

REPORTABLE (46)

CENTRAL AFRICAN BUILDING SOCIETY
v
(1) FINORMACG CONSULTANCY (PRIVATE) LIMITED
(2) RETIRED JUSTICE L.G. SMITH

SUPREME COURT OF ZIMBABWE
GUVAVA JA, CHATUKUTA JA & MUSAKWA JA
HARARE: 21 SEPTEMBER 2021 & 2 JUNE 2022

T. Mpofu, for the appellant

T. Magwaliba, for the first respondent

No appearance, for the second respondent

CHATUKUTA JA: This is an appeal against the whole judgment of the High Court of Zimbabwe handed down on 9 September 2020 in which it ruled that the arbitral award granted against the first respondent be set aside and the matter be referred to a different arbitrator.

BACKGROUND

The appellant and the first respondent entered into a consultancy contract which commenced on 1 January 2013 and was expected to terminate on 31 July 2013. Although the contract was not signed by the first respondent, the parties were agreed that the contract regulated their relationship. The purpose of the contract was to transform the appellant from being a building society into a commercial bank.

On 28 February 2013, the managing director of the appellant wrote a letter to first respondent advising that it was not renewing the contract. It thus terminated the contract and tendered to pay the first respondent cash *in lieu* of notice. Aggrieved by the contents of the letter, the first respondent referred the matter to arbitration.

ARBITRAL PROCEEDINGS

The first respondent's contention before the second respondent (the arbitrator) was that the appellant had no right, in terms of clause 7.1 of the contract, to unilaterally and without reason terminate the contract. It argued that the appellant should have given it notice to cure the breach and/or an opportunity to defend itself. It claimed that the contract should be reinstated failing which it be paid damages in the sum of US\$1 744 451.50.

The appellant argued that it exercised its rights to terminate the contract on notice in terms of clause 7.1 of the contract. It argued that termination of the contract in terms of clause 7.1 did not require the existence of a breach or fault as a pre-condition to invoke the clause. It further argued that it was therefore not obliged to justify or give the first respondent reasons for the termination.

The appellant further argued that the first respondent had breached the contract as it had failed to implement the project successfully within the agreed time frame and budget. It contended that in order to mitigate its losses, it engaged another consultant to complete the project. It argued that it suffered contractual damages in the sum of US\$1 648 169.91 as a result of the breach and filed a counterclaim for damages in the stated sum.

The appellant conceded that a monthly payment of US\$23 517.00 for the month of March 2013 was due to the first respondent in terms of clause 4 of the contract.

The first respondent denied that it had breached any terms of the contract. It argued that the damages claimed by the appellant were wrongly calculated and incompetent.

The arbitrator made a finding that the termination of the contract was in compliance with clause 7.1 of the contract which clause permitted termination of the contract without giving reasons for the termination. The arbitrator dismissed the first respondent's claim that the cancellation of the contract be declared a nullity and that the contract be reinstated. He also dismissed the first respondent's claim for damages. The arbitrator awarded the first respondent the sum of US\$23 517 being the monthly payment for the month of March 2013 due to the first respondent from the appellant.

The arbitrator further held that the appellant had not established its entitlement to the damages in the sum of US 1 648 169.91. He therefore dismissed the appellant's counterclaim.

Aggrieved, the first respondent applied to the High Court to have the arbitral award set aside in terms of Article 34 (2) (b) (ii) of the Uncitral Model, Schedule to the Arbitration Act [*Chapter 7:15*] (the Model Law).

PROCEEDINGS BEFORE THE COURT A QUO

The first respondent argued that the arbitrator misdirected himself in his interpretation of the contract. It was argued that the arbitral award offends the principles

embodied in our public policy as the arbitrator was biased in his decision. It was submitted that the possibility of bias arose from the fact that the arbitrator and Kevin Terry, the Managing Director of the appellant, were known to each other. It was contended that the two engaged in a conversation at the hearing during which the arbitrator expressed more than a casual interest in the life of Kevin Terry. It further contended that the two had a prior relationship and as a result the conversation was likely to give rise to a reasonable apprehension of bias on the part of the arbitrator and he ought to have recused himself.

The first respondent further argued that the arbitrator, in an opposing affidavit which he filed in response to the application before the court *a quo*, used intemperate and unacceptable language towards the first respondent. It was submitted that the language used was evidence that the arbitrator was supporting the appellant in proceedings in which he ought to have been neutral.

In response, the appellant submitted that the conversation between Kevin Terry and the arbitrator was done in the presence of all the parties. It was further submitted that the conversation did not relate to the subject matter of the arbitral proceedings. It was argued that the conversation was innocuous and therefore there was no basis for the apprehension of bias.

The appellant further argued that the allegations relating to the intemperate language in the arbitrator's opposing affidavit were not the basis for the first respondent's apprehension for bias as they were contained in the answering affidavit and not the founding affidavit. The court *a quo* was urged to disregard the arbitrator's opposing affidavit.

DETERMINATION OF THE COURT A QUO

The court *a quo* found that the arbitrator's interpretation of the contract though it was faulty, did not render the award contrary to public policy.

The court *a quo* held that the conversation between the arbitrator and Mr Kelly was innocuous and did not raise a reasonable apprehension of bias. It found that the first respondent did not raise the allegations of bias with the arbitrator during the arbitration process. The allegations were only raised after the decision of the arbitrator. It therefore concluded that the first respondent had not established reasonable apprehension of bias in the making of the award.

The court *a quo* however found that the arbitrator's post award averments in the opposing affidavit created an impression that he was "pitching camp" with the appellant. It found that the averments were intemperate, disparaging and unacceptable in judicial proceedings. The court *a quo* held that disparaging averments taken in conjunction with the conversation between the arbitrator and Mr Terry, and the faulty interpretation of the contract gave a reasonable apprehension of bias. Consequently, it ruled that the arbitral award be set aside and the matter be remitted to a different arbitrator.

Aggrieved by the court *a quo*'s decision, the appellant noted the present appeal.

PROCEEDINGS BEFORE THIS COURT

The appellant noted the appeal on the following grounds:

- “1) The court *a quo* erred and grossly misdirected itself on the facts and evidence in holding that the degree of fault in the arbitrator's reasoning in the award and his alleged acquaintance with Kelvin Terry gave rise to a reasonable impression and apprehension of bias on part of the arbitrator and that consequently the award was contrary to the public policy of Zimbabwe.
- 2) The court *a quo* erred and misdirected itself and in any event in considering the

factual basis of the alleged bias which allegedly took place three months after the granting of the award and therefore could not invalidate the prior award on the basis of the alleged bias.

- 3) The court *a quo* erred in placing reliance on the opposing papers in finding that there was an impression of bias as opposed to the founding papers upon which the application ought to have succeeded or failed.
- 4) The court *a quo* erred and acted without jurisdiction in referring the dispute between the parties to be determined by a different arbitrator”.

ISSUE FOR DETERMINATION

The grounds of appeal raise two issues for determination. The first three grounds of appeal raise one issue, whether the court *a quo* misdirected itself in holding that there was a reasonable apprehension of bias warranting the setting aside of the arbitral award. The second issue is raised in the fourth ground of appeal. In that ground, the appellant seeks to challenge the order of the court *a quo* to remit the dispute between the parties for determination by a different arbitrator on the basis that the High Court is not reposed, by the Arbitration Act, with the power to make an order for remittal.

APPELLANT’S SUBMISSIONS

Mr *Mpofu* for the appellant submitted that the judgment of the court *a quo* was irregular in that it set aside the award on a basis other than the one alleged by the first respondent in its founding affidavit. He submitted that the first respondent in the proceedings *a quo* alleged in its founding affidavit bias of the arbitrator during the arbitral proceedings. He argued that an application stands or falls on its founding affidavit. He further argued that the court *a quo* was therefore called to answer whether there was bias on the part of the arbitrator during the making of the award. He submitted that the court *a quo* correctly concluded that the first respondent did not establish bias and hence the application ought to have failed on that basis.

Mr *Mpofu* argued that the court *a quo* however placed a lot of emphasis on the arbitrator's opposing affidavit to the application instead of the first respondent's founding affidavit.

Mr *Mpofu* further submitted that the court *a quo* made a finding that both the substance of the award and the manner of the making of the award were not contrary to public policy. Mr *Mpofu* argued that the court *a quo* therefore misdirected itself in relying on the arbitrator's affidavit which was filed three months after the issuance of the award.

He also argued that the court *a quo* erred in making contradictory findings and thus reviewed itself. He submitted that, the court *a quo* found that the conversation between Kevin Terry and the arbitrator did not constitute a reasonable apprehension of bias. He argued that the court *a quo* later in the same judgment found that the same conversation constituted bias if it is read together with the arbitrator's opposing affidavit. He submitted that the court *a quo* misdirected itself by taking into account factors it had rejected earlier in its judgment.

FIRST RESPONDENT'S SUBMISSIONS

Mr *Magwaliba* for the first respondent, submitted that the court *a quo* could not be faulted for accepting the evidence adduced by the first respondent in support of its claim that the arbitrator was biased. He argued that the issue of bias was raised in the first respondent's founding affidavit. He submitted that the adverse averments in the arbitrator's opposing affidavit were alluded to in the answering affidavit to illuminate the allegations of bias in the founding affidavit. He submitted that the court *a quo* did not misdirect itself in considering the arbitrator's conduct post the award. He submitted that the court *a quo* did not review itself but considered the arbitrator's pre-award conduct together with the post award conduct.

APPLICATION OF THE LAW

It is trite that an application stands or falls on its founding affidavit. The founding affidavit sets out the case that a respondent is called upon to answer. The principle was aptly set out in *Austerlands (Pvt) Ltd v Trade & Investment Bank Limited & Ors* SC 92-05.

CHIDYAUSIKU CJ remarked at p 8 as follows:

“The general rule that has been laid down in this regard is that an application stands or falls on the founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent is called upon to affirm or deny.”

The first respondent alleged in its founding affidavit in the court *a quo* that the conversation between the arbitrator and Mr Terry was the basis for its apprehension of the bias of the arbitrator and the reason why the arbitrator arrived at a wrong decision. It stated in para 9.10 of the founding affidavit that:

“Finally, the inexplicable findings of the Honourable Arbitrator as illustrated above could only be understood in the contest (*sic*) of some other influence. I am constrained to give that influence as the unusual familiarity between the Honourable Arbitrator and Kelvin Terry the managing director of the 1st respondent.”

The appellant disputed that the conversation was a cause for an apprehension of bias.

The court *a quo* held that there was no basis for any reasonable person to have an apprehension of bias. It remarked at p 10 that:

“I agree with the observations made by the respondent in its heads of argument. These are that the discussion forming the basis of the applicant’s case was held in the presence of both parties and within hearing distance. There was nothing to hide. A biased arbitrator would have been more circumspect. The discussion centred not on the arbitral proceedings themselves but on Mr. Terry’s pending relocation to Kenya on transfer. The timing of his relocation was relevant from a case management point of view in the event that oral evidence was required.”

Further down at p 11, the court stated that:

“I am satisfied that the discussion between him and the arbitrator arose as a result of that communication by the respondent’s legal practitioners and that the Arbitrator’s sole interest in Mr Terry’s imminent departure was legitimate. **No reasonable person could perceive bias under these circumstances.** Further no allegation has been made that the prior dealings referred to by the applicant were in any way connected to the matter under arbitration.” (own emphasis)

The court *a quo* agreed with the appellant’s submissions and in essence concluded that the first respondent had not established bias. The court *a quo* therefore ought to have dismissed the application following its finding.

The court *a quo* however proceeded to consider the first respondent’s contention that the remarks by the arbitrator in his opposing affidavit gave credence to the first respondent’s assertions of the arbitrator’s bias. It remarked that:

“In my view the applicant’s case hinges on the following factors – the degree of faultiness in the arbitrator’s reasoning, the fact that the arbitrator and Kevin Terry are acquaintances and the fact that in response to the present application the arbitrator has attacked the applicant’s intelligence and its legal practitioners’ professional standing. Do these three factors taken together give rise, in the mind of a reasonable litigant in the applicant’s position, to a reasonable apprehension of bias on the part of the arbitrator? In my view that question should be answered in the affirmative. **The arbitrator’s post award comments in particular give the impression that he is “pitching camp with, or rendering assistance to, one of the contestants to the dispute before him.”** (Own emphasis.)

The court *a quo* misdirected itself in three respects when it took into account the arbitrator’s averments in the opposing affidavit. Firstly, the first respondent’s allegations of the arbitrator’s bias, as contained in the founding affidavit, were based on the conversation between the arbitrator and Mr Terry during the arbitral proceedings. The arbitrator’s averments in the opposing affidavit were not pleaded in the founding affidavit. They found their way into the answering affidavit. The first respondent therefore raised fresh allegations of bias in the

answering affidavit instead of confining itself to its allegations in the founding affidavit. The first respondent could not make out a case against the appellant on the basis of the answering affidavit. The court *a quo* therefore misdirected itself when it made a decision relying on the fresh allegations in the answering affidavit. The order of the court *a quo* was therefore not on the basis upon which the application had been brought in the founding affidavit.

Secondly, the court *a quo* had earlier on in its judgment concluded that the allegations of bias based on the conversation between the arbitrator and Mr Terry were without merit. It thus misdirected itself when it relied on the same conversation to arrive, in the same judgment, at a contrary conclusion that the arbitrator was biased. In so doing, it contradicted its earlier findings and essentially reviewed its own earlier determination. It could only have relied on the averments in the answering affidavit to bolster its findings on the first respondent's case, as pleaded in the founding affidavit. It could not use the averments in the answering affidavit to take away findings made on the basis of the founding affidavit. Regard is given to the fact that when the court *a quo* made its pronouncement on the issues raised in the founding affidavit, the first respondent's answering affidavit and heads of argument addressing the arbitrator's opposing affidavit were both before it.

Thirdly, the court took into account factors which occurred after the award in order to find bias during proceedings leading to the award. The arbitrator's opposing affidavit was filed long after the arbitration proceedings had been terminated. It could not therefore be a basis for a finding of bias during the making of the award.

The judgment of the court *a quo* is irregular on the basis that it set aside the arbitral award on a basis other than that sought by the first respondent. It is also untenable on the basis

that the court *a quo* relied on an opposing affidavit that had no bearing to the making of the award. Lastly, before it contradicted itself, the court *a quo* had found in favour of the appellant on the two issues that had been placed before it in the founding affidavit. The resultant order ought to therefore have been the dismissal of the application by the first respondent.

In view of the above findings, it is therefore not necessary to consider the second issue raised in the fourth ground of appeal.

The appeal has merit. The judgment of the court *a quo* cannot therefore stand. It must be set aside.

COSTS

The appellant prayed in the notice of appeal for costs on the legal practitioner and client scale. It however did not motivate for such costs in its heads of argument or oral submissions. There is no basis advanced for granting the punitive costs. An order for ordinary costs is therefore appropriate.

Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

“The application be and is hereby dismissed with costs.”

GUVAVA JA:

I agree

MUSAKWA JA:

I agree

Wintertons, appellant's legal practitioners

Magwaliba and Kwirira, 1st respondent's legal practitioners