HH 51-02
HC 11253/01

NATIONAL SOCIAL SECURITY AUTHORITY
versus
CHAIRMAN, NATIONAL SOCIAL SECURITY AUTHORITY
WORKERS COMMITTEE
and
NATIONAL SOCIAL SECURITY AUTHORITY
WORKERS COMMITTEE
and
I T CHIGWENDERE

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 27 March and 10 April, 2002

Mr *A P de Bourbon SC* for applicant
Mr *P Nherere* for lst and 2nd respondents

SMITH J: This is a review application in connection with an award made by the 3rd respondent (hereinafter referred to as "Chigwendere") as an arbitrator in the dispute between the applicant (hereinafter referred to as "NSSA") and the 2nd respondent (hereinafter referred to as "the Workers Committee"). The background to the dispute is as follows. During the period 5 January 2001 to 29 June 2001 the Works Council of NSSA convened various meetings for the purpose of negotiating and bargaining on the general salary increase, schooling assistance for employees' children, long service awards and transport allowances. The Works Council failed to reach agreement on the various issues and recommended that the matter be referred to arbitration. On 30 April 2001, it was decided that the matter should be referred to the Ministry of Labour for compulsory arbitration. However, on 31 May the Works Council reached agreement on the issue of the schooling allowance for employees' children. That narrowed down the issues for arbitration to the general salary increase and the amount of the transport allowance. Both NSSA and the Workers Committee made written submissions to Chigwendere.

The position adopted by NSSA was that a 25% increment across the board should be awarded. That position was based mainly on the direction given by the Minister of Public Service, Labour and Social Welfare that NSSA should reduce staff and administrative costs to 25% in 1999, 20% in 2000 and 15% thereafter. Under the

National Pension Scheme (NPS) NSSA was operating with 18% of income as staff and administration costs as opposed to the ideal of 2% reported by the I.L.O. for social security schemes. The Ministry directed that costs under that scheme should be drastically reduced to 5% if NSSA was to be viable. It was therefore instructed to reduce costs to 12% in 1999, 8% in 2000 and 5% thereafter. Administration costs and staff costs for the Workmen's Compensation Insurance Fund (WCIF) were 55,7% of premiums in 1998, 40,2% in 1999, 52,5% in 2000 and 51,2% in 2001. According to the 1998 statistics, the figures were showing that the WCIF was completely broke and could not sustain itself. The expense ratios for the years 1998 to 2001 were far too high compared to the norm of 20% for social security and insurance business. Staff costs as compared to premiums amounted to 33% for 1998, 30% for 1999, 27% for 2000 and 29% in 2001, a percentage that is far too high. As regards the NPS, the fund is increasingly coming under pressure as the claims are going up. Insurable earnings have a cap of $4 000, which means that while claims are being paid and are increasing in value due to inflationary factors, the insurable earnings have remained static, thus eroding the financial resource base. The position has been worsened by the cutting of capacity by most big companies, which has negatively affected the contribution base. Moreover retrenchment statistics from 1998 are shockingly high, meaning that the financial base of NSSA is continuously shrinking.

The Workers Committee adopted the position that there should be an 85% salary increase and that the transport allowance should be re-introduced at the rate of 20%, based on the litres a manager gets at any given time, reviewable on an anuual basis. It argued that the cost of living had gone up by between 300% to 400% as at August 2001 according to the Central Statistical Office and, according to the Consumer Council of Zimbabwe August 2001 bulletin, the poverty datum line was standing at $19 700 against a minimum wage of $8 050 in NSSA as at 31 August 2001. During 2000 comparative increments in other sectors such as banks, the Public Service, Zimpapers and the ZBC varied between 55% and 90%, whereas the staff of NSSA got a 43% increase. For the year 2001 the Mining Industry gave a 65% increase and the Chemical and Fertiliser Industry gave a 53% increase, whereas NSSA workers only got a 17% increase as an interim measure. As regards the

financial position of NSSA, both the WCIF and the NPS are in good shape. During the 1993 cost of living negotiations management supplied information which depicted that the WCIF was insolvent. However, the audited statements for that year showed a net surplus of $58 million, against a background of a projected loss of $9 million. In December 1999 management projected a loss of $35 million, but the audited accounts showed a net surplus of $134 million. The period January to October 2000 showed a net surplus of $205 million for the WCIF. As regards the NPS, a net surplus of $948 million was recorded in 1998, one of $1,8 billion was recorded for 1999 and a net surplus of $2 billion was recorded for the first ten months of 2000. The figures show that both funds are going from strength to strength. As at December 2000, interest on investments was 101% of the budget for the year and in 2001 interest on investments up to April 2001 was 17% over the budget.

Chigwendere issued his award on 3 October 2001. In his award he set out the background to the disagreement, the issues on which the parties agreed and then the details of his determination. He awarded, on the wages and salary increment, a further 50% increment, back-dated to January 2001. That was in addition to the 17% interim award. On the transport allowance, he awarded an additional 5% increment on wages and salaries. The award was dated and signed by Chigwendere but no reasons for his determination were given.

NSSA has applied for a review of the award. The grounds of review are as follows. Firstly, the award does not comply with the provisions of Article 31 (2) of the UNCITRAL Model Law which is applied by the Arbitration Act [Chapter 7:13]. That article requires that the award must state the reasons on which it is based. Secondly, the award is arbitrary and improper. It is not based on reason. Thirdly, the award is irrational. It is excessive and so outrageous in its defiance of logic that no reasonable arbitrator who has applied his mind to the dispute could have arrived at it. Fourthly, Chigwendere had no rational reasons for the determination. The award is therefore contrary to public policy.

The respondents oppose the application. The lst respondent says that he has been dragged into the dispute unnecessarily and that the application against him should be dismissed with costs on the higher scale. On behalf of the Workers Committee, the Chairman expressed surprise at the attitude adopted by NSSA. When the award was made on 3 October the Assistant General Manager (Human Resources) authorised payment of the arrears due in terms of the award, which totalled just over $107 million, and the money was actually deposited in the NSSA salary account. The Chairman further submitted that if NSSA wanted Chigwendere's reasons, it should have requested that he supply the reasons. The function of Chigwendere was

the quantum of the award to be given to the workers. The reasons for his determination are implicit in the award. The award was reasonable having regard to the desperate general economic malaise prevailing in this country and, in particular, the prohibitive levels of inflation. NSSA can well afford the increase awarded. It is one of the largest institutional investors in Zimbabwe. The arrear salaries payment of $107 million represents less than a week of NSSA's gross profit on investments.

Mr *de Bourbon*argued that the decision of Chigwendere is devoid of reasoning and thus, by its very nature, is arbitrary and irrational. Article 34 of the UNCITRAL Model Law sets out the grounds on which an award may be set aside. One of the grounds is public policy, the ambit whereof is dealt with in *Zimbabwe Electricity Supply Authority*v *Maposa*1999(2) ZLR 452 (SC). Article 31 thereof sets out in peremptory terms the form and contents of an award. An award which does not comply with those requirements is a nullity. A document which does not comply with the provisions of the Model Law cannot be said to be within the public policy of Zimbabwe. The failure by Chigwendere to give reasons for the award leads inevitably to the conclusion that the award is not a rational one. Chigwendere merely split the difference between the position of NSSA and that of the Workers Committee and made an award mid-way between the two.

Mr *Nhererе*submitted that there was no reason why the lst respondent should have been cited as a party and that he is entitled to his costs on the higher scale. As regards the Workers Committee, he submitted that the application is misconceived. The application was made in terms of ss 26 and 27 of the High Court Act [Chapter 7:06] as read with Order 33 of the High Court Rules. However, in our law, the award of an arbitrator is not subject to review. Such an award can only be set aside on the limited grounds set out in Article 34 (2) of the UNCITRAL Model Law. Mr *Nhererе*agreed that no reasons for the award were given by Chigwendere, but he argued that such failure was not sufficient reason to set aside the award. If NSSA required the reasons it should have requested them. The mere fact that reasons were not given does not mean that the award was irrational. Even if it was irrational, which he did not accept, irrationality was not a ground for setting aside an arbitral award. The spirit of the Arbitration Act is to uphold the finality of arbitral awards. It is only where the arbitrator has misconducted himself, in the sense of wrongful, dishonest or improper conduct, that the award can be set aside. There is no basis for holding that the award is contrary to the public policy of Zimbabwe.

I agree with Mr *Nhererе*that the award of an arbitrator cannot be set aside by way of an application for review in terms of s 26 of the High Court Act [Chapter 7:06] which provides -

> "Subject to this Act and any other law, the High Court shall have power, jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe".

Section 27 thereof then sets out the grounds for such a review.

An arbitrator cannot, by any stretch of the imagination, be regarded as a court of justice, tribunal or

administrative authority. Clearly, therefore, s 26 of the High Court Act does not purport to cover the proceedings and decisions of arbitrators. Furthermore, s 26 of that Act clearly states that it is subject to the provisions of any other law. The Arbitration Act [Chapter 7:02], which was the law in force in this country prior to 13 September, 1996 when the UNCITRAL Model Law was introduced, provided in s 12 thereof for the circumstances in which the Court could set aside an arbitral award. The grounds were much narrower than those specified in s 27 of the High Court Act. Likewise, the UNCITRAL Model Law specifies, in Article 34 thereof, the grounds on which an arbitral award may be set aside. They are very specific and differ from the grounds specified in s 27 of the High Court Act. Clearly it was the intention of the Legislature that, in the case of arbitral awards, the High Court could only set aside awards in terms of the specific provisions of the Arbitration Act and not in terms of the general powers conferred by ss 26 and 27 of the High Court Act.

A similar situation applied in South Africa. In *Dickinson & Brown*v *Fisher's Executors* 1915 AD 166 SOLOMON JA, with whom the rest of the Court concurred,

said at p 175 -

"it is clear that the Legislature intended to provide by statute that all awards to which the Act applies should be final and conclusive and that there should be no appeal therefrom. Provision is, however, made that in certain circumstances an award may be set aside by the Court. Section 18 provides as follows:

> 'Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set the appointment or award aside.'

Now in my opinion that section must be read to be exhaustive, and to provide that it is, in these cases and in those only that it is competent for a Court to set aside an award. That, of course, would not debar a Court from interfering where an arbitrator has made his award extend to matters which have not been submitted to him, for to that extent his award would be null and void, as has been decided in many cases in England. Moreover s (*o*) of the Schedule to the Act of 1898, to which I have already referred, provides that the award shall be final and binding upon the parties 'if made in terms of the submission'. I have no doubt, therefore, that an award could always be challenged if the arbitrator has exceeded his powers, but where he has made his award in terms of the submission, I am of opinion that the Court has jurisdiction to set it aside only in cases which can be brought under the provisions of para 18 of the Act, that is where it has been proved either that the arbitrator has misconducted himself or that the award has been improperly procured."

In *Benjamin*v *Sobac South African Building & Construction*1989(4) SA 940 (C) SELIKOWITZ J referred with approval to the determination in the *Dickinson & Brown*case, *supra*, that an arbitral award could only be set aside by the Court in cases which can be brought under the relevant provision of the Arbitration Act.

It may well be that under its inherent jurisdiction the High Court had the power to review

proceedings before an arbitrator prior to the introduction of the UNCITRAL Model Law on 13 September 1996. Section 12 of the Arbitration Act [Chapter 7:02] conferred powers on the High Court to remove an arbitrator and to set aside an arbitral award but the grounds therefor were very circumscribed. An award could only be set aside where the arbitrator had misconducted the proceedings or the arbitration or award had been improperly procured. There is nothing in that section from which it can be implied that the Legislature intended to deprive the High Court of its inherent jurisdiction to review the actions of an arbitrator or the award given. However, Article 34 of the UNCITRAL Model Law is a very different kettle of fish. It states very clearly that recourse to a court against an arbitral award may be made only by way of an application in accordance with paragraphs (2) and (3) of that article. That makes it very clear that the Legislature intended to deprive the Court of its inherent jurisdiction to review the conduct of an arbitrator. The grounds on which an arbitral award may be set aside are very clearly expressed.

Mr *de Bourbon*submitted that the application should be treated as an ordinary court application for the purposes of Article 34 of the UNCITRAL Model Law and not as an application for review. However, NSSA has nailed its colours to the mast. It has applied for the award of Chigwendere to be reviewed and has specified the grounds therefor, as required by rule 257 of the Rules of Court. No reference is made in the application to Article 34 of the UNCITRAL Model Law. As the procedure adopted is not applicable to arbitration awards, the application cannot succeed.

Article 34 of the UNCITRAL Model Law provides as follows in paragraph (1) thereof -

> "Recourse to a court against an award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article".

Paragraph (2) thereof sets out a number of grounds on which the High Court may set aside an arbitral award. The only one which could be relevant for the purposes of this case is paragraph (b)(ii) which provides that an arbitral award may be set aside by the High Court if it finds that the award is in conflict with the public policy of Zimbabwe. In *Maposa's*case, *supra*, at p 464 D-F GUBBAY CJ said -

> "Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions. See, generally, *Sasfin (Pty) Ltd*v *Beukes*1989 (1) SA 1 (A) at 7I-9G for a useful survey of the authorities dealing with the problem. In order to ascertain the meaning of this elusive concept, in the context of the Model Law, regard is to be had to the structure of articles 34(5) and 36(3), which deal with two aspects:
>
> (a) *Circumstances connected with the making of the award*:

As mentioned earlier, articles 34(5)(a) and 36(3) of the Model Law put it beyond doubt that if:

'…the making of the award was induced or effected by fraud or corruption, the award would be in conflict with the public policy of Zimbabwe'.

This means that if, for example, the arbitrator was fraudulently misled or bribed by a party, the award, however innocuous *ex facie,* be contaminated in the process of making and contrary to public policy".

At p 465 B-D the learned Chief Justice went on to deal with the other aspect as follows-

" *The substantive matter of the award* :

The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe.

What has to be focused upon is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign forum would be prepared to recognise and enforce it.

In my opinion, 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."

The conclusion reached in that matter by the learned Chief Justice was expressed as follows at p 466 E-G -

"Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. 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 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".

To my mind, there is no indication in the award that Chigwendere did not apply his mind to the question or that he totally misunderstood the issue. He was clearly aware of the issues. He decided to make an award of an increase that was midway between what NSSA offered and what the Workers Committee wanted.

Then, in addition, he awarded a further 5% increase in lieu of a transport allowance.

I fail to see how it can be said that his award is so far reaching and outrageous in its defiance of logic or accepted moral standards that it cannot be accepted by a sensible, fair-minded person.

Article 31 of the UNCITRAL Model Law deals with the form and contents of an award. Briefly they are as follows : it must be in writing and signed by the arbitrator; it must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given; the award must state its date and the place of arbitration; after it is made it must be signed and delivered to each party. Article 32 of the UNCITRAL Model Law provides that the arbitral proceedings are terminated by the final award. Mr *de Bourbon*argued that, if an arbitral award does not comply with the requirements of Article 31, then it is null and void. As the arbitral proceedings are terminated by the final award, it is not possible for the court to order that the arbitrator furnish his reasons for the award. It would be against public policy to enforce an award that is a nullity.

I consider that it would go against the spirit of the UNCITRAL Model Law to hold that, if an award did not comply with all the requirements of Article 31, it was a nullity. That would mean that if the arbitrator did not state the date of the award or the place of arbitration, the award would be a nullity. That, to my mind, would be too formalistic an approach. Likewise, I cannot accept that because Article 32 provides that arbitral proceedings are terminated by the final award, the court cannot thereafter order that the arbitrator must do a particular thing to ensure compliance with Article 31. If an arbitrator has failed to state the date or place of arbitration, and it is important that that should be done, why should the arbitrator not be permitted to remedy the omission. It is not uncommon for a court to deliver judgment and then state that the reasons therefor will be delivered later. It cannot be doubted that, once the judgment is handed down, the proceedings before that court have terminated. The handing down or delivery of reasons for the judgment at a later date does not affect the actual judgment or date thereof. It does not extend the proceedings before the court. If an arbitrator fails to comply with the requirements of Article 31 of the UNCITRAL Model Law then a party aggrieved by the omission may approach the court for an order of *mandamus*.

Article 34 (4) of the UNCITRAL Model Law provides as follows -

"(4) The *High Court*, when asked to set aside an award, may, when appropriate and so requested by a party, suspend the setting aside proceedings for a 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 arbitral tribunal's opinion will eliminate the grounds for setting aside."

Where an arbitrator fails to comply with the requirements of Article 31, and the omission is a mere technicality, such as failure to state the date or place of arbitration, the Court could, in terms of paragraph (4) set out above, suspend the setting aside proceedings in order to permit the arbitrator to remedy the defect. That would be much more appropriate than setting aside the award and compelling the parties to start the award proceedings afresh.

In *Christie's* Business Law in Zimbabwe at p 463 the learned author mentions the advantages of arbitration over court proceedings. Two that he mentions are that the procedure can be simplified and finality can be reached more quickly. I agree with him that these two elements are objectives which must be aimed for in arbitration proceedings. An insistence on an unnecessary degree of formalism would frustrate the achievement of those objectives and should be avoided wherever possible. Thus in a case like this, where the main objection by one of the parties to the arbitral award is that the arbitrator failed to give reasons for the award, that party should have applied, as a matter of urgency, for the arbitrator to furnish his reasons within a specified period. If the arbitrator failed to furnish his reasons or furnished reasons which indicated that there were grounds for setting aside the award in terms of Article 34, then the requisite application could be filed.

The application is dismissed, as against the first respondent, with costs on the legal practitioner and client scale, and as against the second and third respondents, with costs on the party and party scale.

Sawyer & Mkushi, applicant's legal practitioners
Honey & Blanckenberg, lst and 2nd respondents' legal practitioners