1. ORIGEN CORPORATION (PRIVATE) LIMITED
versus
DELTA OPERATIONS (PRIVATE) LIMITED
and
IAN DONOVAN

2. DELTA OPERATIONS (PRIVATE) LIMITED
versus
ORIGEN CORPORATION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 1 February and 23 November 2005

Opposed Court Application

A.P. de Bourdon SC, for the applicant
R.Y. Phillips, for the 1st respondent
No appearance from 2nd respondent

KAMOCHA J: These two applications were argued at the same time. In the first application Origen Corporation (Pvt) Ltd. was seeking to have an Arbitral Award of 27 April, 2004 granted to first respondent set aside pursuant to Article 34 of the Model Law contained in the Arbitration Act [*Chapter 7:15*]. In the second application Delta Operations (Pvt) Ltd. On the other hand was seeking an order enforcing the same arbitral award in terms of article 35.

The circumstances giving rise to these proceedings are these. On 21 August 2002, the parties signed a contract in terms of which Delta Operations (Pvt) Ltd. ("Delta") would deliver a quantity of barley suitable for use as stock feed to Origen Corporation (Pvt) Ltd ("Origen") during June and July 2002 and in return Origen would deliver during October 2004 an equivalent quantity of barley suitable for brewing. The relevant provisions of the agreement are these –

"1.1 During the month of June and July 2002 Netbrew shall supply to Origen at the Northern Products grain silos in Chinhoyi a quantity of not less than 2 400 metric tones and not more than 2 450 tonnes of barley.

1.2 The Natbrew Delivery shall comprise of barley unsuitable for brewing purposes but suitable for use as stock feed.

1.3 During the month of October, 2002 Origen shall deliver to Natbrew at Northern Products or G.M.B. Banket a tonnage of barley grown in the 2002 winter season and of an exactly equivalent tonnage to the Natbrew Delivery.

1.4 In the event that, and to the extent that, Origen may fail to deliver the tonnage of barley required to be delivered by it in terms of clause 1.3 then, recognizing that Natbrew shall suffer loss as a consequence of such breach, Origen shall pay to Natbrew the sum of $75 000 per tonne in respect of each tonne which Origen, has failed to deliver in terms of clause 1.3."

Delta delivered 2019.28 tonnes of barley suitable for stock feed as per agreement. But Origen only delivered 1127.848 tonnes, leaving a shortfall of 891.432 metric tones.

It was the above shortfall of barley which gave rise to a dispute which the parties agreed to refer for arbitration. In preparation for an arbitration hearing the parties held a preliminary meeting with the arbitrator at which the issues for the determination by the arbitrator were formulated and cystalised as these.

"(a) Whether the claimant is entitled to an order for specific performances, *viz* that the Respondent deliver 2019.28 metric tones of barley to the claimant; and if not

(b) Whether the claimant is entitled to interest on the amount awarded and if so, from what date and at what rate?"

The arbitrator heard the matter on 23 April 2004 and handed down an Arbitral Award on 27 April 2004 whose order reads thus:-

"It is ordered that:

A. On or before 30 May 2004, Origen Corporation (Private) Limited shall deliver to Delta Operations (Private) Limited 891.432 tonnes of barley of the quality specified in the contract signed by the parties on 21 August 2002.

B. Failing compliance with Order A, Origen Corporation (Private) Limited, shall pay to Delta Operations (Private) Limited, promptly on demand, the full amount expected by Delta Operations (Private) Limited in purchasing the tonnage of barley not delivered by Origen Corporation (Private) Limited in accordance with Order A."

Aggrieved by the arbitral award Origen has approached this court seeking to have the award set aside on the basis that it was grossly unreasonable and was in conflict with the public policy of Zimbabwe. However, at the hearing Origen did not persist with the challenge in respect of Order "A" and stated that the purpose of an arbitration was to determine issues between parties submitted to an arbitrator for a decision. It conceded that in making Order "A", the arbitrator had clearly understood the issue placed before him, and made a determination (rightly or wrongly was besides the point) on that. Although it disagreed with the decision of the arbitrator on that point it conceded that it was still bound by that decision as it was a consequence of arbitration.

The applicant persisted with its complaint against Order B and alleged that the arbitrator had gone on "a frolic". It contended that Order B was in conflict with the public policy of the Zimbabwe because "the reasoning or conclusion in (the award) went beyond mere faultiness or correctness and constituted a palpable inequity that was so far reaching and outrageous in its defiance of logic or accepted

moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award". This quotation is per GUBBAY CJ in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (SC) at page 466F.

The applicant based the above allegations on the following grounds –

(a) That the arbitrator failed to enforce a penalty stipulation as provided for in section 4 of the Contractual Penalties Act [*Chapter 8:04*];

(b) That the award conflicts with the law of Zimbabwe in material respects;

(c) That the arbitrator gave no reason for the order that he made in Order B; and

(d) That the arbitrator failed to properly consider the issues before him.

It was submitted on behalf of Origen that in terms of clause 1:4 of the agreement the parties agreed that in the event of Origen failing to deliver the tonnage of barley required to be delivered it was obliged to pay Natbrew the sum of $75 000-00 per tonne in respect of each tonne which it had failed to deliver in terms of clause 1.3. It, however, admits of no doubt that the parties intended the penalty stipulation to be enforced in the event of Origen's failure to deliver as agreed. Section 4(1) of the Contractual Penalties Act provides that a penalty stipulation shall be enforceable in any competent court. A court can, however, decline to enforce a penalty stipulation or reduce a penalty if it appears to it that the penalty is out of proportion to any prejudice suffered by the creditor – see section 4(2). It seems to me that the above provisions do not permit a court to ignore a penalty stipulation and refuse to enforce it in favour of a creditor. It should be enforced provided its enforcement is not prejudicial to the debtor.

Origen went further and submitted that the award conflicted with the law of Zimbabwe in a material respect. It went on to state that the law was clear on the

nature of damages for breach of contract. It relied on the case of *Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 where INNES CJ at page 22 stated that:-

> "The agreement was not one for the sale of goods or commodity procurable elsewhere. So that we must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party." (My underlining)

In *Rens v Coltman* 1991 (1) SA 452 (A) at page 458 SCOTT AJA put it thus –

> "The fundamental rule with regard to the award of damages for breach of contract is now well established. The innocent party should be placed in the position he or she would have occupied had the contract been properly performed, so far as this can be done by the payment of money without undue hardship to the party in breach. The application of this rule will ordinarily require in many cases, and typically the case of a breach of a contract of sale by the purchaser, that the date for assessment of damages be the date of performance, or as it has often been expressed, the date of the breach."
> (My emphasis)

Similarly, in *Novick v Benjamin* 1972 (2) SA 842 (A) TROLLIP JA at 860-761 had this to say:-

> "A fundamental principle of our law is that for a breach of contract the sufferer should be placed by an award of damages in the same position as he would have occupied had the contract been performed, so far as that can be done by the payment of money, provided (a) that the sufferer is obliged to mitigate his loss or damage as far as he reasonably can, and (b) that the parties, when contracting, contemplated (actually or presumptively) that the loss or damage would probably result from such a breach of contract (see *Victoria Falls & Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Lavery & Co. Ltd v Jungheinrich* 1931 AD 156).Where the contract is one of purchase and sale of a marketable commodity which is broken by non-performance (i.e. non-delivery), effect is ordinarily given to

> that principle by awarding the sufferer the adverse difference (if any) between the contract price and the market price or value of commodity at the proper time and place of performance. That is the general, working rule by which his loss or damage is ordinarily measured, the adverse difference in prices being regarded as representing the loss or damage that the parties usually contemplated is likely to ensue on such a breach …"

In the light of the above authorities Origen submitted that in doing what he did the arbitrator was re-writing the law of this country – a thing he has no power to do. It was for the legislature and the judges to develop the law of Zimbabwe. To allow an arbitrator to do so will be to offend the public policy considerations of Zimbabwe.

Further, it was submitted that the effect of order B was that the arbitrator gave the first respondent something quite a lot more than it sought and considerably more than the law permits. First respondent sought only $75 000 per tonne as an alternative, and the law permits only the actual value of the barley as at the date of breach. But the arbitrator gave the first respondent the price of barley several months later by which time the price had obviously increased.

What that meant was that the arbitrator made an award which neither the parties asked for nor the law permitted. The order sought to put the first respondent into a position it did not seek and which the law did not allow. In the result, applicant submitted that such action by the arbitrator was outrageous, defying both logic and the public policy of Zimbabwe. The order constituted exemplary damages, which are not permitted under Zimbabwean law.

Finally, it was submitted under this head, that the arbitrator had given to himself a role which neither the parties nor the law gives him. His decision should not be allowed to stand.

A further complaint by the applicant was that the arbitrator did not give any reasons for issuing order B of the award. In terms of the contract Delta sought only $75 000 per metric tonne as an alternative. The arbitrator ought to have given the reasons why he would not give effect to the intention of the contracting parties. The result was that the award was repugnant to the provisions of Article 31(2) of the Uncitral Model which provides that:-

> "31(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30."

These provisions are peremptory. The arbitrator had no discretion in the matter since there was no agreement by the parties that he should not furnish his reasons for the decision he was going to make. He ought to have provided treasons for his decision.

Furthermore, it was submitted by Origen that, the arbitrator *in casu* had misconducted the proceedings by failing to properly consider the two issues before him. The public policy of Zimbabwe does not permit arbitrators to consider extraneous issues to those placed before them by the parties for consideration. It was asserted that the arbitrator *in casu* had failed to understand the issues before him. That failure led him to create an issue which did not arise from the pleadings or submissions of the parties. He went on a frolic of his own outside the real issues placed before him. See for instance *Cone Textiles (Pvt) Ltd v Commercial Union Fire, Marine & General Insurance Co. Ltd.* 1989 (2) ZLR 152 (SC) where it was held that an arbitrator misconducts himself if he fails to consider an issue placed before him for consideration. *Vide supra* what the arbitrator did *in casu.*

Delta on the other hand submitted that this court should not lose sight of the fact that courts in this country and indeed in other jurisdictions are always most

reluctant to interfere with an award of an arbitrator. Some of the reasons for the reluctance were set out by FIELDSEND CJ in *Cone Textiles (Pvt) Ltd v Redgment & Others* 1983 (1) ZLR 88 (S) at 92 –

> "The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal and they have agreed that the award shall be final and binding: it is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator."

The Supreme Court quoted with approval the words of SOLOMON JA in *Dickson and Brown v Fisher's Executors* 1915 AD 166 where he said at page 176 –

> "But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact."

Delta further submitted that the binding nature of an arbitral award was emphasised in *Amalgamated Clothing & Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169F-H when GOLDSTONE JA had this to say –

> "When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and subject to the limited power of the Supreme Court under s 3(1) of the Arbitration Act, abandon the right to litigate in Courts of law and accept that they will be finally bound by the decision of the arbitrator. …. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

It, however, seems to me that, *in casu,* what the arbitrator did by making order B of his award calls for the interference of the court. Firstly he ignored a

penalty stipulation and refused to enforce it when he ought to have enforced it provided its enforcement was not prejudicial to Origen.

Secondly, the arbitrator gave Delta the price of barley several months later by which time the price had increased. By so doing the order put Delta into a position it did not seek and which the law did not allow. He ought to have given the actual price of the value of barley as at the time of the breach.

Thirdly order B of the award offends the provisions of article 31(2) of the Uncitral Model Law quoted at page 7 above. He ought to have given reasons for making the order which gave Delta what it did not ask for. He should have explained the departure.

Lastly the arbitrator failed to properly consider the issues placed before him for consideration. He instead created an issue which did not arise from the pleadings or submissions of the parties.

In the light of the foregoing it seems to me that order B should not be allowed to stand and must therefore beset side.

I am in agreement with Origen's submission that the setting aside of order B should affect order A otherwise order A standing alone would not make sense. The reason being that if Origen does not have barley to deliver it cannot be held to be in default. It was not obliged to buy barley in order to deliver to Delta. It was submitted by Delta that order B should just be severed and order A modified. But Delta did not suggest how the modification should be done. It seems to me that order A should also be set aside. Having arrived at that conclusion it seems to me tat the matter should be left for the parties to proceed the way they deem fit as laid down by GUBBAY CJ in *Zimbabwe Electricity Supply Authority v Maposa supra* at page 467B when he said –

> "Party autonomy is a paramount feature under the arbitration regime in this country and where a court sets aside an arbitral award it may not usurp this right of the parties by remitting the matter to the arbitrator for re-determination. It must leave it to the parties to proceed as they deem fit." (Emphasis added)

Consequently I would issue the following order.

It is ordered that:

1. The arbitrator's arbitral award of 27 April 2004 be and is hereby set aside in its entirety.

2. Delta's application for the enforcement of the arbitral award be and is hereby dismissed.

3. The parties are left to proceed as they deem fit.

4. Delta shall bear the costs of these proceedings.

Costa & Madzonga, applicant's legal practitioners

Messrs Gill, Godlonton & Gerrans, 1st respondent's legal practitioners.