COURTESEY CONNECTION (PVT) LTD
and
STANLEY MTETWA
versus
DAVID MUPAMHADZI

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare, 24 May 2006.

Opposed Application

Mr *Nyakunika*, for applicants
Mr *Kasusu*, for respondent

MAKARAU J: This is an application for condonation for the late filing of an application for review and an application for the review of an arbitration award made in terms of an agreement between the parties.

After hearing submissions from counsel, I dismissed with costs the application for condonation and indicated that my reasons would follow. These they are.

It is necessary that I set out the background facts to this application at this stage.

A dispute arose between the parties in connection with an agreement relating to certain piece of land. In terms of the written agreement between the parties, the dispute was submitted to an arbitrator, one C. A. Banda who on 1 September 2004, made available his award. In terms of the award, the applicants before me were ordered to transfer the piece of land in favour the respondent and to complete the construction of a dwelling on the property in accordance with the agreement between the parties. On 19 January 2005, the respondent approached this court for the registration of the award. This was duly granted and an order issued on 19 July 2005. In the order registering the award, an order of costs on the scale pertaining to legal practitioner and client was made against the applicants. A notice to tax such costs was served on the applicants, setting down the taxation for 8 November 2005. On 9 November 2005, this application for condonation and review was filed.

It is common cause that in terms of the Arbitration Act, 1996, an award made under the Act may be reviewed within 3 months of being made. This is notably different from the

time period provided for in Order 33 of the High court Rules 1971 for the filing of an ordinary review.

The applicants were of the mistaken belief that they had to file their application for review in terms of rule 256. Be that as it may, the applicants were out of time in bringing this review before the court. The review ought to have been brought by not later than 1 December 2004. It was only filed in November 2005, some 11 months out of time.

Before I proceed to examine the reasons proffered by the applicants for the delay, it is necessary in my view, to reflect on the law that applies to applications for condonation for the late filing of an application to review an arbitral award made in terms of the Act.

Article 34 (3) of the Act provides:

> "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 has been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal."

Article 34 (1) provides that recourse to a court against an arbitral award may be made only by an application setting aside in accordance with paragraphs (2) and (3) of this article. Paragraph (2) provides the various bases upon which the High Court may set aside an arbitral award and is not immediately relevant.

In my view, the provisions of article 34 (3) provided a prescription period within which the right to set aside an arbitral award may be enjoyed. It is my further view that once the prescription period runs out, the right is lost and no court has been granted the power to revive that right once it has been lost. In entertaining this view, I seek reliance on two legal principles that appear to me to be coinciding.

Firstly, it is trite that the power of the court in relation to arbitral awards is to be found strictly within the language of the statute. Article 34 (3) does not provide for the extension of the three months period within which an application to set aside an arbitral award may be made. I have searched for a manner of reading the express provisions of Article 34 in a way that confers a power on the part of the court to extend the period. I have found none. In my view, the clear meaning of the article is that an application to set aside an arbitral award may be made not later than 3 months from the date of receipt of the award by the party intending to have it set aside. No court or other authority is granted power by the statute to extend that period.

In *Pamire and Ors v Dumbutshena NO and Another* 2001(1) ZLR 123 (H), following *Zesa v Maphosa* 1999 92) ZLR 452 (S), I had occasion to hold that an application to set aside an arbitral award is made under article 34 and not under section 26 and 27 of the High Court Act. I remain of that opinion.

Thus, an application to set aside an arbitral award is not a review application brought under the High Court Act and rules and the rules of this court as set out in Order 33 are not of direct application. It is an application brought strictly in terms of the provisions of the Act and within the time limits set out in the Act.

If at all the court is to hold that it has any power to extend the period provided for in article 34 (3) of the Act, in my view, that power is clearly not derived from the statute itself but may be searched for in the inherent powers of the court at common law.

But and secondly, the right to bring an arbitral award before the High court is not governed by the common law where the court has inherent jurisdiction to control its procedures. It is granted by statute and the powers of the court to grant that right are expressly provided for in the statute. Thus, the power that the court has in terms of the its rules to depart from the rules or to extend times within which certain court formalities have to be observed does not in my view apply. It is common knowledge that the court can extend time within which appeals can be noted for instance. This is so because the court has already reserved unto itself the power on good cause shown, to extend the time within which an appeal can be noted. Similarly, the court grants condonation for the late filing of a number of applications where the rules have provided that such applications are filed within a certain specified period. Such applications include applications to rescind default judgments and application to bring review proceedings. In such instances, the court has again reserved unto itself the power to grant in deserving cases, condonation where the applications are not filed within the specified time. Where no specific rule of the court provides for condonation, the court, exercises its inherent power to control it proceedings and grants condonation so that justice may be done.

The application before me, being an application to set aside an arbitral award in terms of the Act, is not an application initiated in terms of the rules of the court and thus, the time within which it has to be filed is not provided for in the rules but in the Act. Where a delay has ensued before the matter is properly before the court, it is my view

that the court may not properly make recourse to its rules to consider condonation nor may it use its inherent power to control proceedings before it as the matter will not be before it and the legislature has made specific provisions which do not appear to grant he court any power to extend the time within which such applications can be made.

This is not the only instance in which the general power of the court to grant condonation does not apply. One can think of the provisions of the Prescription Act and of the State Liabilities Act which prescribe times within which certain actions have to be brought. It is common cause that the court does not have power to extend such periods even on very good cause shown. I would therefore put article 34 of the Act on the same level as such provisions and hold that the general power that the court has to control its procedures does not extend to granting condonation for the late filing of applications under this article.

I am further persuaded to hold as I do by the fact that the Act is of international pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were to be allowed to extend the period within which an award is to be set aside. Section 2 of the Act specifically provides that in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.

On the basis of the application of the above two principles, I would hold that the right to have set aside an arbitral award under article 34 is irrevocably lost if it is not brought within 3 months of the date of receipt by the party intending to have it set aside.

Assuming that I erred in dismissing the application on the above basis, I still would have dismissed the application on another basis.

Firstly, the reason given for the delay is far from impressive. The applicant alleges that his retiring legal practitioners had a dispute with the arbitrator over the arbitrator's fees and pending settlement of this dispute, the reasons for the award were withheld. it is common cause that the dispute relating to fees was settled in October 2004 and thereafter, no reason has been advanced as to why the application to set aside the award was not filed.

Secondly, the applicants have sought to argue that they cannot afford to complete the building of the agreed residence on the stand purchased by the respondent and thus, for reasons of financial incapacity, the arbitrator should not have compelled them to put up the residence. Were such a defence acceptable at law, bad bargains would never found valid contracts and the doctrine of sanctity of contract would have no meaning in our law of contract.

Thus, even if the applicant had the right to request this court to extend the period stipulated in the Model Law, he would not have persuaded me that his circumstances are such that the indulgence can be granted. He has neither good reason for the delay nor a bona fide defence to challenge the recognition of the award.

It is on the basis of the above that I dismissed the application for condonation on the turn.

Mutezo & Company, applicants' legal practitioners
Mantsebo & Partners, respondent's legal practitioners