

REPORTABLE ZLR (2)

GOLD DRIVEN INVESTMENTS (PRIVATE) LIMITED
v
(1) TELONE (PVT) LIMITED (2) A R GUBBAY N.O.

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & OMERJEE AJA
HARARE, OCTOBER 9, 2012 & FEBRUARY 25, 2013

F Girach, for the appellant

T Mpofo, for the first respondent

No appearance, for the second respondent

MALABA DCJ: This is an appeal against the judgment of the High Court dismissing an application for review of an arbitral award granted by the second respondent (“the arbitrator”) in favour of the first respondent.

There are two grounds of appeal. The first is that the court *a quo* misdirected itself in failing, to uphold the contention that the arbitrator ought to have determined the merits of the question of the illegality of the two agreements entered into by the parties as advanced by the appellant in the heads of argument after the hearing of evidence had ended. The contention is that as the question of the illegality of the contracts was a question of law which went to the root of the dispute between the parties, the arbitrator was obliged to depart from the requirements of Article 23(2) of the Model Law. The second ground of appeal is

that the court *a quo* misdirected itself in failing to uphold the contention that the arbitrator exceeded the terms of submission to arbitration when he granted the award.

The facts of the case are as follows. The appellant is a private company registered in accordance with the laws of Zimbabwe. It carries on the business of tobacco contract farming, merchandising and export. The first respondent is a company incorporated in accordance with the laws of Zimbabwe. It carries on the business of providing telecommunication services in the country. In 2004, the first respondent entered into an agreement with Huawei Technology Investments (Pvt) Ltd (“Huawei”), a company registered in the Republic of China, for the manufacture and supply of telecommunication equipment. The terms of the contract were that Huawei would manufacture and provide the first respondent with communication equipment.

The first respondent had local currency but needed foreign currency for the purposes of discharging its obligation to Huawei. It entered into two agreements with the appellant, the purposes of which were to raise foreign currency from the sale of tobacco to pay Huawei. In terms of the first agreement which related to the 2005/6 tobacco growing season, the first respondent was to provide local currency to enable the appellant to buy tobacco from local growers on its behalf. The appellant’s obligation was to sell the tobacco in foreign currency on behalf of the first respondent. The money was to be transmitted to Huawei to discharge the first respondent’s debt.

The second agreement relating to the 2006/7 tobacco growing season had similar terms. In respect to 2005/6 the first respondent discharged its obligation in terms of

the contract. The appellant bought and sold the tobacco in foreign currency. It then paid the first respondent the sum of US\$4 617 167.82. That amount was not enough to discharge the first respondent's indebtedness to Huawei. No money was paid to the first respondent from the sales of tobacco bought and sold during the 2006/7 growing season.

In 2010 the first respondent made a claim against the appellant for payment of foreign currency owed in terms of the two agreements. The appellant partially admitted the claim but denied that it owed all that the first respondent was claiming. The parties agreed to have the dispute settled by way of arbitration under the auspices of the Arbitration Centre.

The terms of reference which incorporated the terms as finally amended were as follows:

1. Whether GDI bears the onus to account for all funds availed to it by TelOne for the establishment and funding of the outgrower scheme under the 2006/07 agreement? (It had been formally admitted by GDI that such a position obtained under the 2005/06 agreement).
2. Whether TelOne is entitled to be paid a minimum of USD3 459 720.09, and a maximum of USD5 045 170.79 over which GDI allegedly admitted liability in respect of the 2005//06 tobacco agreement?
3. Whether TelOne is entitled to be paid a minimum of USD5 865 672,33 (readjusted), and a maximum of USD10 350 000 over which GDI allegedly admitted liability in respect of the 2006/07 tobacco agreement?
4. Whether TelOne is entitled to claim any amount for which projections were made by GDI at the commencement of the project, but over which admissions of liability were not made at subsequent meeting between the parties; and if so, in what amount? (general damages).
5. Whether TelOne is entitled to recover special damages in an amount of USD 168 490 446 (reduced from USD 250 531 200), being the loss of business profit it sustained?

The parties adduced evidence before the arbitrator who stood the matter down for judgment. In the heads of argument filed on 5 July 2010 the appellant for the first time raised the issue of illegality of the contracts. The first respondent's legal representative strongly objected to the issue being raised at that stage on the ground that it was not part of the defence and its introduction would be prejudicial to its case. The first respondent's legal practitioner drew the arbitrator's attention to the provisions of Article 23(2) of the Model law.

It provides:

“ARTICLE 23

Statement of claim and defence

(1)

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.”

The first respondent's argument was that absent compliance with the procedure for amendment of the statement of defence in terms of Article 23(2) of the Model Law the question of the illegality of the contracts could not be determined by the arbitrator. The appellant's legal practitioner contended that the principle of the law regarding raising of questions of law authorised the arbitrator to act outside the provisions of Art 23(2) of the Model Law.

The arbitrator dismissed the claim by the appellant. He said:

“An agreed list of issues was filed by the parties on 13 May 2010. The hearing of evidence commenced on 20 May 2010, and ended on 3 June 2010, with an adjournment to 2 August 2010 for argument.

The realistic inference to draw from this background is that GDI changed its mind when it proceeded to prepare its heads of argument, and decided to introduce the defence that the two agreements were illegal and unenforceable.

An objection in *limine* should be taken by a defendant before plea. Its object is to avoid further pleadings and the holding of a trial, and to afford finality to litigation, thereby avoiding the consequential costs.”

He goes on to say,

“Having regard to both the absence of an application by GDI to amend or supplement its Amended Statement of Defence, and more importantly, to the excessive delay in raising the illegality defence, the arbitral tribunal considers it now inappropriate to permit GDI to rely on it.”

The arbitrator went on to determine the matter on the merits. He found that the first respondent’s witness Mr Liu was an unreliable witness because he was argumentative and evasive when answering questions. He also found that Mr Liu had refrained from disclosing documents containing information on the foreign currency his company had raised from the sale of tobacco during the two periods covered by the agreements. Mr Liu was constrained under cross-examination to admit that there was information relating to the transactions concerned which he had not disclosed. As a result he produced schedules which revealed the actual proceeds of the tobacco sold over the two seasons. The arbitrator found the two witnesses for the first respondent to be good and credible witnesses.

Relying on the evidence contained in the schedules, the arbitrator addressed his attention to the question whether the matters raised by the first issue had been proved. He found on the evidence of the schedules that the appellant owed the first respondent a sum of

\$5 097 842 in respect of the 2005/6 agreement. He also found that the appellant owed the first respondent US\$11 392 352 in respect of 2006/7 agreement.

The arbitrator dismissed the first respondent's claims in respect of the other matters. As a result he made an order in the following terms:

- “1. GDI is to pay TelOne the sum of US\$5 097 842 in respect of the 2005/06 agreement, with interest thereon at the prescribed rate of 5% per annum from the date of demand (11 September 2009) to the date of payment.
2. GDI is to pay TelOne the sum of US\$11 392 052 in respect of the 2006/07 with interest at six months LIBOR calculated on the outstanding daily balance compounded monthly from the date of demand to the date of payment.
3. GDI is to pay one fifth of the costs incurred by TelOne.
4. TelOne to bear the remainder of its costs.
5. GDI to bear all of its own costs.
6. Four fifths of the fee rendered by the arbitrator are to be shared equally by the parties; the remaining one fifth to be paid by GDI alone.”

In September 2010 the appellant made an application to the High Court for an order setting aside the award on the ground that the decision of the arbitrator refusing to have the question of the illegality of the contracts determined at the stage the appellant sought to raise it was contrary to public policy of Zimbabwe. It also argued that in making the determination of the amount owed to the first respondent on the basis of the information contained in the schedules the arbitrator exceeded the terms of submission to arbitration and therefore acted against public policy of Zimbabwe. The application for review was made in terms of Article 34 of the Model Law which provides:

“ARTICLE 34

Application for setting aside as exclusive recourse against arbitral award

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

- (2) An arbitral award may be set aside by the *High Court* only if—
- (a) the party making the application furnishes proof that—
- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;
- or
- (b) the *High Court* finds, that—
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or
 - (ii) the award is in conflict with the public policy of *Zimbabwe*..”

In a brief judgment the court *a quo* dismissed the application. Whilst the issue of the correctness of the decision by the arbitrator not to entertain the question of the illegality of the contracts without compliance by the appellant with Article 23(2) of the Model law was raised and argued before the court *a quo* the learned Judge President did not say anything on the issue in the judgment. On the second issue he said:

“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 to funds disbursed to it in terms of both agreements.”

The learned Judge President went on to say:

“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 relationship.

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 fault 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 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.”

On appeal the appellant raised the issue of the decision of the arbitrator as being against the public policy of Zimbabwe. On the first issue it is clear that the appellant’s case is based on a proposition that the principles of law governing the raising of points of law in judicial proceedings provided authority to the arbitrator to forego the need to insist on compliance by the parties with the procedure provided by Article 23(2) of the Model Law. The principles of law relating to the circumstances in which a question of law may be raised and determined in judicial proceedings are clear. In *Muchakata v Netherburn Mine* 1996(1) ZLR 153 (S) KORSAN JA said at 157A:

“Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.”

In *Muskwe v Nyajina & Others*-SC-17-12, the court said:

“Undoubtedly, a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations, one of which is that the court has to consider whether raising a point of law at this juncture would cause prejudice to the party against whom it is raised.

In our view there is great prejudice to the appellant who, if the matter is decided against him, stands to lose the appeal without argument.”

The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided it does not occasion prejudice to the other party. These principles are subject to the absence of clear provisions governing procedures in particular proceedings. It is particularly applicable where the procedure in question does not provide a sufficient remedy for raising a point of law. The principles do not, on their own, provide a separate legal basis on which a court can ignore explicit provisions of law designed to deal with the raising of questions of law. In this case Article 23(2) is comprehensive and clearly takes care of the appropriate procedure by which a point of law may be raised in arbitral proceedings. There is no exception to the procedure which was provided for by the legislature which would allow the arbitrator to decide the question of raising of points of law outside Article 23(2) on the ground that one of the parties considers the matter to go to the root of the dispute.

In this case the illegality of the contracts would have been part of the defence raised by the appellant against the first respondent's claims. Raising it at this belated stage of the proceedings and in the manner the appellant did would, if accepted, mean that the arbitrator allowed an amendment to the defence in a manner contrary to the procedure provided for the purpose by Article 23(2) of the Model law. Article 23(2) envisages a situation in which an arbitrator makes a decision to allow or refuse a proposed amendment following submissions by both parties. It was not common cause that the contracts were illegal. The first respondent would have been entitled to resist the proposed amendment of the defence on the basis that the agreements were lawful.

On the second issue the court is of the view that Mr *Girach* pressed the argument of the arbitrator having exceeded his jurisdiction because of an erroneous view of

the facts. He candidly admitted when it was pointed out by the court, that he had believed that the arbitrator had *mero motu* called for the evidence contained in the schedules which he then used to determine the outcome. It is, however, clear from the reasons for the award that the arbitrator used the schedules which had been disclosed as a result of the cross examination of the appellant's witness. Cross examination has always been known in the adversarial system to be the best ever invented means of seeking truth in legal proceedings.

A reading of the award and the reasons thereof against the issues presented to the arbitrator shows that he dealt with the matter within the ambit of issue number one. The appellant for some reason ignores this fact and seeks to measure the legality of the award in terms of the matters covered by issue number two. The arbitrator was however not bound to consider the evidence in respect of issue number two. All issues were before him and he determined the issue as borne out by the evidence. That cannot be said to be an award against the public policy of Zimbabwe.

The appeal is dismissed with costs.

ZIYAMBI JA: I agree

OMERJEE AJA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Dube, Manikai & Hwacha, first respondent's legal practitioners