

REPORTABLE: (160)

**GWANDA RURAL DISTRICT COUNCIL
v
LOURENS MARTHINUS BOTHA (SNR)**

**SUPREME COURT OF ZIMBABWE
GOWORA JA, BHUNU JA & MAKONI JA
HARARE: NOVEMBER 26, 2018 & NOVEMBER 27, 2020**

L. Nkomo, for the appellant
K.I. Phulu, for the respondent

BHUNU JA: This is an appeal against the whole judgment of the High Court sitting at Bulawayo. The judgment upheld the respondent's court application for the registration of an arbitral award against the appellant on terms of the Arbitration Act, Chapter 4:15 (UNCITRAL) Model Law Schedule (Section 2) (Model Law). Judgment No. SC 174 /20 on terms of the Arbitration Act, Chapter 4:15 (UNCITRAL) Model Law Schedule (Section 2) (Model Law).

BRIEF FACTS OF THE CASE

The appellant is a District Council duly constituted as such in terms of the laws of Zimbabwe whereas the respondent is a male adult of full legal capacity and a signatory to the agreement forming the basis of the arbitral dispute.

The appellant is the owner of a farm known as Doddieburn Ranch situate in Gwanda District Matabeleland South Province. On 17 December 2007 the parties concluded a written joint venture agreement. Clause 8 of the agreement provided for an arbitration clause for the resolution of disputes arising from the contract. Clause 3 provided for

accession of improvements and compensation for the improvements upon termination of the contract. It reads:

“In the event of termination of the agreement, the entire infrastructure shall become the property of the council. The operator shall be compensated for all the improvements associated with the Joint venture including movables, the animals and all stock in grades.”

It is common cause that by letter dated 22 October 2014 the appellant terminated the joint venture agreement in terms of clause 3 of the agreement. Upon termination of the contract, the respondent successfully lodged a claim for compensation in terms of the arbitration clause. The arbitral award was couched in the following terms:

“I therefore make the following award:

1. Gwanda Rural District council be and is hereby ordered to pay Lourens Marthinus Botha (Snr) the sum of US\$5 507 980.00 being the compensation due and payable in terms of clause 3 of the Joint Venture Agreement between the parties dated 17 December 2007. Judgment No. SC 174/20
Chamber Application No. SC 456/18
2. The said sum of US\$5 507 980.00 shall be paid by Gwanda Rural District Council to the Hon. Arbitrator through his offices *Messrs Coghlan and Welsh*, Legal Practitioners, Barclays Bank building, 8 Avenue, Zimbabwe who shall hold it in trust and pay from it the following:
 - a) The sum due to Buffels Vallai 375 (Pty) Limited in terms of the Arbitration award of 20 January 2016 and 14 December 2016.
 - b) The balance, if any shall be paid to Marthinus Botha (Snr).
 - c) Each party be and is hereby ordered to pay its own costs save that the Honourable Arbitrator’s costs for the current proceedings shall be borne by the parties in equal shares.
 - d) The arbitration award be and is hereby declared final and binding between the parties.”

Armed with the above award, the respondent sought its enforcement in terms of Article 35 of the Model Law which provides for recognition and enforcement of arbitral awards.

In line with the provisions of the above law, the respondent approached the court *a quo* for registration of the arbitral award for enforcement purposes. The application was opposed but the court *a quo* found in favour of the respondent and issued the following registration order:

“It is ordered that:

1. The arbitral award made by the Honourable Promise Ncube on 13 December 2017 be and is hereby registered as an order of this Court.
2. The respondent shall pay to the applicant the sum of US\$5 507 980 -00.
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3. The said sum shall be paid to the Honourable Arbitrator through his office at Chamber Application No. SC 456/18
Coghlan and Welsh Legal Practitioners Bulawayo who shall hold it in trust and pay from it the following:
 - (a) The sum due to Buffels Valei 375 (Pty) Ltd in terms of the arbitral awards of 20 January 2016 and 14 December 2016.
 - (b) The balance, if any, shall be paid to the applicant.
4. Each party shall bear its own costs but the parties shall bear the arbitrator’s costs for the current arbitration in equal shares.
5. The arbitral award is declared to be final and binding between the parties.”

Aggrieved by the judgment of the court *a quo*, the appellant has raised 4 grounds of appeal challenging its decision to register the arbitral award. The 4 grounds of appeal are as follows:

1. The court *a quo* grossly misdirected itself by disregarding as falling outside the scope of its enquiry the issue of whether the arbitral award is contrary to the law and public policy of Zimbabwe in that the award enforced a joint venture agreement that is null and void *ab initio* because one of the contacting parties is not a juristic person.
3. The court *a quo* erred in law by concluding that there is no basis for refusing to register the arbitral award when the application for the registration was fatally defective by reason of non-compliance with the peremptory provisions of Article 35(2) of the Model law.
3. The court *a quo* erred in law by registering an award that is based on a valuation report that is not sworn to by a valuer as required by law.
4. The court *a quo* erred in registering an arbitral award that is based on a valuation report that is tainted by bias collusion and Impartiality of the valuer, which is against the law and public policy.

Before delving into the merits or otherwise of the grounds of appeal, I pause to observe that when presiding over the registration of an arbitral award, the court has a very limited jurisdiction. This is mainly because its function was merely to register the arbitral award for purposes of enforcement. To that end, it did not in the main exercise its appellate or review jurisdiction. Article 35 which provides for the registration and enforcement of arbitral awards provides as follows:

- “(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the High Court, shall be enforced subject to the provisions of this article and of article 36.
- (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language.”

Thus in terms of the applicable law an application for the registration of an arbitral award is granted upon its mere presentation, authentication and production of the original arbitration agreement subject to the provisions of article 36. The essential requirements to be met by the applicant may be summarised as follows:

1. Present to the High Court the original or a certified copy of the arbitral award.
2. Present to the High Court the original arbitration agreement referred to in Article 7.
3. If the award or arbitral agreement is in a language other than English the applicant must provide a duly certified translation into English.

Once the 3 basic requirements are met the applicant is entitled on the face of it to register the arbitral award as of right. The right to register is however not cast in stone as it is subject to Article 36 which provides an exception to the general rule entitling the applicant to register the arbitral award upon fulfilment of the 3 basic requirements for registration.

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The respondent does not however have an unfettered right to object to registration of the Arbitral award. This is because the right to object is strictly limited within the confines of the grounds of objection stipulated under Article 36: The Article provides that:

“ARTICLE 36

Grounds for refusing recognition or enforcement

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only—
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought 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 thereon, under the law of the country where the award was made; or

- (ii) the party against whom the award is invoked 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 it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or scope of the grounds upon which
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that—

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or Judgment No. SC 174 /20
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- (ii) the recognition or enforcement of the award would be contrary to the public policy of *Zimbabwe*.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) For the avoidance of doubt and without limiting the generality of paragraph (1) (b) (ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to 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.

Undoubtedly the appellant's first ground of appeal falls squarely within the scope of Article 36 (1) (a) (i) which validates an objection to the registration of an arbitral award on the grounds that a party referred to in the arbitral agreement under Article 7 was under some legal incapacity to contract.

The appellant's complaint is that the original party to the Joint Venture agreement *Shashi – Zambezi t/a Doddienburn Holdings* (Duly represented by *Lourens M Botha* of *Doddienburn Ranch West Nicholson*) (*Shashi – Zambezi*) was not a juristic person.

This dispute has its genesis in the original joint venture agreement which cites *Shashi – Zambezi* as the first party to the joint venture agreement. Having realised that there might be a problem with the citation of *Shashi – Zambezi* as a party to the joint venture agreement, the parties mandated the Arbitrator to determine:

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1. The true partner to the joint venture agreement.
2. The true party to be compensated by the Appellant.

On 22 July 2015 the arbitrator issued an interlocutory award in the following terms:

- “i. Marthinus Botha (Snr) Herein called “Botha” or “claimant”) through his *alter ego* *Shashi Zambezi t/a Doddieburn Holdings* was the true party that entered into the JVA with Gwanda RDC on the 17 of December 2007. (Award No. 1)”.

The above interlocutory award, No. 1 was final and binding. The Arbitrator having determined that the respondent was the true party to the joint venture agreement the parties proceeded to agree on the issues for determination by the arbitrator.

At p 119 of the record of proceedings, the Arbitrator records the issues for determination as follows:

“a) Arbitration issues

After much deliberation, it was agreed that the arbitration issues would be as follows:

- i. A determination of the compensation due to Lourens Marthinus Botha by Gwanda Rural District Council in terms of clause 3 of the Joint Venture Agreement between the parties dated 17 December 2007 as read with the arbitral award of 22 July 2015 (This would be the subject matter of the first Arbitration)
- ii. A determination of the value of the compensation due to Lourens Marthinus Botha and payable by Gwanda RDC and when that compensation should be paid. (This would be the subject of the 2 Arbitration awards.

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The parties noted that there could be a situation where the application made in the evidence but that would be up to the Hon. Arbitrator.

- iii. The parties also agreed that the Hon. Arbitrator would be at liberty to appoint a Valuer – to do a valuation of the improvements he would have found in the first Arbitration Award to be improvements that Gwanda RDC should compensate Botha for. The valuation of that valuer, who the Arbitrator indicated would be R.E.D. Property represented by Redfern, would be final and binding on the parties.

a. ...

b. ...

c. Finality of Proceedings.

The parties agreed that my decision would be final and binding on them.

(My emphasis).

The parties to the arbitration award registered by the court *a quo* in this case are Gwanda Rural District Council and Lourens Marthinus Botha (snr), the appellant and respondent in this case respectively. It is common cause that Gwanda Rural District council is a local authority body incorporated as such in terms of the laws of Zimbabwe whereas the respondent is a male adult of full legal capacity to sue and be sued in his own name.

The learned author Peter Ramsden¹ gives an overview as to the legal competence of any person to engage in arbitration. He states:

“Today it seems that anyone who has contractual capacity or who can bring a legal action to court or against whom a legal action can be brought (could sue or be sued) can submit to arbitration.”

That definition of who qualifies to engage in arbitration puts paid to any lingering doubt that both parties appearing before the arbitrator had full legal capacity to submit to arbitration in this case.

The parties agreed to refer their dispute to arbitration in recognition of their respective legal capacities. The fact that in other related matters there might have been a party tainted with legal incapacity is not relevant to the arbitral award at hand which is not so tainted. It is also material to note that once the issue of the true parties to the dispute had been settled by the arbitrator in award No. 1, it ceased to be an issue before any other court or tribunal. The court *a quo* was therefore correct in treating both parties as being clothed with full legal capacity. The parties voluntarily agreed to be bound by the arbitrator’s award electing that his award shall be final.

¹ The Law of Arbitration, South African & international Arbitration, 2014 Juta & co, Ltd 2014.at pP 27 para 5. 2. 4.

The principle of party autonomy is central to arbitration as an alternative mode of dispute resolution. Thus once the parties had conferred the arbitrator with the mandate to determine the true parties to the dispute and the amount of compensation payable to the respondent, the parties were firmly bound by his award. That being the case, none of them can legitimately accuse the other of lacking legal capacity.

I accordingly find that there is no merit in the first ground of appeal. It ought to be dismissed without any further ado.

The second ground of appeal alleges noncompliance with the mandatory provisions of Article 35 (2) of the Model Law. The Article required the respondent to supply the court *a quo* with the following documents before registration of the arbitral award:

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1. A duly authenticated original award or duly certified copy thereof.
2. The original arbitration agreement referred to in article 7 or a duly certified copy thereof.

It is common cause that the respondent initially approached the court *a quo* without a full authenticated original award or certified copy of the award owing to the appellant's failure to pay its share of the arbitrator's costs. For that reason the arbitrator had legitimately withheld release of the full essential documents.

The learned judge *a quo* correctly found that the appellant could not rely on its own fault to frustrate enforcement of the award. This is what the learned judge had to say at p 3 of his cyclostyled judgment:

“In this case, the respondent, a whole municipal authority which initiated the entire process of disengagement with the applicant by terminating the joint venture agreement cited “financial dire straits” for its non-compliance with the requirement for payment of its part of the costs. The circumstances under which that was done or not done, exposes the respondent to the genuine concern that it had its sights on delaying the inevitable. This forced the applicant, who had dutifully paid his share of the fees, to approach this court for registration without the original award For the respondent to then turn around and seek to rely on its own default to undermine the application, is the height of lack of bona fides”.(My emphasis)

Having said that, the learned judge *a quo* buttressed his legal sentiments with the leading case of *Standard Chartered Bank of Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S) at 389G for the proposition that no one should be allowed to benefit from his own wrong. In that case KORSAH JA had this to say:

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“A cardinal principle of the common law is expressed in the aphorism: “*nemo ex proprio dolo consequitur actionem*,” which translates: no one maintains an action arising out of his own wrong. Complementary to this principle is another which stipulates: “*nemo ex suo delicto meliorem suam conditionem facere potest*, which means no one can make his better by his own misdeed”.

I share the learned judge *a quo*’s sentiments that the appellant was deliberately throwing spanners into the works by not paying its share of the costs. Without such payment the respondent was not in a position to obtain the full original award from the arbitrator thereby stalling enforcement of the award. That kind of behaviour is reprehensible and unbecoming of a litigant. Having wrongfully prevented the respondent from obtaining the original award, the authorities are clear that the appellant cannot derive any benefit from its

wrongful conduct. It cannot be heard to cry foul when the respondent availed the best evidence available to it.

It is clear that the purpose of requiring the original award before enforcement is to protect a respondent from the enforcement of a fake or erroneous award. Article 35 (2) was therefore crafted for the benefit of the respondent. Where however, the respondent wrongfully bars or disables the applicant from obtaining the original award, he divests himself of the due protection of the law. Thus in this case, the appellant must be deemed to have waived its right to the due protection of the law provided by Article 35 (2) of the Model Law.

In this case the respondent however subsequently obtained and filed the original award with his answering affidavit thereby fulfilling the requirements of Article 35 (2) of the Model Law. The appellant's complaint that the respondent's application was void *ab initio* for want of compliance with Article 35(2) and therefore beyond repair is misguided. As we have already seen, the appellant was at fault in preventing the respondent from accessing the necessary documentation. It cannot therefore derive any benefit from its own fault.

In any case, the relevant original award was supplied during the course of pleadings. Reliance on the case of *Muchakata v Netherburn Mine*² for the proposition that, if an act is void it is incurably bad is misplaced. This is because owing to the appellant's fault the respondent was only able to supply part of the award available being the order without reasons for the order. In my view that conduct does not render the act void but voidable because there was substantial compliance with the law. The subsequent provision of the full

² 1996 (1) ZLR 153 (S) at 157C

award rectified the procedural defect complained of. It is trite that unlike a void act, a voidable act can be rectified.

I accordingly find no merit in the second ground of appeal.

Turning to the third and fourth grounds of appeal, these need to be treated as one as they both attack the correctness or otherwise of the arbitrators award. Both grounds of appeal question the propriety of the arbitrator placing reliance on the valuation report.

Dealing with his mandate to determine the question of valuation, the Arbitrator had this to say at page 5 of his award:

“iii. The parties also agreed that the Honourable Arbitrator would be at liberty to appoint a Valuer – to do a valuation of the improvements ~~He would have found in the 1st arbitration Award to be improvements that Gwanda RDC should compensate Botha for.~~ The valuation of that valuer, who the Arbitrator indicated would be R.E.D. Property represented by Redfern, would be final and binding on the parties. (My emphasis)

It is plain and a matter of common cause that the parties agreed to be bound by the valuation report of R.E.D. Property represented by Redfern with no strings attached. Once the parties had freely and voluntarily agreed to be bound unconditionally by the valuation of the valuer appointed by the Arbitrator they were firmly bound by that undertaking. The arbitrator was in turn obliged to rely on that valuation in making his award.

Section 3 of the Arbitration Act incorporates and domesticates the Model Law into our jurisdiction. Article 5 of the Model Law generally bars court intervention in matters of arbitration. It provides as follows:

“ARTICLE 5

Extent of court intervention

In matters governed by this Model Law, no court shall intervene except where so provided in this Model Law”.

What this means is that generally speaking courts of law are barred by operation of law from intervening in voluntary arbitration matters unless duly authorised thereto by the Act or the Model Law. It appears that cognisant of that hurdle in the law, the appellant sought to invite the court *a quo*'s intervention through the back door. In particular it is clear that grounds of appeal 3 and 4 raise appeal grounds without stipulating the authority under which the courts may intervene on appeal in purely voluntary arbitration matters.

Voluntary arbitration matters are not subject to appeal because there is no provision for appeal either in the Act or the Model Law. This prompted GWAUNZA JA as she then was in *Ropa v Reosmart Inverstments (Pvt) Ltd & Anor*³ to remark that:

“I found to be persuasive the submission made for the respondent that the effect of an arbitral award is to bring to finality the dispute between the parties. The respondent relied for this submission on the following passage set out in Butler and Finsen “Arbitration in South African Law & Practice” at p 271:

“The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end; the arbitrator’s decision is final and there is no appeal to courts. For better or worse, the parties must live with the award, unless the arbitration agreement provides for a right of appeal to another arbitral tribunal. The issue determined by the arbitrator becomes *res judicata* and neither party may reopen those issues in a fresh arbitration or court action”.

³ 2006 (2) ZLR 283 S) at 286B

Thus, in the absence of any right of appeal in the arbitration agreement, the Act or Model Law, it was remiss of the appellant's lawyers to raise appeal grounds under the guise of objecting to the registration process for enforcement purposes.

In ground 4 the appellant's complaint is that the Registration of the award was against public policy in that the award was based on a discredited valuation report. Looked at from another angle, the appellant is simply saying that it is against Zimbabwean public policy to register a wrong award based on a defective valuation report.

As we have already seen, the parties in their arbitration agreement freely and voluntarily clothed the arbitrator with final binding jurisdiction. It is trite that ordinarily a court or tribunal of final jurisdiction can do no wrong as its determination is generally not subject to any other authority. The only window of opportunity is where the High Court is asked to exercise its powers of review under Article 34 of the Model Law. The appellant could however not invoke the court *a quo*'s review powers by merely lodging an objection to registration of the award. The appellant was obliged to lodge a proper application for review in terms of Article 34 to trigger the court *a quo*'s review powers if it intended to subject the award to review. This it did not do.

The remarks of MALABA DCJ as he then was in *Zimbabwe Educational Scientific, Social and Cultural Workers Union v Welfare Educational Institutions Employers Association*⁴ are apposite, though made in the context of the Labour Act [Chapter 28:01]. In that case the learned judge had this to say:

⁴ SC 11/2013 at page 5.

“An application or appeal to a court or tribunal is a remedy which exists because there is a statutory right to use it to seek relief. For the court to exercise the right to review a decision of the arbitrator as provided by s 89 (1) (d) (1) there has to be a valid application for review in terms of the Act or any other enactment as provided by s 89(1).

The appellant not having taken any valid steps to have the award set aside and having failed to fulfil the conditions laid down under article 3 for objection to the registration of an arbitral award, the appeal can only fail.

It is accordingly ordered that the appeal be and is hereby dismissed with costs.

GOWORA JA:

I agree

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MAKONI JA :

I agree

Calderwood, Bryce-Hendrie & Partners c/o Kwenda Chagwiza Legal Practitioners, the appellant’s legal practitioners.

Vhundhla Pulu c/o Gill Godlonton & Gerrans, the respondent’s legal practitioners.