TRUST CORPORATION SECURITIES (PRIVATE) LIMITED
versus
L.M GABILO
and
DEVORGILLE KATSANZA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 22 January 2009 and 3 June 2009

Opposed Application

D Mundia, for the applicant
T Biti, for the second respondent

UCHENA J: The applicant is a company duly registered in terms of the laws of Zimbabwe. The second respondent is its employee with whom it has had labour disputes leading to this application. The second respondent was suspended from employment pending the resolution of the dispute between her and her employer. The first respondent is an arbitrator who was duly appointed to arbitrate in the labour dispute between the applicant and the second defendant.

The applicant and the second respondent filed written submissions with the first respondent. The first respondent thereafter called them for a hearing which was not finalised. He called them again to clarify the issue of whether or not the second respondent had secured employment during the period of her suspension. On 26 June 2007, while Mr *Biti* for the second respondent was making submissions at the hearing, the first respondent said the second respondent had "told him about how she suffered during the years". The applicant's counsel asked him to clarify where this conversation took place, but the first respondent did not respond to that inquiry.

That hearing was adjourned without a clarification of the first respondent's comments. The applicant's counsel followed it up by letter to the second respondent's counsel dated 27 June 2007. The letter was copied to the first respondent. It reads as follows:

"We refer to the arbitration hearing before Mr *Gabilo* on 26 June 2007.

> As you will no doubt be aware, the arbitrator made some remarks indicating that he had granted audience to the claimant and heard certain evidence from the claimant outside the framework of a hearing. The writer sought an explanation as to how this had occurred and the arbitrator gave no response.
>
> Our client is concerned that the arbitrator may have acted improperly as a result of which his impartiality may be in doubt. In this regard, the respondent is entitled to impeach the arbitrator and have the matter referred to another arbitrator.
>
> Please can we have your client's explanation in this regard not later than 29 June 2007."

The second respondent's counsel did not respond within the stipulated period. The first respondent did not respond even though the letter was copied to him. The applicant's counsel then wrote to the first respondent on 4 July 2007. The letter reads as follows:

> "We refer to our letter of 27 June 2007 addressed to the claimant's legal practitioners and copied to you. We have not heard from the claimant's legal practitioners.
>
> **Our client has instructed us in the circumstances to address its request for your recusal as arbitrator in this matter on the grounds that the respondent entertains serious doubts as to your impartiality or independence as arbitrator. As indicated in our letter of 27 June 2007, the respondent believes that you have entertained representations from the claimant outside the framework of the arbitration hearing. When we requested that you explain the circumstances in which the claimant had made representations to you, you did not answer that question.**
>
> **In the circumstances, the respondent seeks your recusal as arbitrator immediately.** Accordingly you are to refer the matter to the Labour Officer who referred the matter to you for a fresh appointment of an arbitrator. Regrettably, should you not recuse yourself the respondent shall seek the intervention of the High Court."(emphasis added)

The first respondent did not respond to the challenge, but proceeded to make an award without first rejecting the challenge. The applicant thereafter applied to this court for an order terminating the first respondent's mandate to arbitrate, and ordering that, fresh arbitration proceedings, be held, within a fortnight. The applicant is being represented by Mr Shoko the Group Chief Executive of Trust Holdings Limited. The applicant is a subsidiary of Trust Holdings. The first respondent did not oppose the application. The second respondent opposed the application, and raised two points in *limine*. She claimed that Mr Shoko does not have the applicant's authority to institute these proceedings as the applicant's Board of Directors was dissolved in 2005, and could not have authorised him to institute this application. She also

claimed that the applicant's application does not comply with the provisions of article 13 of the Arbitration Act [*Cap 7: 15*] herein - after called "the Act"..

Locus Standi

Mr *Biti* for the second respondent submitted that the applicant did not pass a resolution authorizing Mr Shoko to file this application on its behalf. He argued that the resolution Mr Shoko relied on was passed by Trust Holdings Limited, which described itself in the resolution as a holder of 60% equity in the applicant. He submitted that the resolution was issued by the applicant's majority shareholder instead of the applicant's directors. This argument is supported by the resolution which clearly states that the applicant's board was dissolved in 2005 pending the applicant's voluntary liquidation. This means the applicant does not have a Board of Directors with authority to resolve that Mr Shoko can represent it. When a company goes into voluntary liquidation and its Board of Directors is dissolved, its management and authority to act rests in its Liquidator. Its shareholders have no authority to perform the functions of the dissolved Board of Directors.

Mr *Mundia* for the applicant conceded that Trust Holdings cannot pass resolutions on behalf of the applicant, but argued that Mr Shoko has always acted for the applicant, and can depose an affidavit on the basis of the knowledge he has about the labour dispute between the parties. My understanding of the second respondent's objection is not that the affidavit was deposed by an unqualified person, but that the proceedings were instituted by a person without *locus standi*. In paragraph 2.1 of her opposing affidavit the second respondent said:

> "I am aware that Gift Shoko has not been authorised by the applicant's board to bring these proceedings against myself. In fact I am aware that there is no valid board of the applicant that exists. Shoko thus acted without authority and therefore there is absolutely no basis and foundation of the present application."

It is therefore clear that the issue is on Shoko's authority to institute these proceedings and not his authority to depose to an affidavit supporting the application. In other words the second respondent is saying there is no valid application before the court. Mr *Mundia*, submitted that Mr Shoko represented the applicant in previous proceedings between the applicant and the second respondent. That does not, cloathe Mr Shoko with authority to institute proceedings on behalf of the applicant without a valid resolution of the applicant

authorizing him to do so. I am therefore satisfied that Shoko does not have authority to institute these proceedings.

Compliance with Article 13 of the Act.

Mr *Biti* also raised the issue of procedure arguing that the applicant's application does not comply with article 13 of the Arbitration Act. He submitted that in terms of article 13 (1), the parties should have agreed on the procedure to be used in challenging the arbitrator. He also submitted that the notice of challenge was defective because no evidence was attached to it. He therefore argued that the application does not comply with the procedure through which a challenge to the arbitrator's appointment can be brought to this court. He further submitted that the arbitrator has already made his award, and in the circumstances the applicant should have proceeded in terms of article 34 of the Act. He submitted that the applicant could not apply to this court in terms of article 13, because the parties had not agreed on the procedure for challenging the arbitrator. Mr *Mundia* for the applicant argued that the application was properly made in terms of article 13, as failure to agree on the challenging procedure is not a bar to any challenge arising from what happens during the arbitral proceedings. He further submitted that the letter to the first respondent contains all the information which should be in a statement of challenge and should therefore be accepted as a valid challenge to the arbitrator. Article 13 of the Act provides as follows:

> " (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of para (3) of this article.
>
> (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
>
> (3) If a challenge under any procedure agreed upon by the parties or under the procedure of para (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."

The wording of paragraph (1) of article 13 favours Mr *Mundia*'s interpretation. It states that the parties are free to agree on a procedure for challenging the arbitrator. It does not say that they have to. It further states that the provision is subject to para (3) of this article. Article 13 (3), mentions two procedures, which can be used for challenging the arbitrator. They can use the agreed procedure or the procedure prescribed by para (2). Article 13 (2) provides for a procedure to be followed if the parties do not agree on a procedure to be followed. It specifically states that "failing such agreement, a party who intends to challenge an arbitrator shall …". This means that para (2) procedure is an alternative procedure to be used if the parties do not agree on the procedure to be used. I would therefore agree with Mr *Mundia* for the applicant that the application does not depend on whether or not the parties agreed on the challenging procedure. It is in my view depends on whether or not the applicant, correctly followed the procedure prescribed by para (2) of article 13.

An analysis of article 13 (2) reveals the requirements which should be complied with before a party can request this court to decide on a challenge. They are as follows:

1. The party who seeks to challenge the arbitrator must within fifteen days of becoming aware of the reason for the challenge;

2. Send to the tribunal or arbitrator a written statement;

3. Stating the reasons for the challenge;

4. The challenged arbitrator can withdraw from his office, or the other party can agree to the challenge; and

5. If the arbitrator does not withdraw, and the other party does not agree with the challenge, then the arbitrator must decide on the challenge.

In terms of article 13 (3) the rejection of the challenge by the arbitrator, leads to the following:

1. The challenging party may if he is not satisfied by the rejection;

2. Within thirty days of the rejection request the High Court;

3. To decide on the challenge.

While the challenge is pending in the High Court the challenged arbitrator or tribunal can continue with the arbitral proceedings and make an award.

In this case the arbitrator did not respond to the challenge, but proceeded to make an award without dealing with the challenge. In terms of article 13 (2), he was bound to decide on the challenge. Mr *Mundia* for the applicant argued that, that entitles this court to hear the applicant's application. Mr *Biti* for the second respondent argued that once the award is made it can only be set aside by the High Court in terms of article 34 (2) (b) (ii) of the Act.

As already indicated the procedure under article 13 (2) does not require the parties to first agree on the challenging procedure. The words "failing such agreement" in article 13 (2) means in the absence of an agreement. The applicant's application cannot therefore be dismissed just because the parties had not agreed on the challenging procedure. The application must however comply with the alternative procedure under article 13 (2) and (3), which requires the applicant to within fifteen days of becoming aware of the circumstances on which the challenge is premised, to send a written statement to the tribunal in which the reasons for the challenge will be stated. Mr *Biti* for the second respondent submitted that the applicant's statement was not accompanied by reasons for the challenge. Mr *Mundia* submitted that the letter the applicant wrote to the arbitrator satisfies the requirements of article 13. I agree with Mr *Mundia* as a reading of the article gives the impression that what is required is a simple statement which informs the tribunal or arbitrator of the reasons why its or his recusal is being sought. If the intention was for the challenging party to submit an application accompanied by an affidavit in which the reasons for recusal would be stated the legislature would have required the challenging party to apply for recusal instead of sending a statement. The letter to the first respondent clearly states why his recusal was being sought. It therefore satisfies the requirements of article 13. I am therefore satisfied that the applicant's application can not be dismissed for failure to give separate reasons for the arbitrator's recusal.

On receipt of a challenge the arbitrator can either withdraw from his office or decide on the challenge. The other party can agree to the challenge in which case the arbitrator cannot proceed with the arbitration proceedings. The tribunal or arbitrator can not ignore the challenge and proceed with the arbitral proceedings as if its or his appointment has not been challenged. If the challenge is not successful the challenging party must within thirty days of receiving the arbitrator's determination on the challenge request the High Court to decide the challenge.

In this case, the applicant, send a statement of his challenge to both the arbitrator and the other party within the stipulated period. The other party did not agree, and the arbitrator

did not respond. Article 13 (3) does not provide for an application to this court until after the arbitrator has given the challenging party notice of his decision rejecting the request to recuse himself. This therefore means the applicant's application does not comply with the provisions of article 13 (3).

The Arbitrator has already made an award which the applicant wants to be declared null and void because of the alleged impartiality. Article 13 (2) and (3) permits the arbitrator to continue with the proceedings in spite of the challenge which he will have rejected and the challenging party's request that the High Court determines the challenge. In this case he proceeded without first rejecting the applicant's challenge. This was an irregularity on his party as article 13 (3) allows an arbitrator to continue with the proceedings after notifying the challenger of the rejection of the challenge. Mr *Mundia* submitted that the award should be set aside on the basis that it does not even deal with the challenge. I agree with him that the arbitrator was required to deal with the challenge before proceeding with the proceedings before him, but the issue in this case is whether or not the applicant is properly before this court. This court can in terms of article 13 (3) only decide on a challenge after its rejection by the arbitrator. In this case the failure by the arbitrator to reject the challenge before making the award makes the article 13 procedure inapplicable, as this court can only be requested to intervene when the challenge has been rejected.

I am therefore satisfied that Mr *Biti*'s submission that the applicant is not properly before this court is correct. The applicant is however not without a remedy. Mr *Biti* correctly pointed out that in the circumstances of this case the applicant should have applied for the setting aside of the award in terms of article 34 (2) (b) (ii) of the Act. The applicant could ordinarily have taken the arbitrator's failure to decide on the challenge on review, but article 5 of the Act provides that "no court shall intervene except where so provided in this Model Law". This means this court's intervention in terms of article 13 must be strictly in compliance with the provisions of that article. The Act does not provide for review and article 34 (1) provides that an application to set aside is the only available remedy. Article 34 (1) provides as follows:

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

This means in the circumstances of this case an application in terms of article 34 (1) is the only procedure through which the applicant can seek a remedy from this court.

Article 34 (2) (b) (ii) provides for the setting aside of the award on the ground that it is contrary to the public policy of Zimbabwe. Article 34 (5) defines the circumstances under which an award can be said to be contrary to the public policy of Zimbabwe. It provides as follows -

> "For the avoidance of doubt, and without limiting the generality of para (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if -
>
> (a) the making of the award was induced or effected by fraud or corruption, or
> (b) a breach of the rules of natural justice occurred in connection with the making of the award."

The applicant's grounds, for applying, for the recusal of the first respondent, and the setting aside of his award is that he heard submissions from the second respondent outside the arbitral proceedings. That if proved would be contrary to the rules of natural justice and entitle the applicant to the setting aside of the award in terms of article 34. I am therefore satisfied that the applicant should in the circumstances of this case have applied for the setting aside of the award in terms of article 34 (2) (b) (ii) of the Act. Its application in terms of article 13 of the Act must therefore be dismissed.

In the result the applicant's application is dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
Honey & Blanckenberg, second respondent's legal practitioners