LOURENS M. BOTHA
versus
GWANDA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 16 MAY 2018 AND 14 JUNE 2018

Opposed Application

*K I Phulu*for the applicant
L Nkomo for the respondent

MATHONSI J: This is an application for registration of arbitral award in terms of Article 35 of the Model Law in the Arbitration Act [Chapter 7:15]. The arbitral award was issued by Promise Ncube, an arbitrator appointed by the parties, on 13 December 2017. It directs the respondent to pay to the applicant the sum of $5 507 980-00 compensation due and payable in terms of clause 3 of the parties' joint venture agreement entered into on 17 December 2007. The award itself is final and binding on the parties.

The brief background is that in terms of a joint venture agreement the parties agreed that the applicant would effect infrastructural improvements on a farm belonging to the respondent called Doddieburn Ranch in Gwanda District Matabeleland South and operate an Eco-Tourism project at the farm in question through his flagship business known as Shashi-Zambezi t/a Doddieburn Holdings. In terms of Clause 2 of the agreement the lease was valid for 25 years with a first option to renew for another term. In terms of clause 3;

> "3. TERMINATION AND COMPENSATION
> In the event of termination of the agreement, all the infrastructure shall become property of council. The operator shall be compensated for all improvements associated with the joint venture including buildings, movables, the animals and all stock in grades."

The agreement also contained an arbitration clause, which is clause 8, in terms of which any dispute between the parties in connection with the nature or quantum of compensation after its termination was to be referred to arbitration in accordance with the Arbitration Act.

As is the case with anything human, the joint venture agreement could not subsist forever. The respondent did terminate the joint venture on 22 October 2014 thereby triggering the application of the compensation clause. Since then the parties have bickered endlessly over the rules of disengagement. By order of this court granted by consent in HC 644/15 the dispute was referred to arbitration. The parties later agreed to appoint Promise Ncube as the arbitrator. He has made several awards since his appointment and the arbitral award sought to be registered is actually the sixth award handed down by that arbitrator.

The application for registration is opposed by the respondent which was quick to take a point *in limine* that the application is fatally defective by reason of a failure to comply with Article 35 of the Model Law in that it was not accompanied by the original arbitration award or a certified copy of it. In advancing that argument the respondent stated that the arbitrator had notified the parties that his award would be delivered on 13 December 2017 but only upon payment of the arbitration fee of $4000-00. The parties were required to share that fee equally. The respondent conceded that it failed to raise its share of the arbitration fee as a result of which the arbitrator refused to release the award to the parties. The respondent further conceded that due to what it called "financial dire straits" it had still not paid its share of the fees at the time of the filing of opposition.

The factual position was corrected by the applicant who in fact subsequently filed the original full text of the arbitral award with his answering affidavit having initially only filed the award itself without the reasons. *Mr Phulu* for the applicant submitted that the arbitrator had only released that part and withheld the reasons owing to the respondent's failure to pay the arbitration fees. He submitted further that the applicant had been forced to attach to his application only that which had been released by the arbitrator. *Mr Nkomo* for the respondent would have none of that. He submitted that the application stands or falls on the founding affidavit. The applicant cannot make his case in the answering affidavit to which the original award was attached. He cited a number of authorities in support of that point including *Jackson* v *Rothmans of Pall Mall (Zimbabwe) (Pvt) Ltd* 1993 (2) ZLR 156(S).

Article 35 dealing with recognition and enforcement of awards provides:

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to the provisions of this article and of article 36.
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language."

The import of that provision which has some international flavor, as it ought to, being the United Nations Commission on International Trade Law (UNCITRAL) Model Law is to provide the registering court with an authentic document sought to be registered. It is for the benefit of the registering court which must ensure authenticity before registration. The legislative intendment is to prevent fraud or some other like vices as may lead to a false or forged document being registered thereby being turned into a court order unduly. It occurs to me that the provision should not be abused by a litigant bent on frustrating the objectives of arbitration.

In this case, the respondent, a whole municipal authority which initiated the entire process of disengagement with the applicant by terminating the joint venture agreement cited "financial dire straits" for its non-compliance with the requirement for payment of its part of the costs. The circumstances under which that was done or not done, expose the respondent to the genuine concern that it had its sights at delaying the inevitable. This forced the applicant, who had dutifully paid his share of the fees, to approach this court for registration without the original award. For the respondent to then turn round and seek to rely on its own default to undermine the application, is the height of lack of *bona fides*.

In that regard I can do no better than refer to the seminal passage in the judgment of KORSHA JA in *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1997 (2) ZLR 389 (S) at 389 G where he said:

> "A cardinal principle of the common law is expressed in the *aphorism: 'nemo ex propio dolo consequitur actionem*,' which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: '*nemo ex suo delicto meliorem suam conditionem facere potest*,' which means: no one can make his better by his own misdeed."

The respondent cannot be allowed to benefit from its own wrong of failure to pay its share of the arbitration fees resulting in the arbitrator deciding to exercise a lien right over the reasons for the arbitral award. By so doing the respondent dirtied its hands which disabled it from relying on the non-availability of the reasons for the award to oppose this application. In any event, the full original arbitral award had been filed in the record at the time this matter was set down. For the respondent to still pursue that point *in limine* in typical "touch is a move" style is of no moment in my view. I therefore dismissed that point *in limine*.

Mr Nkomo also raised another point *in limine*, namely that the applicant had failed to attach to the application the arbitration agreement as required by article 35. He submitted that the application is therefore fatally defective and should be dismissed without reference to the merits. However it is common cause that the dispute was referred to arbitration by virtue of a court order issued by KAMOCHA J by consent of the parties. It is a matter that has seen several arbitrations emanating from that consent order. The arbitration agreement could therefore not be produced as it served no useful purpose. *Mr Nkomo* submitted that where there is no arbitration agreement the parties do not have the remedy of registration of an arbitral award.

In my view there is a fundamental flaw in that argument. I agree with *Mr Phulu* for the applicant that such a construction of article 35 would defeat the legislative intendment which is to recognize and enforce an arbitral award made as a result of an agreement of the parties to submit themselves to an arbitration process. Once such process has been completed surely the parties should be able to approach this court in terms of article 35 for recognition and enforcement of the outcome even where there is no arbitration agreement. In any event, the joint venture agreement of the parties signed on 17 December 2007, clause 8 of which provides for arbitration, has been filed and is part of the papers placed before me. I dismissed the second point *in limine* for these reasons.

On the merits of the application the respondent opposed registration of the award even though it did not make an application for the setting aside of the arbitral award in terms of article 34. Nothing turns on the respondent's failure to make an approach for the setting aside of the award because article 36 (1) (a) allows the refusal of recognition or enforcement of an arbitral award at the request of the party against whom it is invoked if that party furnishes the court with

grounds for refusal set out in that article. I therefore turn to examine the grounds for opposition relied upon by the respondent.

I must say that I find it extremely difficult to appreciate the respondent's basis for opposition. Other than merely trying to comply with the provisions of article 36 of the Model Law by reference to the public policy of Zimbabwe the respondent does not make it clear what it is that is contrary to the public policy of Zimbabwe in the arbitral award. Ronnie Sibanda, the respondent's Chief Executive Officer who deposed to the opposing affidavit, initially complains that the arbitral award should not be recognized or enforced because it relied upon a valuation report compiled by R. E. D Property Estate Agents which report was not made under oath. For that reason there was a breach of the Civil Evidence Act [Chapter 8:01]. Anything done contrary to the law is in breach of public policy.

Sibanda goes on to accuse the valuer of bias in favour of the applicant, fraudulent conduct and collusion with the applicant. Quite serious allegations indeed but the disappointment is that they are not substantiated. He states that the allegations arise out of the fact that the valuer held private meetings with the applicant thereby entertaining the applicant in the respondent's absence. According to the respondent, this was improper conduct pointing to impartiality, fraud or collusion among a host of others ills. The rest of Sibanda's concerns point to the respondent's unhappiness with the values attached to the improvements which the applicant ought to be compensated for.

Unfortunately in an application of this nature, even if it were an application for the setting aside of the arbitral award made in terms of article 34, this court does not exercise an appeal power. More importantly the respondent cannot import into this court arguments that were never placed before the arbitrator and then request this court to entertain a new case which was not made before the arbitrator. I say this because a close reading of the arbitral award shows firstly that the question of whether the present applicant was the rightful party entitled to compensation by the respondent was determined by the arbitrator in an award delivered on 22 July 2015. It is common cause that the award in question remains extant and was never set aside. That issue was not placed before the arbitrator during the proceedings giving rise to the latest award sought to be registered. *Mr Nkomo* however submitted that it was incompetent for the arbitrator to substitute

a party in order to give validity to the joint venture agreement. In my view that is outside the scope of the present inquiry.

The arbitral award summarized the background facts leading to what was awarded. Apparently referral of the issue to a valuer and the appointment of one was done by consent of the parties in an earlier award issued on 18 November 2016 to wit:

> "6. The compensation for all the improvements inclusive of animals in Awards 4 and 5 above be and is hereby ordered by consent to be valued by Mr Martin Redfern, Registered Valuer No 0071, of R.E.D Property Estate Agents and Chartered Surveyors, and a report submitted to the Hon. Arbitrator.
> 7. It be and is hereby ordered that the valuation in Award No. 6 above:
> (a) Shall be borne by the parties herein equally (cost thereof)
> (b) Shall be final and binding on the parties subject to sub-clause (d) below.
> (c) Shall be carried out in consultation with parties who shall provide one or more representatives to identify the actual improvements specified in Awards 4 and 5, on the ground.
> (d) Shall be subject to the fact that should any dispute arise in respect of the actual valuation (method and procedure or a factual dispute) such dispute shall be recorded by the Valuer in his final report and be referred to the Hon. Arbitrator for determination, whose decision shall be final and binding on the parties."
> (The underlining is mine)

The arbitral award referring the valuation to the appointed valuer remains extant and was not contested. It is also interesting to note that the award was made by consent. According to the award, and in compliance with the referral order, the Valuer recorded only three issues of dispute between the parties namely the boreholes, roads and three half grown lions in his report of 3 October 2017. At p7 of the award the arbitrator stated:

> "I drew the attention of the parties to the above issues and invited them to indicate whether there were any other issues that were referred to me by the Valuer for determination and none were pointed out. Commendably the parties also agreed on the following:
> ------."

The net effect of what the parties agreed to is that all three disputed issues were amicably settled and the award only recorded what was agreed. The valuation process and report were not challenged at all before the arbitrator. The respondent cannot now seek to raise a challenge which was not raised before the arbitrator.

Recognition and enforcement of an arbitral award can only be refused on the six grounds set out in Article 36 of the Model Law. Of those six grounds the respondent has tried to relate to

the last one which is that the court should find that the recognition or enforcement is contrary to the public policy of Zimbabwe. Article 34 (5) spells out what would ordinarily be regarded as being contrary to the public policy. It reads:

> "For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—
>
> (a) the making of the award was induced or effected by fraud or corruption; or
> (b) a breach of the rules of natural justice occurred in connection with the making of the award."

In my view the provisions relating to refusal to recognize and enforce a n arbitral award must be interpreted narrowly in order to protect the institution of arbitration. After all it is the parties who voluntarily submit to arbitration as a vehicle for a speedy and cost effective method of dispute resolution. They should therefore not lightly be allowed to side-foot the consequences of their choice by raising fanciful defences against registration of awards. The case of *Zesa* v *Maphosa* 1999 (2) ZLR 452 (S) has always been regarded as the *locus classicus* on the subject. The court stated at 466 E-G:

> "Under articles 34 and 36 the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. Where however, the reasoning or conclusion in any award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far-reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible or fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above."

See also *Delta Operations* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 85 C-D; *Provincial Superior Jesuit Province of Zimbabwe* v *Kamoto and Others* 2007 (2) ZLR 8(S) at 13 C-D; *Decimal Investments (Pvt) Ltd* v *Arundel Village (Pvt) Ltd* 2012 (1) ZLR 581(H).

That this is a very high threshold is pretty obvious. It means that even where a decision is faulty or incorrect the court still will not interfere. The court will only interfere where the decision is outrageous in its defiance of logic and so offends against the public's sense of justice. It is only then that the court will set it aside or decline to recognize or enforce it. That remedy is certainly not available to sore losers who simply are unhappy with the arbitral award because it

has been made against them. Such a result happens all the time that a dispute is adjudicated upon because adjudication, by its very nature, means that one of the parties has to live with disappointment. Even where the court does not agree with the decision of the arbitrator it has no power to substitute its own decision.

Clearly the complaints raised by the respondent against the arbitral award do not come anywhere near the threshold for setting aside or refusal to recognize and enforce an arbitral award. The respondent's concerns are the usual fulminations of a disappointed litigant. I conclude that there is no basis for refusing to register the award.

It is ordered that:

1. The arbitral award made by the Honourable Promise Ncube on 13 December 2017 be and is hereby registered as an order of this court.

2. The respondent shall pay to the applicant the sum of US$5 507 980-00 compensation due and payable in terms of clause 3 of the Joint Venture Agreement signed between the parties on 17 December 2007.

3. The said amount shall be paid to the Honourable Arbitrator through his offices at Coghlan and Welsh legal practitioners Bulawayo who shall hold it in trust and pay from it the following:

(a) The sum due to Buffels Vallei 375 (Pty) Ltd in terms of the arbitral awards of 20 January 2016 and 14 December 2016.

(b) The balance, if any, shall be paid to the applicant.

4. Each party shall bear its own costs but the parties shall bear the arbitrator's costs for the current arbitration in equal shares.

5. The arbitral award is declared to be final and binding between the parties.

Messrs Vundhla-Phulu & Partners, applicant's legal practitioners
Messrs Calderwood, Bryce Hendrie & Partners' respondent's legal practitioners