nor proved strictly.

Deciding issue two, the court highlighted the inconsistencies in the awards. First the Court observed that the tribunal contradicted itself when having found in its paragraph 32.12 of the Partial Award that the Respondent acceded to Addax applying an allocation factor of 0.97, it was wrong or contradicted itself by holding in the last sentence of paragraph 32.13 that Addax need to adduce evidence to support the existence of the collateral contract. His Lordship held further that the issue of whether the Respondent acceded to a new allocation factor different from that provided in the CHA is crucial because it determines the liability of Addax to the Respondent. Though the Applicant referred to these inconsistencies as a misconduct, there is no case law or statute referenced on the point. Nonetheless, theses inconsistencies cast a doubt in the mind of the court on the final conclusion of the tribunal that the Respondent is entitled to 1,612,837 barrels of crude oil owing to the application of the non-contractual formular between 2004 and 2012.

On issue three relating to the tribunal's decision that the legal effect of the Respondent treating the CHA as continuing is to sue for damages and that this cannot amount to waiver of the right to claim damages, the Applicant submitted that the points and legal effect of such continuation with the contract were never pleaded by the Respondent and that this amounted to misconduct on the part of the tribunal – **REVENUE MOBILIZATION ALLOCATION & FISCAL COMMISSION v UNITS ENVIRONMENTAL SERVICES LTD (2010) LPELR-9205(CA).** His Lordship found on this issue that the Respondent did not plead the points considered by the tribunal.

Regarding issue four, the court found that on issue of application of the limitation law, *an Arbitral Tribunal is the sole or final Judge on questions of law or fact except where the statute and courts have created exceptions.* The issue of application of the limitation law was submitted by the parties to the Arbitral Tribunal and the tribunal made its decision.

On issue five relating to award of costs, the court found that the Arbitral Tribunal, based on the award it made, did not wrongly apportion the award of costs and that the tribunal complied with Clauses 19 and 26 of the CHA.

Overall, the court set aside the partial and final awards made by the Arbitral Tribunal on grounds of error of law on the face of the award and misconduct arising from inconsistent findings on the face of the award which made the award perverse.

Partial and Final Arbitration Awards Set Aside

Representation:
Parties absent in court.

Prof. B. Adaralegbe, Esq. with M.Y. AbdulMumini, Esq.; W. Udeogwu-Osita, Esq. and H.Tajudeen, Esq. for the Applicant in Suit No. FHC/L/CS/1542/2020 and Respondent in Suit No. FHC/L/CS/1658/2020.

B. Fagbohunlu, SAN; M. Mordi, SAN with T. Anaenugwu, Esq.; I. Omotola, Esq. and O. Adegoke, Esq. for the Respondent in Suit No. FHC/L/CS/1542/2020 and Applicant in Suit No. FHC/L/CS/1658/2020.

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