

ZIMBABWE REVENUE AUTHORITY  
versus  
AMANDIZ ARCHITECTS (PVT) LTD  
and  
JAMES McCOMISH N.O

HIGH COURT OF ZIMBABWE  
MHURI J  
HARARE, 13 July & 8 December 2023

### **Opposed Application**

Mr N Munyuni, for the applicant  
Ms S Mabaso, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup> respondent

**MHURI J:** In May 2022, second respondent was appointed arbitrator to arbitrate a dispute, which had arisen between applicant and first respondent. The reference to arbitration was done in terms of para 17 of the Memorandum of Agreement between applicant and first respondent entered into on 27 January 2012.

Paragraph 17 of the said memorandum reads as follows:-

“Any difference or dispute arising out of this agreement shall be referred to arbitration by a single arbitrator such arbitrator to be appointed by the agreement of the parties within fourteen days of the declaration of the dispute or, failing such agreement, to be appointed by:

- (a) the Chairman for the time being of the Architects Council, or
- (b) the President of the Institute of Architects of Zimbabwe or
- (c) other .....

It is on the premise of this paragraph that this application is before this court.

On the day of hearing of the dispute, applicant raised two preliminary challenges to wit,

1. the jurisdiction of the arbitrator on the basis that there is no agreement to refer the dispute to arbitration (article 16 of the Arbitration Act)
2. recusal of the arbitrator on the basis lack of impartiality in that the arbitrator once served as the President of the architects council and Abel Mandizvidza the sole proprietor of first respondent was his Deputy. (article 12 of the arbitration Act)

As regards the first issue, the Arbitrator made the finding that para 17 of the agreement also applied to the addendum to the agreement. He ruled that this paragraph gave him the jurisdiction to hear and determine the parties' dispute.

As regards the second issue, he recused himself, not on the basis of lack of impartiality but on the basis that the dispute has been going on for a long time and the arbitration needed to proceed without further impediments which would delay the outcome.

Aggrieved by the arbitrator's ruling applicant filed this application for the setting aside of the ruling in terms of Article 16(3) of the Arbitration Act [*Chapter 7:15*] (THE ACT).

The grounds upon which the application is made are that:

- a) the second respondent erred in failing to find as he should have that there was no arbitration agreement between applicant and first respondent.
- b) the second respondent erred in making a finding on jurisdiction after upholding the application for his recusal.
- c) the second respondent misdirected himself at law in failing to appreciate that he ought to have dealt with the challenge of recusal first and that having recused himself from the matter should not have dealt with the challenge of jurisdiction.
- d) the second respondent erred at law in determining the challenge on jurisdiction which in actual fact confirms that despite his 'recusal' he had pitched camp with first respondent.
- e) the second respondent misdirected himself at law in dismissing the jurisdictional challenge and then recusing himself and ordering that another arbitrator be appointed to deal with the matter.

It prayed that the arbitral award issued by second respondent be set aside and substituted with the following:-

- a) that the preliminary objection on the arbitration agreement be and is hereby upheld.
- b) the arbitration proceedings be and is hereby set aside.
- c) Respondent pays applicant's costs on a legal practitioner and client scale.

In deciding the jurisdictional challenge, second respondent had to consider the following relevant historical events, which are:

1. On 27 January 2012 applicant and first respondent entered into an agreement for the renovations of regional manager and staff houses in Beitbridge, a steel shed for commercial offices in Masvingo.

It is in this memorandum of agreement that an arbitration agreement was provided under para 17.

2. First respondent duly performed in terms of the agreement and was paid all its outstanding balances by applicant.
3. Following the completion of the works as per the memorandum of agreement, first respondent was again engaged by applicant in November 2015 to do additional works for the construction of blocks of flats on Border Posts being:
  - Beitbridge Border Post
  - Forbes Border Post
  - Nyamapanda Border Post
  - Chirundu Border Post
  - Victoria Falls Border Post
  - Kazungula Border Post
  - Plumtree Border Post

This engagement was done through an Addendum to the Memorandum of Agreement.

It is common cause that applicant did not sign this addendum, it is only first respondent who did.

4. First respondent again duly performed its side of the terms. This was not denied by applicant.
5. A dispute then arose regarding the payment of a sum of US\$1 290 671-12 by applicant to first respondent being for works done in respect of the additional works.
6. Applicant's refusal to make payment was that it was the Ministry of Local Government and Public Works which was responsible for the payment and also that since it did not append its signature on the Addendum it was not legally bound to pay.
7. The matter was referred to arbitration in terms of clause C of the Addendum as read with para 17 of the Memorandum of the Agreement.

Clause C of the Addendum reads as of follows:-

“The other clauses terms and conditions of the main Memorandum of Agreement shall remain as they are without any changes except the physical address which shall appear as noted and the inclusion of the Addendum.”

To be noted and to be accepted as a trite position is the fact that this court is not sitting as an appellant court. It is also noted that this application is in terms of Article 16 (3) and not Article 34 of the Arbitration Act.

Article 16 provides for competence of arbitral tribunal to rule on its jurisdiction. It reads:-

- “(1) The arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement.....
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed or participated in the appointment of an arbitrator .....
- (3) The arbitral tribunal may rule on a plea referred to in para (2) of this article either as preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling the High Court to decide the matter which decision shall be subject to no appeal; .....”

Article 12 upon which the second challenge was based provides as follows:-

- “(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.....
- (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties a party may challenge an arbitrator appointed or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.”

As already stated the application before me is in terms of Article 16 which speaks to the jurisdiction of the second respondent. The second respondent had found that he had the jurisdiction to entertain the dispute between the parties (applicant and first respondent) and that the arbitration clause (paragraph 17) of the Memorandum of Agreement applied to the Addendum.

I have outlined the common cause facts in this matter, which are that the parties entered into memorandum of agreement in respect of works under Phase 1 and 2. The memorandum contained an arbitration clause. After completion of Phases 1 and 2, the parties drafted an addendum for further works to be done under Phase 3. First respondent endorsed its signature on the addendum but applicant did not. First respondent performed its side of the contract but

applicant refused to pay on the basis that it was the Ministry of Local Government and Public Works' mandate to do so and that it was not bound by the unsigned addendum.

Addendum as the word clearly states, is an additional document added to a document or a contract setting out extra terms as what happened *in casu*. It must be signed by both parties to the main contract for it to have a binding effect. *In casu*, the addendum was signed only by one party. The memorandum of Agreement was between applicant and first respondent. The addendum equally was between applicant and first respondent.

It is in paragraph A of the addendum that the extension of the scope of the agreement to include additional works is stated.

It is therefore my considered view and I agree with second respondent's finding that the arbitration clause contained in the Memorandum of Agreement applies to the addendum. The addendum was not a new contract per se but an additional document setting out further terms to the original contract.

Further, as correctly reasoned by second respondent clause C of the addendum, save for the addition of further works, does not alter the rest of the clauses in the Memorandum of Agreement. This means that the arbitration clause remained extant.

Second respondent had this to say, "Now given that all the other clauses in the addendum did not discuss arbitration it is my conclusion that the parties did not wish or intend to alter or remove the existing arbitration agreement contained in clause 17 of the memorandum of agreement being the arbitration clause." I agree.

In that regard, therefore it is my finding that second respondent as the arbitrator, had the jurisdiction to entertain the dispute between the parties.

The fact that the addendum was not signed by applicant would not disempower the arbitrator from entertaining the dispute. Second respondent was correct in my view when he opined that the fact that one party did not sign the agreement does not remove the intention of the parties to fulfil their obligations.

Indeed the law requires that for it to be valid the addendum must be signed by both parties. I agree with first respondent's submission that the surrounding circumstances including prior dealings between the parties may give rise to a *prima facie* presumption that the terms and conditions embodied in the unsigned agreement represent the true intentions of the parties.

PATEL JA (as he then was) clearly stated the position in the case of *Afritrade International Limited v Zimbabwe Revenue Authority* SC 3/2021

“In principle, an unsigned agreement cannot ordinarily be relied upon as creating a valid and binding contract. However, the surrounding circumstances, including prior dealings between the parties concerned may give rise to the *prima facie* presumption that the terms and conditions embodied in an unsigned agreement represent the true intention of the parties.”

See also the case of *South African Railways and Harbours v National Bank of South Africa* 1924 AD 704 at 715.

In which it was stated:

“The Law does not concern itself with the working of the minds of the parties to a contract but with the external manifestations of their minds. Even therefore if from a philosophical stand point the minds of the parties do not meet yet if by their minds seem to have met, the law will where fraud is not alleged look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement.”

In this case, parties entered into the initial agreement and both met their side of the terms. They again engaged each other for further works. First respondent met its side of the terms. Applicant paid part of the invoice for works under Phase 3 i.e works under the addendum. There was exchange of correspondence between the parties in respect of the works under the addendum. These are manifestations that the parties were *ad idem* as to the works under the addendum. That being the case, second respondent’s jurisdiction is established despite the applicant not having signed the addendum.

It is noted that the second challenge under article 12 is not covered by Article 16(3) upon which applicant approached this court. Be that as it may. I am not persuaded that the ruling by second respondent on his recusal warrants the setting aside of second respondent’s ruling, neither would the fact that the ruling on this point was made after the ruling on the first challenge.

Second respondent recused himself not on the point that he would be partial or that there is likelihood of bias but on the basis that there would be delay in the finalisation of the proceedings. He stated,

“This dispute has been going on for quite sometime. I believe that my recusal will avoid further delays, avoid prolonging this dispute even further. To now spend more time and effort on my appointment will not benefit the speedy determination of this arbitration for both parties and that is of great concern to me. These arbitration proceedings have to proceed without further impediments that would delay the outcome.”

In my view, this is not proof of second respondent pitching camp with first respondent.

All having been considered, I find no basis to set aside the second respondent's ruling. The application is therefore dismissed with costs on an attorney/client scale as prayed for by first respondent.

*Mvingi and Mugadza*, applicant's legal practitioners  
*Musoni Law Chambers*, first respondent's legal practitioners