SHAPTON ENTERPRISES (PVT) LTD t/a NEWBASE
versus
MIMOSA MINING COMPANY (PVT) LTD
and
VIMBAI NYEMBA N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 19 January and 1 March 2017

OPPOSED APPLICATION

K Kachambwa, for applicant
E.T. Matinenga instructed by *R Chibaya*, for 1st respondent

TAGU J: The applicant and the first respondent entered into a Services Agreement on 29 December 2009. It was for a fixed period, (though providing for renewal) terminating on 31 October 2015. The first respondent acting in accordance with clause 7(1) of the agreement duly gave notice to applicant and terminated the agreement at the end of May 2014. The applicant though initially accepted the termination on notice but seeking first respondent's indulgence to provide a longer period of notice (outside the contract) later disputed the termination. The applicant sought a referral of the dispute to an arbitrator. The matter was heard by the second respondent. The second respondent dismissed applicant's claim and found that the first respondent was not liable as it had not breached the contract between the parties. The applicant filed this application for the setting aside of the arbitral award in terms of article 34 (2) (b) (ii) of the Model Law.

In filing its application the applicant stated it as a court application for review. The first respondent properly questioned the nature of the application. However, from the papers filed of record this was an error. It is clear from the founding affidavit and other papers that followed that this was meant to be an application for the setting aside of the arbitral award purportedly on the basis that the finding of the arbitrator offended against public policy of Zimbabwe.

At the hearing of the matter the first respondent raised a point *in limine* to the effect that there was no application before the court because the application was filed out of time. The applicant disputed the assertion by the first respondent and insisted that the application was made in time and that there was no need for an application for condonation.

Before dealing with the merits of the application it is necessary that this court first dispose of the point *in limine*. In order to understand the dispute it is necessary for this court to give a brief background of what transpired.

On 26 November 2015 at 9.21 AM the arbitrator sent an e-mail to the parties advising them that the arbitral award was now ready. She requested settlement of her bills before she could release the award. At 10.29 AM the legal practitioners for the applicant acknowledged receipt of the e-mail from the arbitrator. On Monday the 30th November 2015 at 9.15 AM the counsels for the applicant sent an e-mail to the arbitrator together with the RTGS in respect of the arbitrator's fees. They then in the same e-mail requested the arbitrator to release to them the award. On 3 December 2015 at 1.05 PM the arbitrator sent the arbitral award to the applicant's counsels via e-mail. At 1.38 PM the same day the applicant's lawyers acknowledged receipt of the award but told the arbitrator that the award was not opening and requested the arbitrator to resend it again. At 2.24 PM the same day the arbitrator resent the award to applicant's lawyers. There was no further correspondence from either side until the 9th of March 2016 when the applicant's erstwhile legal practitioners wrote a letter to the arbitrator requesting for the hard copy of the award. The arbitrator sent the hard copy by Swift on 18 March 2016 and it was received the following day on 19 March 2016.

The applicant is now alleging that it only received the award on the 19th March 2016 while the first respondent is arguing that the award was received by the applicant on 3 December 2015 as a soft copy. The issue to be decided is the date when the applicant received the arbitral award. That date will assist the court to determine whether the application filed on 21 March 2016 was lodged timeously or not.

Article 34 (3) of the Model Law stipulates the time within which an application for setting aside of an arbitral award should be filed with this court. It provides as follows:

> "(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal."

In *casu* no request was made in terms of article 33. It follows that the three months have to be calculated from the date the arbitral award was received by the applicant. As I

stated *supra* the first respondent submitted that the applicant received the soft copy of the arbitral award on 3 December 2015. On the other hand the applicant insisted that it received the arbitral award on the 19th March 2016. The applicant further submitted that the arbitral award was supposed to comply with the provisions of article 31 that says that:

> "The award shall be made in writing and shall be signed by the arbitrator or arbitrators….The award shall state its date and the place of arbitration as determined in accordance with article 20 (1)……After the award is made, a copy signed by arbitrators in accordance with paragraph (1) of this article shall be delivered to each party."

In this case what is clear is that the parties had been communicating with the arbitrator through e-mails without any problems. Documents were being exchanged through e-mails without any problems. Problem started when the arbitrator attempted to serve the applicant with a soft copy of the arbitral award on the 3rd of December 2015. The applicant failed to open the award. It advised the arbitrator that the award was not opening. The arbitrator then resent another soft copy of the arbitral ward. There was no further communications between the applicant and the arbitrator until the 9th of March 2016 when the applicant requested a hard copy of the arbitral award from the arbitrator. A number of things can only be assumed.

Firstly, it can be assumed that when the arbitrator resent the soft copy of the arbitral award on 3 December 2015 the applicant managed to receive it and opened it hence it went quite up until the 9th of March 2016. If that was the correct position the award that was sent in the form of a soft copy must have complied with the requirement of article 31. In that case the application for setting aside of the arbitral award should have been made within three months of that date. Secondly, it can also safely be assumed that the applicant failed to open the award on 3 December 2015. That is the reason why the applicant then requested for a hard copy of the award on 9 March 2016. In that case the applicant can be assumed to have received the award on 19 March 2016. The problem faced by the court in resolving this dispute is that there is no concrete proof that the applicant received the award on 3 December 2015. The proof in the record is that a hard copy of the award was received by the applicant on 19 March 2016 through Swift. In the circumstances the court will give the applicant the benefit of the doubt since the court cannot rely on assumptions. It therefore follows that the application was made within 3 months of the receipt of the award. As a result the point *in limine* is dismissed.

ON THE MERITS

Having disposed of the point *in limine* I now deal with the merits of the application.

This is an application for the setting aside of an arbitral award rendered by the second respondent Mrs Vimbai Nyemba in her capacity as an arbitrator and was served upon applicant on 19 March 2016. It is trite law that the court can only set aside the arbitral award on the basis of public policy. In determining the issue the court does not sit as an appeal court. The test to be applied is set out in the case of *Zimbabwe Electricity Supply Authority* v *Maphosa* 1999 (2) ZLR 452 at p 453 where it was held that:

> "The approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an 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 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, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misconstrued the issue, and the resultant injustice reaches the point mentioned."

In this case the facts are that parties entered into an agreement of services. Clauses 7.1 and 7.2 of the agreement said:

> "7.1 either party may terminate the provision of services on one month written notice specifying the part of the service to be terminated and the effective date for termination.
>
> 7.2 upon termination, the Contractor shall cease work in respect of the part of the services terminated on the effective date of the termination but shall continue to perform any part of the services not terminated."

Further the agreement contained clauses 10.1 and 10.2 which provided as follows:

> **"10 REMEDIES FOR BREACH**
>
> 10.1 Either party may, without prejudice to any other remedy for breach of Contract terminate the contract by giving 14 days written notice if the other Party commits a breach of the terms and conditions of this Agreement and fails to remedy such breach within seven (7) days after receiving notice to do so;
>
> 10.2 Mimosa shall terminate the contract on 14 days written notice if the Contractor infringes the copyright, trade secrets or patent of any third party in order to meet all or some of its contractual obligations contained in the Agreement."

In this case the first respondent acting in accordance with clause 7.1 of the agreement duly gave notice to the applicant that it was terminating the agreement of services. In doing so the first respondent specified that it was terminating all parts of the services. The applicant initially accepted the termination on notice. It later discovered that the first respondent had

entered into another agreement of similar services with a sister company. It then sued the first respondent for damages on the ground of breach of contract and more specifically on the ground that by terminating the whole parts of the agreement the first respondent had terminated the agreement in terms of clause 10.1.

In dismissing the claim the learned arbitrator ruled among other things that the first respondent had duly given the applicant 30 days written notice and that clause 7.1 allowed components to be terminated and did not restrict the parties to a particular number of components, hence all components could be terminated as first respondent did. The arbitrator interpreted the contract as follows-

> "The termination was therefore in terms of the contract and the parties in their contemplation had foreseen that 30 days' notice on no fault (no-cause) was adequate for either party to prepare for such termination. The parties in their wisdom agreed to the "no-cause" termination clause which Respondent invoked lawfully.
>
> That the Respondent contracted another party whether related or not does not make the termination based on the agreement unlawful. I am persuaded that the termination was in terms of clause 7.1 and was lawful. There was no need for Respondent to allege breach where it was not the cause of the termination.
>
> As regards, liability, one cannot claim damages if there is no breach of contract. This is a clear principle of the law of contract and as such, I am satisfied that in the matter before me, there was no breach of contract on the part of the Respondent and therefore Respondent is not liable to damages at all.
>
> The claim is accordingly dismissed."

I share the same sentiments with the arbitrator. What the arbitrator did was to give the ordinary grammatical meaning of the words used in the clauses. See *Principle Immigration Officer & Anor* v *O'hara & Anor* 1993 (1) ZLR 69.

In my view the reasoning and or conclusions made by the arbitrator in her award were sound to such an extent that they did not constitute a palpable inequality that is so far reaching and outrageous in their 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. In short the award is not contrary to public policy of Zimbabwe. For these reasons the application to set aside the arbitral award will fail.

In the result it is ordered that:

1. The application is dismissed.
2. The applicant is ordered to pay costs on an attorney –client scale.

Mutendi, Mudisi & Shumba, applicant's legal practitioners
R Chibaya Law Chambers, 1st respondent's legal practitioners.