

REPORTABLE (66)

**NATIONAL PHARMACEUTICAL COMPANY
v
DRAX CONSULT SAGL**

**SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MUSAKWA JA
HARARE: 22 NOVEMBER 2022 & 6 JULY 2023**

T. Magwaliba, for the applicant

E. Mubaiwa, for the respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, dated 30 November 2021, ~~set aside in paras 84/23 of judgment No. SC 86/23~~ Civil Appeal No. SC 173/22 the arbitral award given under the hands of arbitrators retired Justice A. M. Ibrahim, retired Justice M. H. Chinhengo and Advocate F. Girach on 1 March 2021. Under para 84 A of the award the arbitrators declared that the agreement of procurement entered into between the parties did not have the prior approval of the Procurement Regulation Authority of Zimbabwe (PRAZ) as required by s 15 (1) and (2) of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*] (the Act). It is that declaration that was reviewed and set aside by the court *a quo*.

Aggrieved by the decision of the court *a quo*, the appellant has noted the present appeal.

THE PARTIES

The appellant is a company incorporated in terms of the laws of Zimbabwe. The Government of Zimbabwe is its major shareholder. Its objects and functions are defined in s 4 of the Government Medical Store (Commercialisation) Act No 13/2000 and they include the purchase and sale, dealing in and storing medicines, medical equipment and other goods and articles for use in hospitals, clinics, pharmacies and other medical establishments.

The respondent is a foreign company established in terms of the laws of Switzerland.

FACTUAL BACKGROUND

On 11 December, 2019 the parties entered into an agreement in terms of which the respondent was to supply to the appellant certain medicines and medical sundries under Tender number NAT DP 19/2019. The respondent delivered medical supplies worth US\$2 733, 480 to the appellant. Of the above figure the appellant refused to take delivery of some medicines to the value of US\$210 000.00, arguing that the contract was concluded in contravention of s 15 (1) and (2) of the Act which provision reads as follows:

- “15 (1) A procurement entity shall not initiate or conduct any procurement requirement proceedings in which the value of the procurement requirement is at or above the prescribed threshold, unless such procurement entity has been generally authorized by the Authority to conduct such proceedings.
(2) Authorization in terms of subsection (1) shall be given in writing.”

It was for that reason that the appellant refused to pay for the medicines and medical sundries supplied to it by the respondent even though it had taken delivery of the bulk of the medicines and proceeded to consume same. The appellant formally cancelled the above quoted tender for the supply of medicines and sundries. It did so on 9 June 2020. The

respondent's view was that the cancellation was unlawful. The arbitrators found that the contract was illegal on the grounds that it was concluded without the authority required in terms of the Act. Displeased with that finding the respondent approached the court *a quo* with an application for the setting aside of that arbitral award. It did so under Article 34 of the first schedule to the Arbitration Act.

The court *a quo* granted the application and proceeded to set aside the arbitral award for being in conflict with the public policy of Zimbabwe. It is that decision that is the subject of this appeal.

GROUNDS OF APPEAL

The appellant relies on four grounds of appeal as follows:

- “1. The High Court grossly erred in finding that paragraph 84 A of the award issued by Justice A. M. Ebrahim (Rtd), Justice M. H. Chinhengo (Rtd) and Advocate Firoz Girach dated 1 March 2021 was contrary to the public policy of Zimbabwe and proceeding to set it aside when no authority to enter into the contracts in issue had been given by the Procurement Regulatory Authority of Zimbabwe in accordance with section 15 (1) and (2) of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*].
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2. The High Court further erred in considering the approval of the contract by the Special Procurement Oversight Committee in terms of section 54 of the Act to have been sufficient for purposes of section 15 of the Act when it was clear that the two legal provisions served different purposes.
3. The High Court further grossly misdirected itself in taking into account irrelevant factors in interpreting the letter of 6 November 2019 and concluding that the said letter had been issued by the Procurement Regulatory Authority of Zimbabwe in accordance with section 15 of the Act.
4. The High Court further erred in relating to an interpretation of the letter of 6th November 2019 taking into account factors which had neither been pleaded, nor argued by the parties and proceeding to make a finding against the appellant on the basis of such factors.”

RELIEF SOUGHT

The appellant seeks the following relief:

“The present appeal be allowed with costs and the judgment of the High Court be set aside and substituted with the following:

- (1) The application in case number HC 2713/21 be and is hereby dismissed.
- (2) The applicant shall pay the costs of suit.”

ISSUES

The grounds of appeal only raise one issue, namely, whether or not the contract of procurement was approved by PRAZ in terms of s 15 (1) of the Act. Surprisingly, the grounds of appeal do not challenge the substantive finding of the court *a quo*, namely that the arbitral award was contrary to the public policy of Zimbabwe.

ANALYSIS

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After considering case law as to how the High Court should exercise its powers under Article 34 or 36, of the Arbitration Act the court *a quo* correctly came to the following conclusion:

“From the above decision, the settled position of the law is that an arbitral award ought to be set aside if its enforcement would offend the public policy of Zimbabwe.”

See *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S)

The court *a quo* also correctly stated the law in so far as the converse position is acceptable, that is, an arbitral award should not be set aside unless the arbitrator’s reasoning or conclusion is so flawed as to violate some fundamental principle of law or morality or justice.

See *Delta Corporation (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S).

The court *a quo* further observed that an award may be set aside as being contrary to the public policy of Zimbabwe if it is so outrageous in its defiance of logic or recognized 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. See the *Zimbabwe Electricity Supply Authority* case *supra*.

It is also trite that the mere faultiness or incorrectness of an arbitral award cannot, on its own, be the basis upon which an award may be set aside. The award must, in addition, offend the public policy of Zimbabwe.

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PUBLIC POLICY

It is necessary to define public policy in the context of the present case. The public policy of Zimbabwe in cases of this nature is defined by s 15 (1) and (2) of the Act, namely that a State procurement authority shall not entertain the procurement of goods or services whose value is equal to or exceeds the prescribed threshold without the prior approval of the regulatory authority PRAZ. Thus s 15 (1) and (2) constitute both the law and the public policy of Zimbabwe in cases of this nature. If for example procurement is made without the requisite authority such procurement would be deemed contrary to the law and the public policy of Zimbabwe. Conversely, if the procurement entity obtains PRAZ approval and enters into a legally binding contract, it would be contrary to the law and the public policy of Zimbabwe to declare such contract illegal and proceed to set it aside.

DECISION OF THE COURT A QUO

The court *a quo* found in favour of the respondent on the basis of a letter dated 6 November 2019 written by the Chief Executive Officer of PRAZ addressed to the Managing Director of the appellant. The appellant argued that the letter does not constitute authority given in terms of s 15 (1) and (2) of the Act. It argued that the letter was written on behalf of Special Procurement Oversight Committee (SPOC), a subcommittee of PRAZ, which cannot exercise the powers of PRAZ. The respondent argued to the contrary, insisting that the letter originates from PRAZ itself. The relevant part of the letter reads as follows:

“Your minute dated 29 October 2019 refers.

At the Special Procurement Oversight Committee (SPOC) round robin meeting held on 6 November 2019:

Members observed the following:

- The direct procurement method has been done to address the urgent need of the requirements in view of the current crisis at medical institutions country wide.
- The current requirements are a stop gap measure to address the current crisis.
- On the medicines, the accounting officer is proposing to award all 85 costs except for 32 imipramine 25mg tablets that has been recommended for cancellation since the drug is no longer being used in public health institutions.
- On medical sundries, the accounting officer proposed to award 15 items out of the 18 items as follows:
.....
.....

Therefore, the accounting officer’s recommendations are consistent with the provisions of the PPDPA Act.

Accordingly, SPOC resolution 0519 of the same date, having reviewed the Accounting Officer’s submission in terms of s 54 (10) of the Public Procurement and Disposal of Public Assets (PPDPA) Act, resolved on the founder as follows:

To award Tender NAT DP 19/20 for the supply and delivery of registered medicines and surgical sundries to Natpharm regional stores to Drax Consult SAGL.
.....
.....

You are therefore advised to proceed as follows:

1. Take all necessary steps as directed by the resolution.

2. In all communication, please quote the above SPOC resolution number and the date.

N. Chizu

Chief Executive Officer

PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE.”

This letter was the subject of intense scrutiny by the court *a quo*. It noted in particular what it referred to as “four crucial points” in need of attention. Firstly, it was observed that the letter was written on the PRAZ letter head. Effectively, reasoned the court *a quo*, that meant that PRAZ “had unequivocally assumed ownership of the letter.” Secondly, the court *a quo* observed that the letter had been written and signed by the Chief Executive Officer of PRAZ, which makes it clear that the letter had been written on behalf of PRAZ itself and SPOC, its subcommittee. Thirdly, it was noted that the letter gave Natpharm (the appellant) authority to procure medicines and surgical sundries from Drax Consult Sagl (the respondent). Fourthly, in the letter, the Chief Executive Officer advised the respondent to “take all necessary steps as directed by the resolution” and to quote the above SPOC resolution number and the date”. Based on these observations the court *a quo* came to one conclusion – that the letter emanated from PRAZ not SPOC and that the letter whose wording is clear and unambiguous, constitutes the PRAZ authority required under s 15 (1) and (2) of the Act.

That finding of fact on the part of the court *a quo* cannot be faulted. It is based on the evidence placed before it. This court will not interfere with the finding of fact made by the court *a quo* save under the parameters described in *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01 where this Court held:

“An appeal to this Court is based on the record. If it is to be related to the facts there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have

arrived at such a decision. And misdirection of facts is either a failure to appreciate a fact at all, or a finding of fact that is contrary to the evidence actually presented. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at p 670 and *S v Pillay* 1977 (4) SA 531 (AD) at p 353 C-E.”

In casu, the appellant argues that the letter of 6 November 2019 originated from SPOC and could not have been the authority required under s 15 of the Act. This view is not supported by the evidence. As correctly observed by the court *a quo*, the letter originated from PRAZ. The fact that the letter makes reference to SPOC resolutions does not alter the fact that it was the Chief Executive Officer of PRAZ who wrote on behalf of that authority. There was no misdirection on the part of the court *a quo*, certainly not of the magnitude referred to in the *National Railways* case *supra*, warranting interference on the part of this Court.

We note in passing, that it is inconceivable that a procurement authority of the stature of the appellant could have engaged in procurements of this magnitude without the approval of PRAZ. Surely, they must have relied on the letter from PRAZ of 6 November 2019 which letter was addressed to their managing director, with detailed instructions as to how the appellant should proceed. One wonders why the appellant now seeks to resile from that arrangement!

The fact that the arbitrators erred when they found that the contract between the parties was illegal and unenforceable for want of compliance with s 15 (1) and (2) of the Act is now established. The question that needs to be addressed is whether the award is contrary to the public policy of Zimbabwe and therefore liable to be set aside in terms of s 34 of the First Schedule to the Arbitration Act [*Chapter 7:15*]. The respondent argues that the award offends the public policy of Zimbabwe in that it declared as illegal and unenforceable a contract authorized by the relevant body. The court *a quo* took the view that the award

offends public policy in that it is so outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person's conception of justice in Zimbabwe would be intolerably hurt by the award. It asserts that "it is illogical for any fair-minded person to conclude that a contract which has been sanctioned in terms of the law by the body empowered to give its blessing is unlawful." The court *a quo* noted that public policy dictates that a contract done within the terms of the law should be respected. For that proposition it relied on the decision in *Delta Corporation (Pvt) Ltd v Origen (supra)*.

The court *a quo* noted that the letter of 6 November 2019 was one of the papers placed before the Arbitrators and would have been one of the documents to be considered before issuing the award. If it was not considered, then the Arbitrators did not take into account relevant information before them. In that respect the court *a quo* was of the view that the Arbitrators failed to apply their minds to the import of the letter hence wrongly arrived at the decision that the contract was illegal for non-compliance with s 15 (1) and (2) of the Act. Where the Arbitrator has not applied himself to the question or has totally misunderstood the issue, and the resultant injustice reaches intolerable prejudice, then the Arbitral award must be set aside. The court *a quo* concluded, correctly in our view, that the award would have been made against the evidence. *In casu*, the respondent stood to lose substantial sums of money under circumstances where the appellant had refused to pay for the medicines it received, and consumed, under the guise of non-compliance with s 15 (1) and (2) of the Act. The court *a quo* found that the injustice arising from a finding of illegality reached the point of offending the public policy of Zimbabwe. We therefore find no fault with the court *a quo*'s findings of fact and law.

DISPOSITION

The court *a quo*'s reasoning cannot be faulted. It must be upheld. The appeal has no merit. Costs shall follow the cause.

Accordingly, it is ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs of suit.

BHUNU JA:

I agree

MUSAKWA JA:

I agree

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Costa & Madzonga, appellant's legal practitioners.

Samukange Hungwe Attorneys, respondent's legal practitioners.