WINDMILL (PRIVATE) LIMITED
versus
GABRIEL CHAIBVA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 January and 22 February 2017

Opposed Matter

E T Moyo, for the applicant
R Munganasa, for the respondent

TAGU J: This is an application made in terms of article 34 of the Model Law which is the second Schedule to the Arbitration Act [*Chapter 7:15*] (hereinafter referred to simply as the Model Law), for the setting aside of an arbitral award made by the Arbitrator on the grounds set out by the applicant in its founding affidavit.

The brief background to the matter is that the applicant a manufacturer and distributor of fertilizers, animal feed and other agricultural inputs and chemicals entered into a contract growing agreement for the 2011/2012 agricultural season with the respondent. In terms of the agreement the applicant was to supply to the respondent on credit agricultural inputs for the season in return for payment through the harvested crop of maize by marketing it through the applicant at a stipulated price. Following the end of the 2011/2012 agricultural season sometime after August 2012, the applicant alleged that it recorded a shortfall on the repayments by the respondent. The respondent requested for further inputs in respect of the following season. The applicant declined for two main reasons, namely that according to its records the respondent had a shortfall on its repayments and that in any case the agreement was for one season and it had been discontinued for the following season.

A dispute then arose as to whether or not the agreement had been terminated. The dispute was referred for arbitration as contemplated by clause 7 of the agreement between the parties. Mr Chris Molam was duly appointed as an arbitrator in respect of the dispute in December 2012 through the assistance of the Commercial Arbitration Centre. Following a

protracted process the parties reached some settlements which were recorded and forwarded to the Arbitrator by the respondent on 10 and 16 September 2015, copies of which are attached and marked Annexure (C1) – (C2) respectively. The parties deliberated over the payment due to the respondent in respect of excess maize delivered. According to the applicant the Arbitrator indicated that he had accordingly made his determination on the issues at the heart of the dispute and the applicant regarded the proceedings as having been terminated.

However, the applicant said nine months later and on 1 June 2016 the applicant was served with a document claiming quantification of alleged damages in relation to the matter. Barely three working days later and on 9 June 2016, and without the applicant being afforded the benefit of responding to the quantification claimed it was served with an award purportedly made by Mr Molam the Arbitrator in the matter awarding several items and amounts of money as damages due to the respondent. The manner in which the purported award was made aggrieved the applicant resulting in him seeking recourse to this court in terms of the Model Law seeking the following relief-

"IT IS ORDERED THAT:

1. The arbitral award of Mr Chris Molam, commercial arbitrator, dated (*sic*) 10 June 2016 be and is hereby set aside.

2. The Respondent shall pay the costs of this application."

The respondent opposed the application. In his opposing affidavit the respondent submitted that the applicant erred in recording such shortfall of maize deliveries as was made apparent in the arbitral hearing and claimed that the respondent had satisfied his obligations in terms of the contract entered into between the parties. According to him the terms of reference of the Arbitrator were (i) whether the contract had been properly terminated or not; (ii) whether or not there was a shortfall on the part of the respondent; (iii) to ultimately determine whether or not either of the parties had breached the contract and the remedies the innocent party had in light of such breach, i.e., quantification of these damages and costs of suit. He submitted further that no settlement as contemplated in the Arbitration Act was ever reached between the parties or ever captured as forming part of the award. He averred he assumed that the impression given by the Arbitrator on 4 September 2016 at the hearing was to the effect that the contract was still valid and urged parties to, in light of this finding

attempt to reach common ground in respect of other issues. To him the matter had not been concluded and the determination made by the Honourable Arbitrator on 14 September 2015 was clearly an interim ruling and that the Arbitrator was not *functus officio* when he deliberated on the quantum of damages post the decision of 14 September 2015. It was his further view that if the applicant was not given an opportunity to respond to the statement of claim filed by the respondent on 3 June 2016 and that it was not part of the quantification process, then the award was given in default and the approach adopted by the applicant to set it aside is wrong. Finally, the respondent submitted that in his e-mail dated 6 September the Arbitrator was forced to make a determination on what he had and assumed that that the applicant was accepting same because of its silence. To that extent he argued that the award is in no way contrary to public policy as the applicant seeks to argue. The respondent accordingly prayed that this application is without merit and must be dismissed with costs on a higher scale.

What the court perceives to be common issues for determination in this matter are:

(a) What were the terms of reference for arbitration?

(b) Whether or not the determination made by the Honourable Arbitrator on 14 September 2015 was a final award?

(c) Whether or not the Arbitrator was impartial in his approach vis-à-vis the award of 10 June 2016?

(d) Is the subsequent award issued by the Arbitrator on 9 June 2016 purportedly quantifying the award consistent with public policy of Zimbabwe?

(a) WHAT WERE THE TERMS OF REFERENCE FOR ARBITRATION?

On pages 1 to 2 of the arbitral award which is now pages 13 and 14 of the consolidated record the Arbitrator recoded the terms of reference in clear and unambiguous terms as follows-

> "THE SCOPE OF THE ARBITRATION
>
> The parties met for pre-arbitration in early April 2013 and agreed on the procedure to be followed in this case;
>
> i) That the arbitration would proceed by way of written statements as well as oral evidence.
>
> ii) That electronic means of communication would be used i.e. emails, telephonic where necessary.
>
> The Parties further agreed on the matters which were for arbitration. These matters were properly captured by the Respondent in his heads of argument and were as follows;

a) What were the material terms of the agreement?
b) What quantities of inputs did the Respondent supply the Claimant and their cost?
c) Were there other costs or provisions provided by the Respondent to which the Claimant is liable for?
d) How much maize did the Claimant deliver and what was the value of that maize and its value in total?
e) Is the Claimant liable to pay the Respondent the amount Claimed or any lesser amount thereof? Does the Respondent owe the Claimant an amount to be for any excess maize delivered and
f) Whether the contract had been lawfully terminated?"

The above constituted the sole terms of reference for which the Honourable Arbitrator was to adjudicate on and anything else outside these terms of reference was outside the Arbitrator's mandate. In the case of *Augur Investments Ou* v *Farclot Investments (Pvt) Ltd T/AT & C Construction and Another* HH 175/16 the applicant as in this case had sought to have the arbitral award set aside on the basis that it offended public policy because among other reasons, the Arbitrator had dealt with issues that were not part of the terms of referral. However, in that case the court found that the Arbitrator had not dealt with issues outside the terms of referral.

(b) WHETHER OR NOT THE DETERMINATION MADE BY THE HONOURABLE ARBITRATOR ON 14 SEPTEMBER 2015 WAS A FINAL AWARD?

What is apparent from the papers is that on 14 September 2015 at 3:17 PM the Arbitrator generated an e-mail addressed to the parties containing his ruling on the matter before him. For avoidance of doubt I copied the e-mail in full. It read as follows:

> "I have not had a response to my mail below. From the Respondents or their counsel. So I can only assume acceptance.
>
> I have received a printed submission dated 10th September 2015 from Mr Chaibva. (He assures me the Respondents have also been supplied with copies?)
> He requests a determination from me, particularly as the rains and growing season are upon us. He is rightly anxious to be able to plant crops with inputs supplied on credit.
> I confirm that Mr Chaibva was Not in Breach of his 4th October, 2011 contract with Windmill and Pioneer Hibred to supply a budgeted 185 tones of maize for budgeted crop inputs including fertilizer and chemicals budgeted at $ 42.121. He supplied a total of 223.42 tones of maize to National Foods as directed by Windmill for which a total of $58 538.30 was realised (confirmed in writing by Mr Nheta. National Foods Managing Executive. Maize Division on 9th June 2014).
>
> Received crop inputs cost a total of $41 824.77.
> Charges for 1200litres of diesel . transport charges, and an invoice for $ 10 320 are Not matters for this Arbitration. [They do however need to be discussed between the Parties and amicably settled].

> My determination therefore is:
> Mr Chaibva of Oswa Farm. Mhangura was Not in Breach of his Maize Growers Contract with Windmill Pvt Ltd dated 4 October 2011.
> The Contract Agreement clearly states "This agreement shall remain valid until terminated in writing by Windmill and Pioneer Hi-Bred"
>
> Referral of this dispute to Arbitration.or the Respondent's prayer for "the Claimant's to be dismissed with costs and judgment be entered against the claimant for cancellation of the agreement" [Scanlen and Holderness. Respondent's Legal Practitioners. Respondent's Response dated 25 February 2013] do NOT constitute proper cancellation of the Contract between the Parties.
>
> I am of the firm opinion that outstanding matters can be quickly resolved to ensure Mr Chaibva is in a position to prepare for and sow this season 's maize crop timeously."

My clear understanding is that this determination was resolving the issues that the Arbitrator had been appointed to resolve. While the Arbitrator alluded to some outstanding issues the Arbitrator clearly stated that those were to be resolved amicably between the parties. This ruling does not sound as an interlocutory order and that this Arbitrator was to resolve the outstanding issues. I agree with the applicant that after making such a ruling the Arbitrator was *functus officio* until and unless he was given a clear mandate to resolve those outstanding issues.

However, the order dated 10 June 2016 included the ruling of 14 September 2015 and a lot of other issues like quantification of damages which the Arbitrator had not been mandated to do. The order of 14 September 2015 was final in nature though it pointed out that there were other issues to be resolved. In drafting the current order complained of the Arbitrator with due respect went on to spell that his order of 14 September was interlocutory. I do not agree with that interpretation. If he intended it to be so he should not have said the outstanding issues were to be resolved amicably between the parties. The Arbitrator exceeded his mandate.

(c) WHETHER OR NOT THE ARBITRATOR WAS IMPARTIAL IN HIS APPROACH VIS-À-VIS THE AWARD OF 10 JUNE 2016.

What is clear is that when the quantification was done post the decision of 14 September 2015 the applicant was not given an opportunity to be heard. An illustration of the curious conduct by the Arbitrator is apparent from p 9 of his award particularly para (g) which makes dispiriting reading. The Arbitrator confessed that he was shown a document that was not produced during the hearing apparently on account that the maker of the document

failed to attend proceedings. The curious questions to be asked are by whom and how did the Arbitrator gather evidence outside the hearing which parties were not afforded opportunity to test by cross examination? This does not inspire confidence in the impartiality or objectivity of the Arbitrator throughout the proceedings. This coupled with the intemperate use of language by the Arbitrator in his email makes this court to draw adverse inferences against his impartiality. See *S* v *Katsaura* 1997 (2) ZLR 102 (H) at 106 where the court cautioned against the intemperate use of language by judicial officers. In *Cottle* v *Cottle* [1939] ALL ER 537 it was held that a reasonable apprehension of bias would have been established if the Arbitrator is related to or friendly with one of the parties or was hostile to one of the parties as a result of past events or events during the hearing.

In casu the Arbitrator showed that he was not impartial in his approach vis a-vis his approach to the award of 10 June 2016.

(d) IS THE SUBSEQUENT AWARD ISSUED BY ARBITRATOR IN JUNE 2016 PURPORTEDLY QUANTIFYING THE AWARD CONSISTENT WITH PUBLIC POLICY OF ZIMBABWE?

In terms of article 34 (2) (b) (ii) of the Model Law recourse may be had to court for setting aside an award where if it is in conflict with the public policy of Zimbabwe. Further, and in terms of article 34 (5) (b) , without limiting the generality thereof an award would be in conflict with public policy if there is a breach of natural justice in connection with the making of the award.

The Learned author G Feltoe in his book, *A guide to Administrative and Local Government Law in Zimbabwe* at p 68 observed that it is an elementary notion of fairness and justice that a decision should not be made against a person without allowing the person concerned to give his side of the story. This is graphically described in *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 at p 154, citing the late Professor de Smith who wrote in his book *Judicial Review of Administrative Action* 4 ed at pp157-158:

> *"*That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice was administered, pronounced in Seneca's Medea, enshrined in the scriptures, mentioned by St Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the Law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteenth-century judge to the events in the Garden of Eden."

Article 23 of the Model Law requires periods of time to be agreed as to the filing of any statements and further entitles one responding to any claim to file his statement of defence within the times agreed upon. *In casu,* when on 1 June 2016 the respondent filed a claim seeking assessment of damages, which was served on the applicant on 3 June 2016, there was no agreement between the parties regarding firstly, whether any further statements should be filed with respect to assessment of damages and if so, the periods for filing same. In the absence of such agreement as to the filing of further statements and periods for filing same the applicant could not be held to be in default as contemplated by article 25. *In casu,* the Arbitrator never called for a hearing with respect to the question of assessment of damages, neither was the applicant afforded an opportunity to submit its response as barely three business days later the award was made solely on the basis of submissions made by the respondent alone. In my view, that contravention of the articles alone renders the making of the award inconsistent with the most elementary principle of natural justice in contravention of the public policy of Zimbabwe. As a result the award must be set aside. See *Conforce (Pvt) Ltd* v *City of Harare* 2000 (1) ZLR 445 (H) at 454 where a point is made that an arbitral award which violates a fundamental principle of substantive law would be inconsistent with the public policy of Zimbabwe.

In *Beazley NO,* v *Kabell & Anor* 2003 (2) ZLR 198 (S), *ZESA* v *Maposa* 1999 (2) ZLR 452 (S), *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 and *Muchaka* v *Zhanje* 2009 ZLR 9 at 11E-G the point was reiterated that the court will interfere with an award where the:

> "reasoning or conclusion in it 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 and fair minded person would consider the conception of justice in Zimbabwe would be intolerably hurt by the award".

In my view in terms of article 34 of the Model law the only relief which this court can grant if it is satisfied that the grounds have been established for it to interfere with the award is the setting aside of the award. Any other order falls outside the mandate of the court.

In the present case the applicant has managed to establish sufficient grounds upon which this court can set aside the award. The issue of costs follows the result.

In the result it is ordered that:

1. The arbitral award of Mr Chris Molam, commercial arbitrator, dated (*sic*) 10 June 2016 be and is hereby set aside.
2. The respondent shall pay the costs of this application on the normal scale.

Scanlen & Holderness, applicant's legal practitioners
Mhishi Legal Practice, respondent's legal practitioners