REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPPLICATION NO. 456 OF 2016

IN THE MATTER OF THE ARBITRATION ACT 1995

AND

IN THE MATTER OF AN APPLICATION BETWEEN

COASTAL BOTTLERS.....1ST APPLICANT

EQUATOR BOTTLERS LIMITED.....2ND APPLICANT

MT. KENYA BOTTLERS LIMITED.....3RD APPLICANT

KISII BOTTLERS LIMITED.....4TH APPLICANT

RIFT VALLEY BOTTLERS LIMITED.....5TH APPLICANT

BEVERAGES SERVICES KENYA LIMITED.....6TH APPLICANT

NAIROBI BOTTLERS LIMITED.....7TH APPLICANT

COCA COLA CENTRAL, EAST AND

WEST AFRICA LIMITED.....8TH APPLICANT

HIGHLANDS MINERAL WATER

COMPANY LIMITED.....9TH APPLICANT

SAFEPAK LIMITED.....10TH APPLICANT

VERSUS

GREENPLAST INTERNATIONAL LIMITED.....RESPONDENT

INVOLVING AN ARBITRATION BETWEEN

GREENPLAST INTERNATIONAL LIMITED.....CLAIMANT

AND

COASTAL BOTTLERS & 9 OTHERS.....RESPONDENTS

RULING

1. I have before me an application dated 4th October 2016 for setting aside of an Arbitral Award published on 5th April 2016 and confirmed after a request determined on 6th July 2016. As an alternative, the Applicants pray that the Court does remit the Award for corrective action on the impugned portions of the Award namely those on plastic scraps, unsupported invoices, VAT and interest for the period of the Arbitrators' delay so as to eliminate the grounds for setting aside.

2. A common denominator of the Applicants is that they were, at all material times, involved in the bottling, distribution and/or marketing of beverages and other products in Kenya packaged with PET products or the conversion or production of resin for use in PET packaging. The 1st to 7th Applicants are bottlers and affiliated with the word famous Coca Cola Brand. The 8th and 9th Applicants are non-manufacturers and Safepak Limited (the 10th Defendant) is a converter.

3. In the Memorandum of Understanding (M.O.U) which is a central document to the controversy here, PET is defined to be polyethylene terephthalate, a type of plastic material.

4. The Applicants intended to incorporate a company limited by guarantee whose main objective was to be to promote better waste management and recycling of PC-PET products. PC- PET being PET packaging used and disposed of by consumers at any location within Kenya. Pending the incorporation of that special vehicle company to be called PETCO, the Applicants and Greenplast International (the Respondent or Greenplast) agreed to work together for purposes of collecting and recycling of post-consumer PET waste in Kenya. The Respondent would be suited as it was in the business of collecting, warehousing, crushing and exporting PC-PET.

5. In the scheme of things it was intended that upon incorporation of PETCO, PETCO would enter into a formal agreement with Greenplast for the collection and recycling of the PC-PET. In the run-up to that incorporation, the Applicants and Greenplast entered into the M.O.U which they declared to be a "legally binding M.O.U to express and record their unequivocal intention." That M.O.U, although undated, was signed by the parties on 1st April 2011. An underlying objective of the M.O.U was that the parties agreed to work together for the purposes of collecting and recycling PC-PET products in Kenya.

6. In the Award, which is the subject of these proceedings, the Arbitral Tribunal ably set out the salient terms of the MOU as being:-

> *i. The Respondents would in due course cause a company known as PETCO Limited by guarantee, to be incorporated with the main objective of promoting better waste management and recycling of PC-PET products.*
>
> *ii. The Respondents appointed the Claimant to collect and re-cycle the approved quality PET waste in Kenya on an exclusive basis in accordance with and subject to the terms set out in the MOU.*
>
> *iii. Unless terminated by either party, the MOU would remain in force for a period of 5 years.*
>
> *iv. In consideration of the satisfactory fulfilment of the Claimant's obligations under the MOU, the Respondents would pay the Respondent for the services provided at the rates that were to be specified in the 3rd schedule to the MOU but in fact were not.*
>
> *v. The MOU defined the words "approved quantity" to mean the approved maximum quantity of PET products that the Claimant was authorized to collect in Kenya as set out in the 3rd schedule. This amount was again, not specified in the 3rd schedule.*

7. Although the MOU was to remain in force for a period of 5 years from 1st April 2011 (see clause 3 of MOU), the relationship between the parties soon ran into headwind. In June 2011, just two months after the signing of the MOU, a dispute arose with respect to the price payable to Greenplast for PET wastes collected as well as the actual quantity collected and exported by Greenplast.

8. Regarding the price, Greenplast, took the position that it was a fixed sum of US$ 350 irrespective of the international market price of PET waste. At the other end, the Applicants contended that the price of US $ 350 per metric ton was a variable subsidy which was to cushion Greenplast from losses arising from the slump in the international market prices for PET flakes.

9. Pursuant to clause 13 of the MOU, Greenplast declared a dispute and, as a first tier, parties attempted to resolve the matter through mediation but failed. Eventually, the dispute was referred to the arbitration of an Arbitral Tribunal constituted of Mr. A. B Shah (retired Judge) and Mr. Tom Macharia.

10. In an Award published on 5th April 2016, the Tribunal awarded Greenplast:-

> a) A sum of US $ 898,042.15 and from which US $ 65,000 already paid would be deducted.
>
> b) VAT on the principal sum.
>
> c) Interest at the rate of 14% per annum from 26th April 2012 until payment in full.
>
> d) Costs.

11. The Applicants thought the Award to have errors and requested the Tribunal to make certain corrections and clarifications. This would

be pursuant to Section 34 of the Arbitration Act. The Tribunal by a ruling delivered on 6th July 2010 declined to review its finding and affirmed its Award and in addition ordered the Applicants to bear costs of the additional proceedings. Of importance is that the Ruling on the request for correction and clarification is deemed to be part of the Award by dint of the provisions of Section 34(4) of the Act. The parties are now here in respect to the entire Award.

12. The challenge to the Award is brought under two broad headlines. First, that the Arbitral Award is against the Public Policy of Kenya and second, that the Award dealt with a dispute not contemplated by the parties and not falling within the terms of reference to the Arbitration.

13. On the Public Policy question, it is argued that the Award is riddled with glaring inconsistences and irreconcilable findings. That while the Tribunal found that Greenplast was entitled to payment for PET Flakes collected, processed and exported, it proceeded to order payment for other form of plastics being plastic scraps amounting to US $ 391,582.30 not contemplated in the agreement between the parties. Related is that the Tribunal made findings on what constituted the contracted PET Flakes and yet proceeded to award payment in regard to plastic scraps and this would be contrary to Public Policy.

14. The tribunal is assailed for condemning the Applicants to interest at 14% per annum which covered a period of nine (9) months in which the Tribunal took to publish the Award. The Applicants assert that this amounts to unfair deprivation of the Applicant's property in terms of article 40 of the Constitution.

15. The second limb is connected with the order on Value Added Tax (VAT) made on the claim. The Applicants are aggrieved by the order of the Tribunal that it should pay VAT. They argue that the claim for VAT was not made in the statement of claim and they were deprived of an opportunity to be heard on it contrary to the right of fair hearing. Again on VAT, the Applicants contend that a consequence of the order was that they would be required to pay US $ 143,686.72 over and above the principal sum as opposed to the contracted tax inclusive price thus shifting the tax burden to the Applicants contrary to the agreement between the parties.

16. Greenplast reacted to the application through a Notice of Preliminary Objections dated 4th October 2016 in which it raises 11 grounds. Those really can be collapsed. Greenplast question the jurisdiction of the Court to hear and determine the application which it contends is incompetent and contravenes the provisions of the Arbitration Act and express agreement of the parties. That the application is against the principle of finality and speedy enforcement of awards. That the application does not furnish proof or otherwise disclose any breach of Public Policy.

17. It is evident that the only objection that could possibly be a true preliminary demurrer is that the Court lacks jurisdiction to entertain, hear and determine the application which is before it and moreover that it is incompetent. That is where I begin.

18. Greenplast argues that the intention of the parties was to exclude intervention of the Court in all respects and looks to Clause 13 of the MOU for this argument. This is the Arbitration Agreement which sets out the path to be taken in dispute resolution and which, ultimately, in regard to arbitration, provides:-

> "The decision of the arbitrator(s) shall be final and binding upon the parties to the fullest extent permissible by law."

Greenplast also seeks to rely on the decision of Nyutu Agrovet Limited v Airtel Networks Limited **[2015]eKLR**.

19. The concept of the finality of arbitration Awards has been underscored in several decisions. For instance, in Anne Mumbi Hinga v Victoria Njoki Gathara Civil Appeal No. 8 of 2009 [2009] eKLR the Court observed:-

> "In the arbitration agreement there is an implied agreement between the parties to carry out the ultimate award.
>
> The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation"

20. The limited Court intervention in Arbitration matters is codified in section 10 of the Arbitration Act:-

> "Except as provided in this Act, no court shall intervene in matters governed by this Act."

21. Yet one of the few occasions when statute allows recourse to the High Court is by way of an application for setting aside under the provisions of section 35 of the Act and it is within this window that the application before Court is brought. Section 35 reads:-

> "Application for setting aside arbitral award
>
> (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
>
> (2) An arbitral award may be set aside by the High Court only if—

(a) the party making the application furnishes proof—

(i) that a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

22. The objection, in my view, misunderstands or misconstrues the principle of finality. While clause 13 of the MOU covenants that the decision of an arbitrator(s) appointed to resolve disputes is final and binding, it has a rider. The rider which the proposition by Greenplast ignores is that the decision shall be final and binding to the fullest extent permissible by law. The law, reading sections 10 and 35 of the Act together, permits a party to an Arbitral Award to seek Court intervention under section 35 of the Act. The Arbitration agreement did not shut out that avenue.

23. The Court will not summarily slam the door on the Applicants. Instead, it is my business to interrogate whether the application makes out a case for the setting aside of the Award within the restricted confines of section 35 of the Act. The Preliminary Objection is without merit.

24. As the Court turns to consider the grounds which the Applicants urge reveal reasons for setting aside of the Arbitral Award, I observe that just as parties to a civil suit are bound by their pleadings, so too is an applicant to a section 35 application bound to the grounds raised for setting aside. The grounds on the face of the application and or in the affidavit in support beacons out the breadth of issues which the Respondent must confront and it would be patently unfair to the Respondent if new issues, which have not otherwise been embraced as requiring resolution, are raised. The application cannot be a boundless and untethered errand. I make this observation because the Applicants have, in the course of submissions, travelled beyond the matters raised in the application.

25. A second matter that I point out this earlier is that one challenge to the Award is that the Tribunal dealt with a dispute not contemplated by the parties and not falling within the terms of the reference to arbitration and is brought under the auspices of section 35 2(iv) of the Act:-

"the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside."

26. The recent Court of Appeal decision in Synergy Industrial Credit Limited v Cape Holdings Limited [2020] eKLR delivered on (6th March 2020) after the parties herein had made their submissions will be referred to by this Court. That decision, will no doubt, be a premier guide on the approach courts should take in considering an application brought under section 35 (2) (a) (iv) of the Act.

27. On the question of public policy, the decision of Christ for All Nations v Apollo Insurance Co. Ltd (2002)2 EA 336(CCK) continues illuminate on what would amount to the Public Policy of Kenya. Ringera J held:-

> **"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public Policy of Kenya if it was shown that it was either: (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category, I would without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals**."

28. In paragraph 71 of the Award, the Arbitral Tribunal held:-

> "We accept the Respondents submissions to the effect that Pet Flakes and plastic scraps are not one and the same thing. As the claimants 2nd witness Rajiv Shah stated in his evidence, the two have different customs duty codes and attract different customs duties and cannot therefore be considered to be the same item for purposes of the MOU. Secondly, the product descriptions in the bills of lading make a distinction between the two and it is not clear why that should be so if the two descriptions refer to the same material. We therefore find that the Claimant is not entitled to claim payment for the material set out at page 96 of the Respondents Further List of Documents. The plastic scraps summarized on the said page 96 of the Respondents Further List of Documents amount to 1053.28 tons."

29. The Applicants' counsel argue that notwithstanding that finding, the Tribunal at paragraph 76 of the Award contradicts itself by stating that all PET is a subset of the material identified broadly as plastic scraps and on that basis took into account and included for payment invoices in which the material export was described as PET Flakes/plastic scraps equivalent to 481.786 metric tons. In the impugned holding, the Tribunal expressed itself as follows:-

> "From the evidence adduced by both parties, we accept that whilst plastic scraps are not necessarily all PET, all PET is a subset of the material identified broadly as "plastic scraps". We are therefore satisfied that the Claimant did indeed export PET during the period between 15TH September 2011 and 15th December 2011 for which it is entitled to payment at the agreed subsidy rate $350 per tonne."

30. The Applicants assert that as it was not possible to distinguish, from the invoices, "PET flakes" and "PET scraps", there was no basis for the Tribunal to order the Applicants to pay. That in view of the ambiguity, the Tribunal ought to have excluded the entire amount bearing the description "plastic scraps" as this was not contracted for in the MOU. It is argued that the Award on "plastic scraps" was a matter not contemplated in the MOU or in issues framed for determination and so the Tribunal exceeded its mandate by determining a matter not within its jurisdiction.

31. Greenplast's answer is that the Tribunal set out the conflicting positions of the parties and made findings of fact based upon an evaluation of all the evidence submitted by each of the parties.

32. This Court was treated to lengthy submissions (including the oral highlights) on whether "PET flakes" are distinguishable from "PET scraps". This was, with respect, wholly unhelpful because this Court is not sitting on appeal against the decision of the Arbitrator. Under the heading "Volume of Pet Flakes Exported", the Tribunal discusses what it saw as the evidence availed to it by the parties on that matter. The debate as to whether pet flakes and plastic scraps are one and the same thing was very much alive before the Tribunal and the Tribunal made a call on it.

33. The decision reached by the Tribunal was that in paragraph 71, of the Award which I, again, reproduce:-

> "We accept the Respondents submissions to the effect that Pet Flakes and plastic scraps are not one and the same thing. As the claimants 2nd witness Rajiv Shah stated in his evidence, the two have different customs duty codes and attract different customs duties and cannot therefore be considered to be the same item for purposes of the MOU. Secondly, the product descriptions in the bills of lading make a distinction between the two and it is not clear why that should be so if the two descriptions refer to the same material. We therefore find that the Claimant is not entitled to claim payment for the material set out at page 96 of the Respondents Further List of Documents. The plastic scraps summarized on the said page 96 of the Respondents Further List of Documents amount to 1053.28 tons."

34. In expressly disregarding the claim of "plastic scraps", the Tribunal would have been aware that, from the terms of the MOU, payment in regard to "plastic scraps" was not included. This was the effect of the holding in paragraph 71.

35. Did the Tribunal make other findings that suggest that it made an award for collecting, recycling of "plastic scraps" which were not within the contemplation of the MOU? The answer to this is not in reading paragraph 76 of the Award in isolation but to appreciate it holistically. So in paragraphs 75 to 78 to the Tribunal rendered itself:-

> "[75] Whereas the invoices and customs declaration forms identify the material being exported as "flakes", in many instances the shipping documents identify the cargo as "plastic scraps."
>
> [76) From the evidence adduced by both parties, we accept that whilst plastic scraps are not necessarily all PET, all PET is a subject of the material identified broadly as "plastic scraps". We are therefore satisfied that the Claimant did indeed export PET during the

period between 15th September 2011 and 15th December 2011 for which it is entitled to payment at the agreed subsidy rate $ 350 per ton.

[77] The Respondents also urge us to disregard the quantity of PET flakes set out at page 97 of their Further List of Documents on the basis that no bills of lading were supplied in respect of the corresponding invoices. The Claimants advocate did provide a schedule marked AR 5 attached to his submissions which was also dealt with in the testimony of Mr. Jai Shah demonstrating that the said bills of lading had indeed been supplied to the Respondents.

[78] We therefore find that the Claimant collected, recycled and exported 2751.549 metric tons made up as follows:

a) Tonnage at pages 94, 95 and 97 of Respondent's submission: .....:1362.021

b) Tonnage exported by the Claimant between June and 15th December 2011 .....: 1389.528

Total tonnage .....: 2751.549."

36. I make some observations on these findings. I am unable to agree that by merely holding that "whilst plastic scraps are not necessarily all PET, all PET is a subject of the material identified broadly as "plastic scraps", the Tribunal included material not contracted for payment. My understanding of paragraph 76 is that, from the Tribunal's appreciation of the evidence, it understood PET to be but a part of a larger group of material identified broadly as "plastic scraps" but that nevertheless Greenplast did indeed export PET during the period between 15th September 2011 and 15th December 2011 for which it was entitled to payment under the MOU. Read together with paragraph 75, I understand the Tribunal to be saying that merely because in many instances shipping document identify the cargo export as "plastic scraps" did not detract it from finding them to be flakes as identified by invoices and custom declaration forms. I do not discern the Tribunal to be holding that payment for collecting, recycling and exportation of other form of plastics other than PET Flakes was payable under the MOU.

37. If, however, the Tribunal, notwithstanding its distinction of "plastic scraps" from "plastic flakes", still made an award for anything other than PET Flakes then the Tribunal would have misapprehended the evidence before it. Yet that is not a ground upon which this Court can interfere with an arbitral award under section 35. An arbitral tribunal is a master of facts and parties who do not, by agreement, reserve the right to a review by way of an appeal (section 39 of the Act) must live with a tribunal's misapprehension of the evidence. As Justice Ringera aptly put it in Christ for All Nations (supra) the parties to an arbitration (from which no appeal lies against its award) must be prepared to bear the pain of a wrong interpretation of a contract or misapprehension of the facts.

38. So too must the argument that an erroneous award that may have benefited Greenplast and therefore unjustly enriched it is contrary to Public Policy fail. To accept that a misapprehension of evidence or law that leads to a party being awarded damages that it may not be deserving is contrary to public policy is to accept that the merit of all decisions must be scrutinized under a section 35 application. So, for example, if a Tribunal erroneously awards a party damages of Kshs. 1,000,000.00 instead of Kshs. 500,000.00, then the aggrieved party can argue that the party has been unjustly enriched to the sum of Kshs. 500,000.00 and seek that it be set aside as being contrary to Public Policy. To allow such argument is to wrongly turn a section 35 application into a merit based inquiry of the award.

39. I turn to another issue. Mr. Karori appearing for some of the Applicants submitted that the witness for Greenplast confirmed that the reason why some Bill of Lading were raised as plastic scraps instead of PET flakes was because the duty payable on plastic scraps was less than on PET flakes. Counsel then submitted that to uphold the award would amount to a court of law sanctioning a claim that is intended to avoid or to reduce payment of Tax. If there was indeed an element of tax evasion on the part of Greenplast then that should be of concern to this Court. The trouble is that, not once, is the alleged illegality taken up in the application as a Public Policy ground for setting aside the award. The Applicants attempt to expand their application beyond what they presented.

40. The Tribunal made the following award on interest:-

"We award and direct that the Respondents, jointly and severally, pay interest to the Claimant, calculated at 14% per annum on simple interest basis from 26th April 2012 until payment in full of the principal sum of US $ 898,042.15."

41. The Applicants see this as unjust because it took the Tribunal nine (9) months to publish the award and yet the interest was made payable even for the period of delay. That there was substantial injustice occasioned upon the Applicants as this amounted to deprivation of their property contrary to article 40 of the Constitution.

42. Greenplast's answer is that even the High Court is no stranger to complaints of delays in rendering their judgments and that in any event the Applicants themselves were responsible for extensive delays in the proceedings before the Arbitrators and made frequent applications for adjournments.

43. When the Applicants sought a correction and clarification on the Award from the Arbitral Tribunal, the Tribunal, on this question of interest, observed:-

"[15] Unlike the Civil Procedure Act which makes provision for the period within which a judgment is to be delivered, the Arbitration Act does not prescribe the time period within which an ward (sic) is to be published. Nevertheless, it is trite that the Award ought to be published within a reasonable period of time taking into account the issues arising, the volume of documents and evidence to be perused and time consumed in considering issues of law placed before the Arbitral Tribunal. We are satisfied that the award was published within a reasonable period of time which cannot be construed to be punishment on any of the parties."

44. The Court has given anxious consideration to this matter not in the least because it is an argument that can arise every time there seems to be an unreasonable delay in the publication of an Award in the case of arbitrations or a judgment in the case of civil suit. The objective of an award of interest is to compensate a party for loss it suffers for being put out of use of money it deserves. So the delay in publication of the award deprived Greenplast of use of the money comprised in the award during the period of delay. It would be unjust for the party to be denied an award of interest for this period when no blame can be attributed to it for the delay. On the other hand, interest which accrues during the period of delay punishes the losing party as it has to pay more than if the award was published promptly.

45. An unreasonable delay in publication of the award has the potential of hurting one or both sides to a dispute. And just as the Applicants have a good argument against the interest, so does Greenplast for its award. The answer may lie with a party against whom a claim is made making arrangements to mitigate losses that may result from unreasonable delay in publication of awards. The party, assuming it has the ability, may choose to have the amount claimed deposited in an interest account, of course with the concurrence of the Tribunal, and so interest for the period will be no more than that earned in the account. On this occasion, this Court is unable to find that the order of interest is contrary to Public Policy because to set it aside would punish an innocent party, which in itself is not pro Public Policy

46. As I conclude on this part, I again point out another attempt by the Applicants to recast their case beyond the grounds raised in the application. It was submitted that having made an award in a foreign denominated currency (US dollars), the interest award should have been libor rates and not 14%. That the interest awarded is punitive. I decline to discuss this argument at all as to do so would be to give some legitimacy to an improper expansion of the application.

47. The Tribunal ordered the Applicants to pay VAT on the principal sum, which I am told totals to US $ 143,686.72. The attack on this order is two-pronged. First, that payment of VAT was not contemplated in the MOU. Second, that it was not pleaded and arose for the first time at submissions stage during the Arbitral proceedings. It is contended that the issue of whether VAT was payable or not was not one of the issues framed for determination before the Tribunal.

48. Greenplast does not share the view and asserts that it was pleaded in paragraph 23 of the statement of claim. Second, that the issue was dealt with in the Ruling on review and that the application is now an appeal from that decision dressed up as a section 35 application.

49. Let me first consider whether payment of VAT was in the contemplation of the MOU. In the MOU, rates is assigned the following meaning:-

> "....rates to be charged by Greenplast pursuant to clause 7 herein and as more particularly set out in the third schedule hereto."

The third schedule is on the approved quantity of the PET products and the rates. On rates this appears:-

> "The Rates: Rate of Kshs. [·] per ton, excluding VAT."

50. It is common ground that the actual "rate" was neither specified in the body of the MOU itself nor in the third schedule. It is also common ground that by a letter dated 16th June 2010, the Applicants agreed to pay Greenplast a subsidy of US $ 350 per metric ton of processed and exported PET waste.

51. Yet the third schedule to the MOU itself contemplated a rate per ton, excluding VAT. By implication any VAT payable would be on the rate as opposed to being included in the rate. In other words, on the wording of the MOU, the rates were exclusive of VAT and not inclusive of VAT. So if VAT was payable then a charge on it would be over and above the rate agreed. That is how the MOU contemplated the question of VAT.

52. So was VAT payable? In its Ruling on the Applicants' request for correction and clarification and which is part of the award(see the discussion on this earlier in this decision), the Tribunal makes this finding as to whether VAT was payable:-

> "[11] Mr. Patten, when examined on this issue of VAT at the hearing, readily conceded (at page 512 line 12 of typed proceedings) that VAT was payable. It is also not in dispute that each of the invoices sent by the Claimant to the Respondents clearly identified the amount of VAT payable over and above the agreed rate of 350. The Respondents did not query this apportionment of the amount due when they made part payments. VAT was thus clearly contemplated by the parties in the agreement and is payable by virtue of the provisions of the Value Added Tax Act. Indeed, this Tribunal has no jurisdiction to vacate the order for payment of VAT except in a manner provided by statute on account of the provisions of Article 10 210 (1) which states as follows:-
>
> "No tax or licensing fee may be imposed, waived or varied except as provided by legislation."

That VAT is payable was in fact somewhat acceded to by Mr. Patten in his affidavit in support of the application when he states:-

> "(v) In any event, if any VAT was payable, the same ought to have been payable from the agreed and contracted amount such that no additional award for VAT should have been made. I am aware that in the part payment made under invoice No. where the Applicants paid a sum of USD. 65,000.00, VAT was deducted from the invoice amount and not added as awarded by the Tribunal."

53. The Arbitral Tribunal is a master of facts and this Court accepts its finding. The effect of the finding is that the MOU contemplated that the VAT payable would be over and above the agreed rate and this Court has given reasons why that finding cannot be faulted.

54. As to whether payment of VAT was pleaded, I agree with the Applicants that it was not pleaded. Although counsel for Greenplast asks

me to infer its plea in paragraph 23, that would be a stretch. Paragraph 23 reads:-

> "The Claimant claims from the Respondents jointly and severally the sum made up of the number of total tons exported × 350 dollars together with interest at the rate of 26% per annum on all outstanding balances on invoiced sums not paid. The Respondents have paid to the Claimant the sum of 65,000 dollars on account which has been duly credited to running/continuing balance. The Claimant shall at the trial rely upon the statement of account delivered with this claim."

The pleading that the statement of accounts will be relied on is notice that the statement of accounts will be relied on as evidence and it does not amount to a pleading that what is in the statements is what is claimed. The entire claim is set out in the statement of claim.

55. That said, on the authority of Synergy Industrial Credit Limited (*Supra*) an Arbitral Tribunal has some **limited latitude** in awarding remedies which the parties have not specifically bespoken. The Court of Appeal held:-

> "We will only add that decisions on the equivalent provisions of the New York Convention and the Model Law abound and are clear that an arbitral tribunal has discretion to award remedies where its powers are not specifically limited. Thus for example in *Telenor Mobile Communications As v. Strom LLC., 524 F. Supp. 2d 332 (2007*), one of the complaints in an application to vacate an arbitral award was that the arbitral tribunal had awarded a remedy that the parties had not asked for. Rejecting the argument, the *US District Court, Southern District of New York* stated (quotes and footnotes omitted):
>
> "*Arbitrators enjoy broad discretion to create remedies unless the parties' agreement specifically limits this power. While an arbitrator's award must draw its essence from the parties 'agreement…the effectiveness of arbitration in resolving complicated commercial disputes would be severely undermined if arbitrators were limited to the mechanical application of contested contractual provisions. If the arbitration clause does not include any limit on the arbitrators' powers to craft a remedy, a respondent must overcome a powerful presumption that the arbitral body acted within its powers. Accordingly, while an arbitrator may not award relief expressly forbidden by the agreement of the parties, an arbitrator may award relief not sought by either party, so long as the relief lies within the broad discretion conferred by the FAA (Federal Arbitration Act)."*

56. In the matter before Court, two of issues framed by the parties for the Tribunal's determination are:-

> *(ii) What is the rate of compensation for the PET that was exported by the Claimant under the terms of the MOU?*
>
> *(iii) Was the amount of US $ 350 per ton a fixed compensation rate or was it a variable subsidy depending on the international price for PET Flakes.*

57. It has to be, I think, that a discussion of the rate payable could not be complete without the element of VAT payable and in which the MOU provided as excluded in the rate. This Court holds and finds that once the claimant made a claim on the basis of the contracted rates, an auxiliary relief would be for payment of VAT that would accompany the principal sum payable. The claim for VAT would have to be in the contemplation of the parties and the award would not be commercially efficacious if the element of statutory Tax that was agreed would be added to the rates was excluded. It is therefore little wonder that although Greenplast had sought the VAT element at submissions before the Arbitrator, the Applicants did not object to it then.

58. On the question of bias and partiality in favour of Greenplast the Applicants raise the following:-

> "[21] THAT a review of the proceedings before the Tribunal and correspondence from the Arbitrators clearly shows that the Tribunal was biased and partial in favour of the Respondent and in effect perpetuated a miscarriage of justice against the Applicants as demonstrated below:-
>
> *a)* At page 95-96, the Tribunal admits production of a contested document issuing a ruling on the admissibility of the said documents as sought by the Applicants. At page 96, the Tribunal states:- "*What we propose to do is mark it as marked for identification and admitted de bene esse and then the arbitrators will decide on its admissibility at the end of the day.";*
>
> b) The Tribunal issued an Award that is inconsistent with its own findings and deliberately found in favour of the respondent to the detriment of the Applicants;
>
> c) That by a letter dated 22nd September 2016, the Tribunal in the letter issued by Mr. A B Shah assumes jurisdiction on the issue of assessment of costs and rules (without hearing the parties) and claimed that the High Court has no jurisdiction. Attached is a bundle of correspondence with the Arbitrators on the issue of assessment of costs in support hereof marked "CCL-14".

59. The Court has discussed the supposed inconsistencies in the findings by the Arbitral Tribunal. This Court is unable to say that those inconsistencies, if any, demonstrate bias on the part of the Tribunal. The Tribunal gave its reasons for reaching the conclusions it did. Even if there was misapprehension of the facts or the law, it has not been demonstrated that this was driven by a deliberate effort and improper motive on the part of the Tribunal to reach wrong conclusions.

60. The proceedings before the Tribunal show Mr. Munyu appearing for the Applicants as objecting to the production and use of a document said to have been written on a without prejudice circumstances. He then says:-

> "We therefore ask the Court to uphold the objection and perhaps before further reference are made on that document, make a ruling

on that document on administration of the document."

61. The record shows that the Tribunal then proposed to mark the document for identification and or be admitted *de bene esse.* That is, the admission was provisional. The Tribunal explained:-

> "..... the arbitrators will decide on its admissibility at the end of the day."

Counsels were then invited to put in some submissions on it. It seems that it was agreed that counsel put in submissions after Mr. Patten testifies. From the record, counsel do not appear to have followed through the invitation. But of significance is that the Tribunal did not bar them from doing so. Again, it has not been demonstrated how the manner in which Tribunal dealt with the matter prejudiced the Applicants.

62. An issue arose as to whether the claimant's costs should be taxed by the High Court or assessed by the Tribunal. The Applicants took the view that as there was no agreement conferring the Tribunal with the task, the jurisdiction to tax the costs was with the High Court. In a letter of 22nd September 2016 one of the Arbitrators, A. B. Shah states:-

> ".... According to my records Mr. Rebelo and a member of your firm appeared before me on 6th July 2016 when it was agreed that Mr. Rebelo files his bill of costs within 7 days and that the Respondents counsel will file his/her objections to the items objected.
>
> The High Court, as I see it, has no jurisdiction, in this matter, to adjudicate on the costs payable to the Claimant by the Respondents."

63. Responding to this letter, counsel for the Applicants reiterates his earlier position and expresses his discomfort with the handling of the matter by the Arbitrator and pens off:-

> "We urge that this issue be settled first before any other directions are taken."

64. It would seem that the Applicants were entitled to that discomfort because decisions of the Tribunal ought to have been taken by both Arbitrators and not one Arbitrator as Mr A.B. Shah was purporting to do. But the letter of the other Arbitrator, Mr. Tom Maina Macharia, made amends to the situation. In his letter of 23rd September 2016, he had it clear that the Tribunal had not made a decision. The way or other, on the matter and it was to issue the directions in the next 10 days. I am not told what decision was eventually taken and on my reading of the proceedings I am unable to find the decision in that respect.

65. My view is that the misstep by the single member of the Tribunal had been corrected when his colleague clarified that no decision had been made on the matter. In the end therefore nothing turned on the views taken by Arbitrator A. B Shah and the Court is reluctant to read bias of the Tribunal because of that slip-up.

66. Ultimately I do not see merit in the Notice of Motion dated 4th October 2016 and I do hereby dismiss it with costs.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Court Assistant: Nixon

Miss Weru for Kamau Karori for 6th and 8th Applicants.

Miss Kageni for 1st Applicant

Wathutha for 2nd, 3rd, 4th 5th and 7th Applicants.

Rebelo for Respondent