

GOLD DRIVEN INVESTMENTS
versus
TELONE (PVT) LTD
and
A. R. GUBBAY N.O

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 26 May 2011 & 9 May 2012

Mr *C. Muchenga*, for the applicant
Adv T. Mpofo, for the first respondent

CHIWESHE JP: The applicant seeks an order setting aside an arbitral award handed down by the second respondent on 16 August 2010. The applicant avers that the award is in conflict with the public policy of Zimbabwe in the following material respects:

- a) “The Arbitrator made a determination on the issues not placed before him for adjudication.”
- b) “A breach of the rules of natural justice occurred in connection with the making of the award.”
- c) “The award conflicts with the substantive law of Zimbabwe in material respects.”

The applicant substantiates these averments as follows:

(a) Issues not before the arbitrator for determination

- (i) a determination was made on a claim for realised proceeds. This claim had not been placed before the arbitrator (second respondent) for determination.
- (ii) the arbitrator did not consider the first and second issues placed before him and erroneously held that they were alternative claims, where no such alternative claims had been made and placed before him. In the result he awarded an amount in excess of what the first respondent had claimed.

As a result the applicant submits that the arbitrator had gone “on a frolic of his own” making a determination outside his terms of reference. The award, argues the applicant, is procedurally improper and should be set aside on that basis.

(b) Breach of the Rules of Natural Justice

The applicant further submits that the arbitrator made a determination on an issue that was improperly introduced by the first respondent, that is the claim on realised

proceeds. This claim was single handedly introduced by the first respondent in its heads of argument. The first respondent's claim in the procedure document should have been amended to accommodate this new claim. The issue of this claim had not been included and agreed to by the parties. In the result the applicant was prejudiced in the conduct of its defence as it was not accorded an opportunity to fully present its defence on this claim. This amounts to a breach of the rules of natural justice argues the applicant. For that reason the award must be set aside on the grounds that it is in conflict with the public policy of Zimbabwe.

(c) Award conflicts with the substantive law of Zimbabwe

It is averred that the award conflicts with the substantive law of Zimbabwe in that the dispute was not determined in terms of the governing contract between the parties in that with regards the 2005 Tobacco agreement.

- (i) the arbitrator in awarding the first respondent all the proceeds generated from the scheme failed to apply the exchange rates agreed to by the parties in terms of the agreement. He gave a remedy which was not provided for in the contract. He accordingly acted outside the law of Zimbabwe thus the award must be set aside as being contrary to the public policy of Zimbabwe.
- (ii) alternatively, in awarding all the proceeds to the first respondent, the arbitrator's reasoning "went beyond mere faultiness or incorrectness and constituted a palpable inequity that was so far reaching 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".
- (iii) with regards the 2006 Tobacco agreement, the applicant attacks the award on the same grounds as the 2005 agreement with the inclusion of an additional ground, namely that the arbitrator failed to take into account any trade usage of the tobacco industry. In particular that the tobacco auction rate was different from the interbank rate, a notorious fact at the time.

- (iv) the arbitrator awarded according to the applicant, the remedy of specific performance in circumstances where the other party had admitted to breaching the 2006 agreement in material respects, namely the partial funding of the establishment of the grower scheme and the procurement of inputs.
- (v) alternatively the arbitrator entertained a point raised in first respondent's heads of argument for the first time, namely, that first respondent had met its obligations in terms of the contract and was therefore not in breach, when in fact first respondent had in its admissions of fact admitted that its funding was only partial with regards establishment of growers' scheme and nil with regards the purchase of green tobacco. This argues the applicant, amounted to a breach of the rules of natural justice in that the applicant was not afforded the opportunity to address the issue introduced by the first respondent belatedly.
- (vi) the arbitrator failed to make a determination as to the legality of the agreements entered into by the parties, despite extensive arguments on the point says the applicant. For that reason the applicant avers that the arbitrator gave a blind eye to illegality, a fact which is contrary to the public policy of Zimbabwe. In particular a ruling should have been made as to whether the Reserve Bank had authorised the transactions, argues the applicant.

(d) Arbitrator had no power to act outside the Procedure Document.

The applicant states that in terms of the procedure document agreed to by both parties the arbitrator's fee was to be shared equally between the parties. In the award the arbitrator ordered that $\frac{4}{5}$ of the fee be shared equally with the balance being met by the applicant alone, contrary to the position taken by the parties in the procedure document. The arbitrator had no power to act outside the terms of the procedure document. The award regarding his fees must also be set aside argues the applicant.

In its opposing affidavit sworn to by Hampton Mhlanga, its Acting Managing Director, the first respondent avers that the award is not in conflict with public policy. Instead it is based on sound principles of law consistent with the dictates of public policy.

The respondent's understanding of the award is that with regards both the 2005 and 2006 agreements, the applicant had a duty to account to the respondents all monies advanced to it. It rendered its account which the first respondent accepted from which account arose the relief sought. The relief sought was not based only on the admissions made by the applicant nor was it confined only to such admissions. It was instead based on the full accounts given by the applicant with regards funds disbursed to it in terms of both agreements. As for the applicable exchange rate the arbitrator found on the evidence presented to him by the parties that the rate of exchange had been agreed by the parties. Further the first respondent argues that its initial statement of claim was amended by agreement of the parties under the stewardship of the arbitrator. It is also denied that the rules of natural justice were breached in view of the fact the "new" issue alleged to have been brought up belatedly arose when the applicant, which hitherto had denied its obligations to account for all the funds availed to it in terms of the two agreements, later during the course of the arbitration admitted to such obligation. This was a separate admission from the ones previously made by it. Naturally the papers were amended to capture this new development occasioned by the applicant's own conduct. The applicant cannot in the circumstances cry foul, contends the first respondent. It also denies that the arbitrator made a determination on an issue outside his terms of reference. On the contrary all the issues determined by the arbitrator are captured in the first respondent's amended claim and the parties' agreed issues.

The first respondent further argues that the arbitrator determined the issues before him by reference to the terms of the agreements entered into by the parties and analysis of the evidence adduced by both parties, including findings on the credibility of the witnesses. It cannot in the circumstances be said that in doing so, the arbitrator acted in conflict with the substantive laws of Zimbabwe. As for costs the first respondent submits that the parties gave the arbitrator leave to decide their fate at the close of the hearing. The issue of whether the two agreements had been authorised by the Reserve Bank was never raised by the parties, save belatedly by the applicant, in its heads of argument. The arbitrator naturally would not allow this issue to be brought in at this stage "through the back door" so to speak. These submissions by the first respondent constitutes the basis of its defence to this application.

A perusal of the record of arbitration vindicates the first respondent's assertions as to how the proceedings were conducted and the basis upon which the award was granted. I find nothing untoward in the manner in which the hearing was conducted both in terms of

procedural propriety, evidential analysis and interpretation of the laws governing contractual relationships.

In support of this application the applicant has relied *inter alia* on the case of *Delta Operations (Pvt) Ltd vs Origen Corporation (Pvt) Ltd* SC 86-06.

It is clear that a court will only set aside an arbitral award where the “*reasoning or conclusion in 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 reached the point mentioned above.*”

By any stretch of the imagination it cannot be said that the present award constitutes a palpable inequity in the proportions envisaged in the Delta Corporation case *supra*. On the contrary, as already indicated, I do not find any faultiness or incorrectness in the arbitration proceedings let alone of the magnitude described by the applicant. The award in my view is in accordance with the substantive and procedural laws of Zimbabwe. Both parties were afforded a fair hearing in accordance with the rules of natural justice. In particular it has not been shown in what way the award is in conflict with the public policy of Zimbabwe. Accordingly the application cannot succeed.

For these reasons I order as follows:

- (1) That the application be and is hereby dismissed in its entirety.
- (2) The applicant shall pay the costs.

Musemburi & Muchenga, applicant’s legal practitioners
Messrs Dube, Manikai & Hwacha, 1st respondent’s legal practitioners