REGAL INSURANCE COMPANY (PRIVATE) LTD
versus
ZIMBABWE POSTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 29 June 2020 & 12 January 2022

COURT APPLICATION

E Mubaiwa, for the applicant
R Makumbe, for the respondent

MANZUNZU J: This is a court application in which applicant seeks an order in the following terms:

"IT IS HEREBY ORDERED THAT:

1. The arbitral award by the Honourable Mutangadura dated 20 September 2018 did not delve into agreed terms of reference and consequently was not a final award.
2. Applicant be and is hereby entitled to refer the dispute to another arbitrator for resolution.
3. Each party to bear its own costs."

In describing the nature of the application the applicant says:

> "this is an application in terms of rule 230 of the High Court Rules as read with section 14 of the High Court Act and article 34 subsection (2)(a)(ii), (iii) and subsection (2)(b)(ii) of the Arbitration Act for an order setting aside the arbitral award issued by Honourable Mutangadura and directing that the parties be duly afforded the right to have their dispute resolved by a competent arbitrator."

Rule 230 of the then High Court Rules, 1971 provides that:

> "A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies. Provided that, where a court application is not to be served on any person, it shall be in Form No. 29 B with appropriate modifications."

Section 14 of the High Court Act [*Chapter 7:06*] states that:

> **"**The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

Article 34 subs (2)(a)(ii), (iii) and subs (2)(b)(ii) of the Arbitration Act, [*Chapter 7:15*] reads:

> " (1)…
> (2) An arbitral award may be set aside by the *High Court* only if—
> (*a*) the party making the application furnishes proof that—
> (i) …
> (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;
> (iv) … or
> (*b*) the *High Court* finds, that—
> (i) … or
> (ii) the award is in conflict with the public policy of *Zimbabwe*."

The background of the matter is that on 28 April 2016 the applicant and respondent (the parties) entered into a commercial agreement, essentially for applicant to pay respondent commission in respect of insurance sales at the rented counters. Clause 15 of the agreement provides for dispute resolution mechanism by way of arbitration in the event the parties could not find an amicable resolution to the dispute.

In June 2018 the parties approached an arbitrator for the resolution of the dispute which had arisen between them. Pursuant to such referral the parties attended pre-arbitration proceedings. It is at these proceedings that the parties, (in which the applicant was the claimant) agreed on the arbitration process as follows:

> "The parties specifically agree to waive the 30 day time period provided for in Clause 15.3 of the Commercial Agreement and agreed that the arbitration proceedings shall be conducted as follows:
>
> a) Claimant shall file its statement of claim, supported by all documentary evidence in support thereof, by close of business on 13 July 2018. The claimant shall serve the statement of claim and supporting documents on the respondent on the same day of filing documents with the arbitrator.

b) Respondent shall file its response, supported by all documentary evidence in support thereof, by close of business on 27 July 2018 and shall serve the same on the claimant on the same day.
c) Claimant shall file its reply (if any) by close of business on 16 August 2018 and shall serve upon respondent on the same day.
d) The parties shall lead oral evidence on 27, 28 and 29 August 2018.
e) Claimant shall file closing submissions by 10 September 2018, respondent by 20 September 2018 and claimant shall file its reply by 3 October 2018.
f) The arbitrator shall deliver the final award by 22 October 2018."

The applicant says it was failed by its legal practitioners Messrs *Mawere Sibanda* in its failure to abide with the agreed timelines of the arbitration process. The said lawyers renounced agency on 15 August 2018 by letter which also stated that the arbitrator would not attend to the papers for non-payment of the deposit fees by the applicant. However the applicant learnt the arbitrator terminated the arbitration proceedings on 20 September 2018. As a result of which the applicant said the material terms of the dispute were not determined, as such, the matter was not properly terminated contrary to the views of the respondent because the award does not delve into the agreed terms of reference. Furthermore, termination was not in any of the scenarios provided for in art 32, the applicant argued. The applicant also averred that it was against public policy to leave the dispute unresolved.

In opposition the respondent said applicant neglected the agreed arbitration process in that the applicant did not file a statement of claim. On 20 September 2018 the arbitrator issued an award and terminated the proceedings on the basis that the applicant/claimant had neither filed a statement of claim nor explained why it had not done so.

Following the failure by the applicant/claimant to abide with the arbitration process and in the absence of any explanation, the respondent asked the arbitrator to terminate the proceedings in terms of art 25. To that end, the arbitrator concluded that; "In the absence of any communication from the Claimant demonstrating a cause for failing to communicate its statement of claim in terms of a procedural agreement validly entered into between the parties the arbitration proceedings are hereby terminated in terms of art 25 (a) of the Arbitration Act [*Chapter 7:15*]."

Article 25 (a) of the Arbitration Act [*Chapter 7:15*] provides that:

" Unless otherwise agreed by the parties, if, without showing sufficient cause—
(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings."

The issues which arise for determination are:

a) Whether or not the arbitration was properly terminated.

b) The effect of the termination on the rights of the parties.

c) As a matter of procedure is article 34 applicable in this case.

WHETHER OR NOT THE ARBITRATION WAS PROPERLY TERMINATED

The applicant's argument is that the arbitrator breached the *audi alteram partem* rule in that she proceeded to terminate the arbitration proceedings without affording the applicant the opportunity to be heard on whether or not it had sufficient cause for its failure to file the statement of claim. The rule connotes that both parties must be heard before a decision is taken. See *Decimal Investments (Private) Limited* v *Arundel Village (Private) Limited* HH 262/12.

Article 25 (a) cited supra is clear in its reading. There is the use of the words "*without showing sufficient cause."* Certainly one cannot be expected to show sufficient cause unless one is afforded the opportunity to do so. Failure to file a statement of claim, on its own, is no proof that one has no sufficient cause.

In *casu* it was even more demanding for the arbitrator to hear the applicant before the proceedings were terminated because the respondent requested the Arbitral Tribunal to terminate the proceedings. It means the respondent was the only one heard before the proceedings were terminated. As it turns out in this application, the applicant has an explanation why the statement of claim was not filed, which explanation ought to have been considered by the Tribunal had an opportunity been granted.

The respondent more or less concedes that this basic principle of natural justice was not complied with but seeks refugee in that the applicant ought to have proceeded to challenge the award in terms of art 34.

AS A MATTER OF PROCEDURE IS ARTICLE 34 APPLICABLE IN THIS CASE

The respondent argued that an arbitration award cannot be challenged through any other means other than through art 34. There was reference to the case of *Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers Union & Anor* 2001 (2) ZLR 388 (S).

Article 34 (1) and (2) reads:

"(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"

However, para 3 of the founding affidavit says the application is brought in terms of art 34 although the relief sought is one intended to render the award ineffective. Indirectly the applicant is saying the award must be set aside although it seeks an order to say that it is not a final award.

Mr Mubaiwa for the applicant says the award was not final and definitive because the determination did not speak to the claim. The dispute remains unresolved. These are matters of common cause. Paragraph 1 of the relief sought says, "The arbitral award by the Honourable Mutangadura dated 20 September 2018 did not delve into agreed terms of reference and consequently was not a final award." Whether one calls an award "final" (because it determines terms of reference) or "not final" (because it did not delve into agreed terms of reference), to me, the overall effect is the same in that the arbitration proceedings have been terminated. In *casu*, akin to a default judgment. Similarly a defaulting party to a default judgment does not seek a declarator to render the judgment ineffective. Instead a party seeks for rescission of judgment in order for a party to open the gates for participation in the case. For a party to then seek a declaratory order in the circumstances of this case is improper. What the applicant is saying is that the award must be left extant but rendered ineffective by a declaratory order so that I exercise my rights as if it were not there. Indirectly the applicant is saying the award must be set aside so that it can exercise its rights to refer the dispute to another arbitrator. A proper case to set aside the award has been made under art 34 save the relief sought cannot be a declaratur.

THE EFFECT OF THE TERMINATION ON THE RIGHTS OF THE PARTIES

I agree with Mr Makumbe for the respondent that arbitration is a creature of statute and the parties' rights cannot be created through a declaratur. Reinstitution of proceedings terminated through art 25 (a) as read with article 32, is not allowed as long as the award is extant. On this basis the respondent urged the court to dismiss the application.

As earlier own said in this judgment, paragraph 1 of the relief sought is not sustainable at law. However the application is properly made under art 34 and a proper case has been made to justify the setting aside of the arbitration award. In any event that was the intention of the applicant if one looks at the letter of 3 July 2019 (annexure F) to the Commercial Arbitration Centre, para 3 of which reads, "*We are accordingly instructed to seek a postponement sine die*

to enable our client to prosecute the application for the setting aside of the exparte award by Honourable Susan M Mutangadura." (underlining is mine). While a party is at liberty to seek a relief as per draft order, the final order is that of the court. Such a court order must not only be competent, but must accord with the intention of the party and what the party has proved. In *casu* the applicant has shown that the award was prematurely and unprocedurally granted. In the premise it must not be allowed to see the light of the day.

Disposition:

1. The arbitral award by the Honourable Mutangadura dated 20 September 2018 terminating the arbitration proceedings in terms of art 25 (a) of the Arbitration Act, [*Chapter 7:15*] be and is hereby set aside.
2. The applicant be and is hereby entitled to refer the dispute to another Arbitrator of the parties' choice or in the absence of such agreed choice one who is appointed by the chairperson of the Commercial Arbitration Centre.
3. Each party shall bear its own costs.

Lawman Law Chambers, applicant's legal practitioners
Dube Manikai & Hwacha, respondent's legal practitioners