

REPORTABLE (22)

ALLIANCE INSURANCE

v

(1) IMPERIAL PLASTICS (PRIVATE) LIMITED

(2) THE HONOURABLE JUDGE L.G. SMITH (RTD) N.O.

**SUPREME COURT OF ZIMBABWE
MALABA DCJ, MAVANGIRA JA & UCHENA JA
HARARE, JANUARY 20 AND MARCH 28, 2017**

R. Jambo, for the appellant

T. Mpofu, for the first respondent

No appearance for the second respondent

MALABA DCJ: This is an appeal against the whole judgment of the High Court dismissing an application to set aside an arbitral award in terms of s 34 of the Arbitration Act [Chapter 7:15].

The facts in this matter are that the first respondent owned a plastic processing plant which was insured by the appellant under an assets all risk policy. On 11 August 2013 a fire

occurred on the premises of the first respondent which destroyed its building. The first respondent issued a claim with the appellant for the replacement of the building, stock and other movables which were covered under the insurance policy. In order to assess the damage, the appellant, on behalf of its auditors KPMG, requested a list of information from the first respondent. After the audit, KPMG came up with an assessment of the amount to be paid as compensation. The audit report was not made available to the first respondent and a payment was made. The first respondent considered that the payment was far below the sum insured and proceeded to engage its own auditors, BDO, which came up with a different computation of the value of stock to be insured.

A dispute arose between the appellant and the first respondent concerning the value of the stock, whether the crane was to be considered a fixture in the building and whether the electrical connections were covered by the insurance policy. In terms of the insurance policy, any dispute arising in respect of a claim under it should be referred to arbitration. In other words, the parties when they signed the insurance contract voluntarily submitted to the jurisdiction of an arbitrator in the event that a dispute arose between them.

The first respondent instituted a claim before an arbitrator, who is the second respondent. It claimed the following:

1. That the insurer replaces the insured's crane and/or pay a sum equivalent to the value of the crane, which could be sourced from suitable suppliers.

2. That the forensic report by BDO Audit Firm be adopted and the insurer pays replacement value of stock as per the BDO report.
3. That the Bill of Quantities for electricals be prepared by a reputable contractor appointed by the arbitrator at the insurer's expense to replace the damaged electricals and the value thereof be paid to the insured.
4. Reimbursement of all costs incidental to the arbitration, including costs on an attorney/client scale.

The appellant opposed the claim on the grounds that the crane was not indemnified under the policy, that there was no basis for relying on the BDO report in respect of the stock and that the electricals were already paid for. The first respondent adduced evidence through witnesses who testified that though the crane was detachable it constituted an integral part of the building and therefore was insured. The appellant's witnesses testified that the crane was a detachable fixture and was not covered by the insurance policy. The arbitrator held that the crane was part of the building and even if that was not the case it was covered by the policy because it was a tangible asset that was owned by the first respondent. He ordered the appellant to replace the crane or pay the sum equivalent to the value of the crane.

In respect of the stock, the appellant insisted that the valuation given by KPMG should be accepted and that the BDO valuation should be ignored because it was done after the settlement of the claim. The appellant, however, did not challenge the admissibility of the BDO report as evidence. It merely challenged the figures that BDO came up with and that the audit was

conducted at the instance of the first respondent. From the evidence adduced by the parties, the arbitrator observed that the KPMG report was defective as it omitted some elements in its valuation. He also considered the fact that the appellant did not lead evidence from a member of the KPMG team which had conducted the audit. He held that the BDO assessment was more accurate and ordered the appellant to pay the sum of \$188 815.90 as the balance of the amount paid for stock that was destroyed. Evidence was also led in respect of the electricals and the claim was dismissed. The arbitrator ordered the appellant to pay costs on a legal practitioner/client scale.

Aggrieved by the arbitral award, the appellant approached the High Court for an order setting it aside in terms of Article 34 of the Arbitration Act. Article 34(2) of the Arbitration Act provides grounds upon which an arbitral award may be set aside by the High Court. It states:

“(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 an 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*.”

The salient feature of the provision is that it prohibits any recourse against an arbitral award other than in terms of its requirements and limits the grounds on which the award can be assailed. The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are followed. The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34(2). An application brought before the Court under this provision is, in essence, a restricted appeal and the applicant should prove the grounds set out in order to succeed in its application.

In this case, the appellant’s grounds for setting aside the arbitral award were that it contained decisions on matters that went outside the scope of submissions for arbitration and also that it violates the public policy of Zimbabwe. The court *a quo* considered whether or not the appellant proved sufficient grounds upon which it could set aside the arbitral award as the matter before it was not an appeal or a review but that the award could only be set aside in accordance with Article 34 of the Arbitration Act.

In respect of the first ground advanced by the appellant, the court *a quo* found that, after carefully considering the papers before it, it was unable to find where the arbitrator exceeded the terms of reference. The learned Judge said at p 6 of the cyclostyled judgment:

“Clearly the second respondent was guided by the BDO report in dealing with the value of the stock.

Given the above, I do not see how a person who accepts the formula suggested in the BDO report, can then fail to order payment of a specific sum as replacement value for the stock.”

The second ground advanced by the appellant was also dismissed after the learned Judge made a finding that the award was not “so unreasonable” as to offend the public policy of Zimbabwe.

The appellant then appealed to the Court on the following grounds:

- “1. Article 34 of the Arbitration Act [*Chapter 7:15*] is unconstitutional as it fails to uphold the right to equal protection and benefit of the law guaranteed in accordance with section 56(1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013.
2. The court *a quo* erred by concluding that the arbitral award does not contain decisions on matters beyond the scope of the submissions to arbitration.
3. The court *a quo* erred by ignoring the fact that no contract of insurance existed in respect of the crane and, by upholding the arbitral award in this regard, is allowing the first respondent to be unjustly enriched, which in itself is contrary to the public policy of Zimbabwe.
4. The court *a quo* erred by disregarding the principles of sanctity of contract and freedom of contract and relied on the BDO report in upholding the award on the stocks, notwithstanding that the said report was not presented to the appellant in breach of the insurance policy conditions and consequently in violation of the public policy of Zimbabwe.”

The question for determination is whether or not the court *a quo* erred when it dismissed the application to set aside the arbitral award.

Before addressing this question, it is prudent to highlight why the Court was of the view that the first ground of appeal was improperly before it. The ground of appeal, as outlined above,

states that Article 34 of the Arbitration Act is unconstitutional, as it fails to uphold the right to equal protection and benefit of the law guaranteed in accordance with s 56(1) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013. The ground of appeal raises a constitutional question which was never before the court *a quo*. Mr *Jambo* persisted with this ground of appeal and urged the Court to find that Article 34 of the Arbitration Act is a violation of the appellant's rights. This submission is erroneous. A constitutional question cannot be raised as a ground of appeal as it should arise in the context of proceedings. The Supreme Court is a court of record and deals with issues that were before the court of first instance. A constitutional question does not just arise on appeal because it is merely contemplated in the mind of a litigant. It should be properly raised in the court *a quo* for the Court to determine it.

The Court will also state that this is a classic display of *mala fides* by the appellant as it is clear that, having seen that its application in terms of the provision failed, it now seeks an order declaring the same provision unconstitutional. It is trite that where there are two courses of action open to a litigant, as the appellant had, to either challenge the constitutionality of Article 34 or apply for the setting aside of the arbitral award in terms of that provision, and it unequivocally elected to take one of them, it cannot turn round afterwards and take the other course of action. The point was made in *S v Marutsi* 1990 (2) ZLR 370 at p 374B that:

“It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other, not both.”

The appellant cannot succeed in adopting a position contrary to the one it elected on appeal simply because its application failed in the court *a quo*. The ground of appeal was therefore improperly raised as it was not an issue before the court *a quo*.

In order to determine the issue before the Court, the grounds upon which the appellant sought to have the arbitral award set aside should be examined.

WHETHER OR NOT THE ARBITRAL AWARD CONTAINED DECISIONS ON MATTERS THAT WENT BEYOND THE SCOPE OF SUBMISSIONS FOR ARBITRATION

Article 34(2)(a)(iii) of the Arbitration Act states that an arbitral award can be set aside if it contains submissions on matters beyond submissions for arbitration. In *Inter-Agric (Pvt) Ltd v Mudavanhu & Ors* SC 9/15 at p 3 of the cyclostyled judgment GOWORA JA said:

“In addition, at law, the arbitrator was only competent to determine the dispute between such parties as had been referred to him by the labour officer. Thus, he was confined to his terms of reference. He had no mandate beyond that which had been referred to him.”

In casu, the terms of reference were agreed on and submitted by the parties. For this ground to succeed, the appellant should have shown that the arbitrator did not address the matters before him or that, in addressing the matters before him, he proceeded to exceed his mandate and dealt with other extraneous issues. It was the appellant’s argument in the court *a quo* that the first respondent in its claim prayed for an order that the audit report by BDO be adopted but the arbitrator went on to award a specific amount of US\$188 815.90. It argued that by making such an award he went beyond the scope of the submissions for arbitration. The first respondent, on the other hand, submitted that the arbitrator specifically awarded the sum that had to be paid arising out of the evidence and therefore did not go outside the scope of the submissions for

arbitration. This question can only be answered by analysing the relief sought by the first respondent in its statement of claim in respect of the stock. It was to the effect that:

“The forensic audit report by BDO Audit firm be adopted and the insurer pays replacement value of the stock as per the BDO report.”

Essentially the relief sought under this paragraph was that the second respondent finds that the value of stock as assessed by BDO is payable to the first respondent by the appellant. The amount payable to the first respondent in light of the BDO report is US\$184 815.90. This specific amount was claimed by the first respondent in its written submissions before the arbitrator. The arbitrator merely ordered the payment of that specific amount upon making a finding that the BDO assessment should be accepted as the value of the stock. This is not tantamount to making an award beyond the submissions for arbitration.

The arbitrator, however, made an error, which error is conceded by the first respondent, in awarding US\$188 815.90 instead of US\$184 815.90. The error should, however, not have the effect of setting aside the arbitral award.

Article 33(1)(a) of the Arbitration Act provides for recourse where an error is made in the arbitral award. It states:

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties —

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature.”

This provision provides a method by which an error in the arbitral award can be rectified. It is not for the courts to set aside the award based on an error that can be corrected in terms of the Act. The appellant failed to show that the arbitrator acted outside his mandate and therefore the decision of the court *a quo* dismissing this ground for setting aside the arbitral award is upheld.

WHETHER OR NOT THE AWARD OFFENDS THE PUBLIC POLICY OF ZIMBABWE

The appellant's third and fourth grounds of appeal succinctly state that the award offends the public policy of Zimbabwe. Article 34(2)(b)(ii) of the Arbitration Act provides that the High Court can set aside an arbitral award if it finds that the award is in conflict with the public policy of Zimbabwe. Guidance on how a court should proceed when faced with this ground for setting aside an arbitral award was given by GUBBAY CJ in the case of *Zesa v Maposa* 1999 (2) ZLR 452 (S). At 466E the learned CHIEF JUSTICE said:

“An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside. Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision.”

The import of these remarks is that the Court should not be inclined to set aside the arbitral award merely on the basis that it considers the decision of the arbitrator wrong in fact or in law. If the courts are given the power to review the decision of the arbitrator on the ground of error of law or of fact, then it would defeat the objectives of the Act. It would make arbitration

the first step in a process which would lead to a series of appeals. The learned CHIEF JUSTICE went on further to say, at p 466F–G:

“Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable 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 applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.”

These remarks ought to guide the Court in determining whether the award by the first respondent is contrary to public policy. The question that should be in the mind of a Judge who is faced with this ground for setting aside an arbitral award is that, in light of all the submissions and evidence adduced before the arbitrator, is it fathomable that he would have come up with such a conclusion. If the answer is in the affirmative, there is no basis upon which to set aside the award. The appellant’s submissions should be considered in the light of these remarks.

It was submitted for the appellant that the court *a quo* and the second respondent tampered with the sanctity and freedom of contract. This submission is hinged on two allegations. First, that there is a clause in the insurance policy placing an obligation on the first respondent to furnish all information regarding a claim and it failed to comply by withholding information that it submitted to BDO. The second allegation is that the payment of a premium is a condition precedent to any indemnity and by ordering the appellant to replace the crane, the second respondent violated the sanctity of the contract. In *Book v Davidson* 1988 (1) ZLR 365 (S) the sanctity of contracts was discussed as follows at 378G-379C:

“There is, however, another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts.’ (*Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 504-505E) ...

‘If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.’ (*Printing and Numeric Registering Co v Sampson* (1875) LR 19 Eq 462 at 465)

‘[T]o allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, *prima facie* at all events, contrary to the interests of any and every country.’ (*E Underwood and Son Ltd v Barker* (1899) 1 CH 300 (CA) at 305)”

The above dictum shows that the principle of sanctity of contracts confines the court only to interpreting a contract and not creating a new contract for the parties. It entails that the court should respect the contract made by the parties and give effect to it.

In both instances which the appellant alleges that the second respondent violated the principle of sanctity of a contract, it is the Court’s view that the appellant misconstrued the principle. There is a distinction between creating a new contract between the parties and interpreting a contract in a manner which is unfavourable to a party. *In casu*, the second respondent did the latter and that has given rise to the appeal. The determination of whether or not in terms of the policy the crane was a fixture in the building and covered by the policy is a factual finding which was made by the second respondent. Both parties adduced evidence before the arbitrator through their witnesses and he made a finding that the crane is part of the building and was therefore insured. This also applies to the determination whether the first respondent supplied information to the appellant as part of its claim. In light of this, the Court cannot make

a finding that the second respondent and the court *a quo* violated the doctrine of sanctity of contract.

The appellant also claimed that the award violates the public policy of Zimbabwe because the first respondent was unjustly enriched by being compensated for the crane which was not insured and allowing it to be indemnified for stock when it had failed to timeously furnish the insurer with information relating to the claim. It is the Court's view that, as highlighted above, the award in respect of these two items was made after the arbitrator had made factual findings and therefore the Court cannot interfere with these findings. The award by the arbitrator was made after a consideration of the evidence that was before him. It cannot be said that the conclusions reached by him constitute a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable 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. The appellant has not shown that the arbitrator took leave of his senses in making the award. As categorically stated above, an award cannot be set aside merely on the basis of a difference of opinion. The appellant's third ground of appeal is therefore without merit and should be dismissed.

Accordingly, the following order is made -

The appeal is dismissed with costs.

MAVANGIRA JA: I agree

UCHENA JA: I agree

Jambo Legal Practice, appellant's legal practitioners
Joel Pincus, Konson & Wolhuter, first respondent's legal practitioners