MUSONZOA (PRIVATE) LIMITED
vs
STANDARD FIRE AND GENERAL INSURANCE
COMPANY (PRIVATE) LIMITED
and
DR BRIAN CAMPBELL

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 31 January and 5 June 2002

Opposed Application

Adv. *P. Nherere,* for the applicant
Adv. *F. Girach,* for the 1st respondent
Adv. *R.Y. Phillip,* for the 2nd respondent

CHINHENGO J: The applicant is a producer of agricultural products including paprika. In early November 1998 it had about sixty hectares under paprika and it insured this crop with the first respondent against loss from hail, wind and fire. A hailstorm did indeed strike the crop and caused damage which the applicant considered to be extensive. About fifty-five hectares were affected. A dispute arose between the applicant and the first respondent as to the amount of damage caused by the hailstorm and the compensation to be paid by the first respondent. The first respondent appointed one Paul Falkenberg (hereinafter called "Falkenberg") to assess the loss. His first assessment was that the applicant had suffered a nett loss of 23 tonnes of paprika. The applicant was dissatisfied with this assessment of its loss. Discussions followed with Falkenberg. Falkenberg re-assessed the loss and determined it at 46.6 tonnes. The applicant was still dissatisfied with this assessment. It contracted two independent assessors who put the loss at 99 tonnes and at between 70 and 90 tonnes respectively. Without going into further details, the applicant's dissatisfaction with Falkenberg's assessment was in its mind confirmed by the independent assessors and a dispute as to the amount of the damage and of

compensation payable arose between it and the first respondent. The applicant and the first respondent agreed to submit the dispute to arbitration. They appointed the second respondent to conduct the arbitration proceedings. I shall henceforth refer to the second respondent as "Dr Campbell". The arbitration proceedings were held over a number of days, the last of which was on 18 September 2000. At this last meeting of the proceedings, the applicant's legal practitioner, who had that morning received information that Dr Campbell had a prior association with the first respondent, the second respondent's general manager, Mr Guy Adams and the loss assessor, Falkenberg, raised the issue that because of the prior association Dr Campbell could not possibly be impartial. He in effect alleged that Dr Campbell was or would be biased in favour of the first respondent. He specifically stated that because of the possibility of Dr Campbell's bias, the applicant would not be bound by Dr Campbell's findings and his award. Against this background Dr Campbell conducted the proceedings on 18 September 2000 and later handed down his award. In this application, the applicant seeks an order that Dr Campbell's award be set aside and that a fresh arbitration be held within a fortnight of the order which I may make in its favour and that such arbitration be presided over by an arbitrator appointed by the President or Chairman of the Commercial Arbitration Centre. The respondents have opposed the application and prayed for its dismissal with costs.

Preliminary Issues raised by the Parties

The applicant's founding affidavit consisted of two parts. The first part was an application for condonation for the late institution of these review proceedings. The second part dealt with the merits of the application. I am not enamoured with the procedure where such a combined application is filed because the costs of preparing the application on the merits may be unnecessarily incurred if condonation is not granted. The applicant stated that the application for condonation was made out of an abundance of caution in case the court found that the present proceedings

should have been instituted immediately after 18 September 2000 or within eight weeks therefrom as provided in R 259 of the Rules of this Court. The applicant did not persist with the application for condonation at the hearing. Mr *Nherere,* submitted that there was no need for the application for condonation because the review application had been brought within eight weeks of the applicant becoming aware of the procedural irregularity about which it complains. I shall deal with this submission later on in this judgment. For the moment however it suffices to state that the first respondent opposed the application for condonation. Mr *Girach,* submitted that the explanation given by the applicant was not sufficient to warrant the grant of the application. If I thought (which I do not) that the issue of condonation was properly to be dealt with under the said Rule 259, I would have condoned the late institution of the proceedings for the reasons given by the applicant. I could even have found that this application was not instituted out of time because it was made within eight weeks of the applicant becoming aware of the irregularity about which it complains. The issue however must, in my view, be examined against the provisions of the Arbitration Act [*Chapter 7:15*], in particular the First Schedule thereto which I will refer to as "the Model Law". I say so because the Model Law in Article 13 prescribes the procedure and time limits where a party to an arbitration wishes to challenge the impartiality of the arbitrator. In addition, the relief sought by the applicant in these proceedings, i.e. to set aside an arbitral award, can only be obtained by proceeding in terms of Article 34(2) of the Model Law. See *The Catering Employers Association of Zimbabwe v (1) The Zimbabwe Hotel and Catering Workers Union (2) The Deputy Chairman of the Labour Relations Tribunal* S-112-2001 where SANDURA JA at p 5 of the cyclostyled judgment said:

> "The sole grounds on which an arbitral award may be set aside by the High Court are set out in Article 34(2) of the Model Law contained in the First Schedule to the Arbitration Act [*Chapter 7:15*] …"

and again at p 8

> "In my view, Article 34(2) of the Model Law sets out the sole grounds on which an arbitral award may be set aside by the High Court. That is what Article 34(2) says and that is what this court said in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 458F."

In his heads of argument and in oral submissions Mr *Nherere* appeared to have appreciated this stricture in the law hence he abandoned the application for condonation and relied entirely on the provisions of the Arbitration Act.

I will set out the provisions of the Model Law which are relevant to this application first and then the facts of this case and finally my conclusions on the law.

Articles 12, 13 and 34(2) of the Model Law, the last in so far as it is relevant to this application, provide as follows –

"Article 12

Grounds for challenge

(1) Where a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess the qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13

Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the

arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the High Court to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 34

Recourse against award

(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) (not relevant)
(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) (not relevant)
(iv) (not relevant)
(v) (not relevant

(b) the High Court finds, that

(i) (not relevant)
(ii) the award is in conflict with the public policy of Zimbabwe.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award, or if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) (not relevant)

(5) For the avoidance of doubt, and without limiting the generality of paragraph 2(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if -

(a) (not relevant)

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

The following are some of the propositions which emerge from the above provisions of the Model Law –

(1) that the challenge to an arbitrator in respect of his impartiality is made in terms of Articles 12 and 13 of the Model Law. It can also be made in terms of Article 34(2) as read with Article 34(5) of the Model Law if, as I shall show later, the grounds upon which a challenge could have been made emerge after an award has been handed down;

(2) that any such challenge may be made if circumstances exist that give rise to justifiable doubts as to the impartiality of the arbitrator;

(3) that it is mandatory for the arbitrator to disclose to the parties any circumstances which give rise to justifiable doubts as to his impartiality;

(4) that the challenge, if made in terms of Article 13, must be filed in writing within fifteen days from the date after the challenging party becomes aware of the existence of the circumstances specified in (2) above;

(5) that short of the arbitrator resigning his office upon being challenged or the other party acquiescing to the challenge, it is mandatory for the arbitrator to decide on the challenge;

(6) that if the arbitrator decides against the challenge, the challenging party may, within thirty days of receiving the decision, request, the High Court to decide on the challenge; and

(7) that no appeal shall lie against the decision of the High Court on the challenge.

I will deal with the provisions of article 34 later for what it is worth in the circumstances of this case. But it is necessary at this stage to try and reconcile the procedure under Articles 12 and 13 as read with Article 15 of the Model Law on the one hand and Article 34 on the other hand. If in terms of Article 13(3) the High Court decides that the challenge was merited, that decision, in my view, has the following consequences:

(a) the mandate of the arbitrator is terminated;

(b) if he was a sole arbitrator and the parties do not otherwise agree, any hearings previously held shall be repeated;

(c) the decision of the High Court may not be appealed against;

(d) the award made after the challenge falls away. In view of the decision in *Catering Employers Association of Zimbabwe v The Zimbabwe Hotel and Catering Workers Union & Anor (supra)* I am not certain whether I could say that that award can be "set aside". To "set aside" as defined in Bouvier's *Law Dictionary* means to "annul; to make void; as to set aside an award". To "set aside" therefore connotes an act of intervention by a court of law invalidating something which was otherwise valid. The words "set aside" may be used in relation to other situations and not be confined to cases where a court intervenes to invalidate something otherwise valid – see *Daly N.O. v Galaxie Melodies (Pty) Ltd 1975 (2) SA 337 (C)* at 340 and *Galaxie Melodies (Pty) Ltd v Daly N.O.* 1975 (4) SA 736 (AD). In my view, if an arbitrator makes an award

in the circumstances contemplated by Articles 12 and 13 (as in the present case) the award would have to be "set aside" within the wider meaning of that phrase and not in the sense which SANDURA JA was concerned with in *Catering Employers Association (supra).* Such setting aside would not be a determination in law as to the status of the award (which it would be under Article 34) but more in the sense that it is declaration that the award was a nullity. This interpretation seems to me to be consistent with the general purport of Articles 12 and 13 of the Model Law which make it mandatory for an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. A failure to make such a disclosure where it should have been made renders the proceedings a nullity and the award consequent thereon liable to be "set aside" for that reason and not for the reasons specified in Article 34 of the Model Law which are applicable where the award is otherwise valid until it is invalidated by a Court.

(e) the arbitrator may not, upon termination of his mandate, be entitled to any fees because the proceedings which he conducted are a nullity.

I must observe, for clarity, that it seems to me that if after an award has been made and a party to the arbitral proceedings concerned discovers at that stage that the arbitrator was disqualified by reason of his failure to disclose any circumstances that were likely to give rise to justifiable doubt as to his impartiality, such party may proceed only in terms of Article 34 of the Model Law and will in that event have to establish that the arbitrator was actually biased or that the award was otherwise in conflict with the public policy of Zimbabwe or establish any other appropriate grounds specified in that Article.

From the foregoing it is apparent to me that there is no basis for the application of the High Court Rules in so far as the issues addressed by the above-

mentioned Articles of the Model Law are concerned, and in particular in so far as the time limits for making the challenge are concerned. Thus, if an applicant fails to comply with Article 13 in respect of the time limits for challenging an arbitrator, he cannot bring the same action on the basis that the eight weeks prescribed in rule 259 of the High Court Rules have not elapsed. And if the relief sought by the applicant is to set aside the award, he can only do so in compliance with Article 34 of the Model Law, which also provides that an application in terms thereof can only be made within three months from the date on which the party making that application received the award. It is important to appreciate that if an application to the High Court is based on a challenge to the arbitrator as to his impartiality then such application must be made within thirty days after receiving the decision rejecting the challenge. Otherwise, every other application for setting aside an award of an arbitrator must be lodged within three months as provided in Article 34(3) of the Model Law.

Issues for Determination

The issues for determination in this application are the following: First, whether the procedures I have outlined above were complied with. Second, whether there were in this case such circumstances as were "likely to give rise to justifiable doubts" as to the arbitrator's impartiality and independence. Third, whether the arbitrator had an obligation to disclose those circumstances. Fourth, whether a challenge was made to the arbitrator and, if so, whether he decided on the challenge. If he did not, what was the effect of his failure to do so.

Whether challenge was made to Arbitrator

On the last day of the arbitral hearings on 18 September 2000, the applicant notified the first respondent (through Mr Adams) and Dr Campbell that it did not believe that Dr Campbell would be impartial because of his prior association with the first respondent, the first respondent's Mr Adams and Falkenberg. The applicant

averred that both Mr Adams, on his own behalf and on behalf of the first respondent, and Dr Campbell denied that they had any prior association.

The first respondent and Mr Adams and Dr Campbell averred that they did not deny or dispute that they had a prior association but that they in fact admitted a prior association but pointed out that that association was purely professional and was not of such a nature as would have influenced Dr Campbell in the arbitration. From the evidence before me, I would find in favour of the applicant that Mr Adams and Dr Campbell denied that they had a prior association when they were confronted by the applicant's legal practitioner on 18 September 2000. This finding is supported by the fact that the association had not been disclosed voluntarily and also by the very belief entertained by both Mr Adams and Dr Campbell that the association was immaterial. These factors are likely to have led the two to deny the prior association on 18 September 2000. Their subsequent conduct, whether in writing or otherwise, would also seem to indicate that they had denied the existence of a prior association between them.

After conveying the challenge verbally on 18 September, the applicant sent a letter to the first respondent and copied it to Dr Campbell on 2 October 2000. The letter, in the relevant part, reads:

> "We wish to confirm our client's disquietitude with Dr Campbell's handling of the matter more particularly in that our client is no longer confident of Dr Campbell's being impartial. We raised this particular point with yourself and we confirm that we agreed that the meeting (of 18 September) would go ahead for the purpose of obtaining Dr Campbell's input irrespective of the suspicions harboured by our client. We further confirm the position we took that our client, given its suspicions, had vowed not to be bound by Dr Campbell's verdict.
>
> The reasons advised by our client for challenging Dr Campbell's impartiality, which reasons we advanced both to yourself and to Dr Campbell are as follows:
>
> (a) our client advised that Dr Campbell acted for both Unity Insurance Company and Standard Fire & General Insurance in a consultancy

capacity with regard to Zimtobac Insurance Scheme that both insurance companies operated. Our client advised that your Mr Adams was working initially for Unity Insurance Company whilst it was running the Zimtobac scheme and the said Mr Adams is now currently employed by Standard Fire & General Insurance Company. It is confirmed that Doctor Campbell did not disclose his prior association with Standard Fire & General Insurance, or with Mr Adams in the capacity aboveto alluded.

(b) Dr Campbell has not disclosed that Mr Falkenberg, the assessor employed by Standard Fire & General Insurance Company, was a contemporary school colleague of his. In our client's view, this has clouded Dr Campbell's approach to the matter.

The above notwithstanding, we are still awaiting Dr Campbell's opinion for purposes of further negotiations in the matter. Our instructions are however to the effect that we should commence liaising with the Commercial Arbitration Centre with a view to obtaining possible names of individuals to act as arbitrators in this case."

On 3 October 2000, the first respondent responded to the applicant's letter of 2 October as follows:

"We refer to your fax of the 2nd October 2000 the contents of which are noted.

We fail to understand why your client is of the view that any decision made by the Arbitrator would not be impartial or independent as the main reason for such opinion put forward by your client is not correct.

On the first point I would advise that Dr Campbell has never been employed by either AIG Zimbabwe, Standard Fire and General or myself in any consultancy capacity on the Zimtobac Insurance Scheme. In recent years Dr. Campbell was called upon as an expert witness in a tobacco claim by AIG Zimbabwe and AIG Zimbabwe and ourselves were on the receiving end of a claim that Dr Campbell had on his own tobacco crop. These are not relationships that would in my mind draw a person to conclude that any award would be biased towards us.

On the second point we fail to understand how this is of concern to your client. Your client's accusation that Dr Campbell's approach/dealings in the arbitration have been clouded due to his school association with Mr

Falkenberg is totally unfounded and unjustified, as you yourself would agree that Dr Campbell has conducted the arbitration in a professional manner. I have not noted any tendency to lean in any particular direction and have found that the issues and questions raised by the Arbitrator have been technically sound and would result in a fair assessment of what your client's loss was due to the insured peril.

Dr Campbell is known to the writer as being a very principled, fair, honest and upstanding professional in the agricultural sector and I know that he has acted in similar arbitration matters involving cotton and tobacco crops. He is a renowned expert on cotton. In my dealings with him and against him with regard to his own claim I found him to be highly principled and honest and I believe he could not act in any way other than being impartial.

Will your client reconsider its stance on the matter on the basis that we have cleared up what we consider to be your client's major concern?

Turning now to your last paragraph in which you advise that your client has instructed you to look for possible candidates to act as a new arbitrator we advise that in terms of Article 12 of the Arbitration Act, 1996 we are not satisfied that your client had provided sufficient justifiable doubts as to Dr Campbell's impartiality or independence. We have cleared up your client's misunderstanding in terms of point one which basically leaves us with the old school friend issue which we contend is not a real issue as to warrant a fresh arbitration. If an arbitrator is to be replaced then the hearings etc will then have to be repeated which is not only time consuming but also costly.

We understand that in terms of Article 13 of the said Arbitration Act, 1998 we can reject the challenge that your client has made and ask the High Court to decide on the matter. We also understand that the arbitrator can continue with the proceedings and make an award even though the matter is being referred.

We are not at all satisfied that your client is justified in its assertion that the Arbitrator will not act in an impartial and independent manner and we have requested our own Legal Practitioners to advise on the matter. We will communicate with you once we have heard from them in this regard."

The above letters clearly indicated that the applicant was challenging the arbitrator as to his impartiality and that it stated its grounds for the challenge. The reply in the third paragraph thereof was a denial of any association, which denial was

well crafted in terms of phraseology. It was cryptic as well because it restricted the denial to an employment relationship. The reply also disputed the materiality of the association. Later, as I shall show, the first respondent admitted an association which it was not prepared to admit in the letter of 3 October. The applicant's letter of 2 October was clearly a challenge to the arbitrator. Although the first respondent has contended in this application that a written statement challenging the arbitrator was not sent to the arbitrator, other correspondence emanating from Mr Adams indicates that the first respondent was in no doubt that a challenge had been mounted.

On 1 November Mr Adams, writing on behalf of the first respondent, advised the Commercial Arbitration Centre as follows:

> "We are at present awaiting legal advice from our legal practitioners with regard to the aborted arbitration undertaken by Dr B. Campbell and once we have heard from them we will get back to you. For your information Dr Campbell was challenged on his impartiality to arbitrate on the matter as he was an old school chum of the Loss Adjuster even though he was more than qualified to arbitrate on the case. We are sure that if we choose someone from the legal profession that person will undoubtedly be known to the legal practitioner acting for Musonzoa Farm.
>
> In the meantime we would request that you supply other possible candidates who are not from the legal profession as we believe that the issues to be resolved are more to do with the practical growing of crops and the assessment of hail damage on such crops. As far as we are concerned the insurance policy interpretation is a minor issue.
>
> We would ask you to note that Mr A. Musonziwa is in fact our legal counsel so we would not like to end up with another aborted arbitration on the ground that he was not impartial.
>
> By copy of this letter we are asking Mr Kanongovere (applicant's attorney) if he agrees with our view on the selection of a suitable arbitrator."

The above letter was a response to a letter which the first respondent had received from the Commercial Arbitration Centre in which the names of possible fresh arbitrators were suggested following the applicant's approaches to the Centre in that regard. The letter clearly indicates not only that the first respondent considered

that Dr Campbell's impartiality had been challenged and that the proceedings he had conducted had aborted, but also that the first respondent was amenable to the appointment of a new arbitrator. The first respondent put its final position on the issue of the challenge to Dr Campbell in its letter to the applicant's legal practitioners on 17 November 2000. It said –

> "Arbitration – Musonzoa Farm – Paprika Loss
>
> We have now received confirmation back from our Legal Practitioners of our views with regard to the challenge brought forward by your client concerning the impartiality of the arbitrator namely Dr. Brian Campbell.
>
> Once again we would like to point out that Dr. Campbell was never employed by either Unity Insurance or myself as a consultant in relation to a tobacco crop insurance scheme and also Dr. Campbell whilst attending the same school as the Loss Adjuster was something like 6 years the Loss Adjusters junior. The Loss Adjuster advises that he does not have any personal relationship with Dr. Campbell save as to see him watching a school rugby game. We contend that your client has obviously been misguided and misinformed in this matter and we are not at all happy with these assertions made by your client and we would add that most of the parties involved in the arbitration proceedings have taken it as a slur on their professional reputations.
>
> Turning now to the actual challenge of the arbitrator and his subsequent award we are advised by our Legal Practitioners that your client has no legal grounds to do so in that your client has failed to adhere to the procedure laid down in the Arbitration Act, No. 6 of 1998. In this regard we would point out that our client is in breach of Article 13 of the said Act in that your client did not inform the arbitral tribunal within the stipulated time and nor did your client send a written statement of the reasons for the challenge to the arbitral tribunal. Your client merely made a unilateral decision that he wanted the arbitration to cease without referring to all the parties sitting together at the same meeting. It is laid down in the arbitration procedures that the arbitral tribunal can decide on the merits of the challenge. Your client's actions were not done in accordance with the laid down procedures as set out in the said Arbitration Act.
>
> Due to your client's action referred to in the previous paragraph the next procedure laid down in Article 13 could not be adhered to. The arbitral tribunal sitting as a group was not given the necessary opportunity to make a decision on the challenge. Had the arbitrator decided that the challenge was

not justified then your client could then have approached the High Court to decide on the matter. As you know the proceedings could still have proceeded pending the ruling from the High Court.

Our Legal Practitioners have also advised on Article 34 of the Arbitration Act and they have commented that they believe your client has no grounds to challenge the arbitration under this article either.

We now turn to item (c) of the Memorandum of Agreement made between your client and ourselves in that we both agreed to abide by the decision of the arbitrator and accepted that it would be final and binding on both parties with no rights of appeal. We contend that the arbitrator has made his award which we believe was done in a professional manner without any bias whatsoever and we would advise that we are bound by it in terms of the Memorandum of Agreement that we both agreed to.

We would request you to advise on your client's final position on the matter. If your client still wants to persist in its challenge even though we believe he may be barred from doing so as your client was in breach of the laid down procedures in the Arbitration Act you would leave us with no choice but to make an application to the High Court to decide on the merits of your client's challenge as we are not at all enamoured with the idea that we should start all over again with a fresh arbitration.

We await your further comments in due course."

In this letter the first respondent was, among other things, challenging the procedure adopted by the applicant. All the correspondence emanating from the first respondent which I have quoted extensively had one thing in common. They were quite evasive as to the nature of the association between the first respondent, Mr Adams, Mr Falkenberg and Dr Campbell. The common thread running through them was that these parties had no prior association at all or at best their association was of no consequence in any respect whatsoever.

The Nature of the Prior Association

The nature of the prior association became clear only after the applicant lodged the present proceedings following upon further information being made

available to it to prove that the association was not merely fleeting or inconsequential but that it was substantive in its own way. In the opposing affidavits the first respondent and Dr Campbell could no longer deny the prior association. They, in fact, admitted it. The evidence on the nature of the association was revealed by the applicant in paragraphs 19 to 24 of the founding affidavit. I will quote from them:

> "19. In due course, Applicant's legal practitioner received a fax from the First Respondent advising that First respondent would be abiding by the finding of the Second Respondent, and reiterating that Dr. Campbell had never had any dealings with Unity Insurance, nor with Mr Guy Adams. I annex same hereto as Annexure "I"
>
> 20. It was at this juncture that Applicant's legal practitioner requested that Applicant furnish tangible proof of a connection between the First Respondent, Second Respondent, Falkenberg and Guy Adams. In our endeavours to provide such information, we had occasion to liaise with one R.J. Cary who advised as follows:-
>
> 20.1 He advised that during the period 1996/1997 agricultural season, he grew tobacco;
>
> 20.2 He advised that the crop was insured under the Zimtobac Scheme through the insurance brokers AGI;
>
> 20.3 He advised that the insurance certificate he received reflected Unity Insurance Company Limited as a participant in the Zimtobac Scheme;
>
> 20.4 Further upon suffering hail strikes, he advised that the hail assessor appointed by the insurance company was Falkenberg. For the record, Falkenberg is the same gentleman who was appointed assessor by First respondent in this instance;
>
> 20.5 He advised that Dr. Brian Campbell of Agricultural Services was appointed to see to the recovery of the crop and he further advised that in so rendering services, Dr. Campbell had occasion to liaise with Falkenberg;
>
> 20.6 He also advised that he had occasion to contact Mr Guy Adams who at that time was employed by Unity Insurance.

I annex hereto as Annexure "J" a letter from R.J. Cary as well as the Application form for Insurance for the Zimtobac Scheme [annexed as Annexure "J"]. I draw this Honourable Court's attention to the insignias on the top left and top right hand corners of the said application form, which clearly illustrate that Unity Insurance Company Limited and First Respondent were participants thereof; I further annex as Annexure "K" a certificate from Zimtobac where there is the insignia of Unity Insurance Company Limited and which certificate was issued on 2 December 1996.

22. As Annexure "L" hereto is a report prepared by Dr. Campbell on 12 February 1997 vis-à-vis Mr Cary's farm. "

23. As Annexure "M" hereto, is a letter prepared by Mr Cary dated 19 July 1997, the contents of which are self explanatory. However, more particularly vis-à-vis the second, third and fourth paragraphs thereof, it becomes clear that Falkenberg, Mr Adams and Dr. Campbell were all involved in the Scheme. This Honourable Court's attention is further drawn to the letter's destination, being Agricultural and General Insurance Brokers (Pvt) Limited.

24. In spite of the clear evidence linking Dr. Campbell, Mr Adams and Falkenberg to one Scheme at the same time, First Respondent has continuously insisted that there are no past business ties between First and Second Respondents. The falsity of this assertion is quite patent."

In its opposing affidavit the first respondent virtually admitted all the averments made by the applicant in paragraphs 19 – 24 of the founding affidavit. I quote from the opposing affidavit paragraphs 28 – 33

"28. Ad para 19
Annexure '1' did not state that second respondent had never had any dealings with Unity Insurance Company or with myself. It states that second respondent was never employed either by Unity Insurance Company or myself as a consultant, and in this respect I refer to paragraph 23 above.

29. Ads para 20
I have no knowledge of Applicant's dealings with his legal practitioner.

Ad paras 20.1-20.4
These are not disputed.

Ad para 20.5
Mr. Falkenberg was appointed as the assessor in this matter. He, in turn, appointed the Second Respondent to oversee the recovery of the crop. Second respondent was not appointed by Unity Insurance Company Limited.

Ad para 20.6
I cannot recall Mr. Cary contacting me directly, but he may have had cause to do so.

30. Ad para 21
The application form presented in annexure 'J1' covers the 1998/1999 season and not the 1996/1997 season, as alleged, as First Respondent was not operating in the 1996/1997 season. I confirm that in the 1998/1999 season First Respondent and AIG (Zimbabwe) Ltd jointly underwrote the tobacco scheme, but in 1996/1997 Unity Insurance Company was the sole insurer, as indicated in the certificate of insurance presented in annexure 'K'. These facts are not disputed. The letter from R.J. Cary at annexure 'J' is disputed as to the sixth paragraph thereof in that I reiterate that the Second Respondent was not appointed by the insurance company but by the assessor.

31. Ad para 22
It is not disputed that the Second Respondent tendered the report annexed to the application and marked 'L', but this would have been done in accordance with instructions from the assessor, Mr. Falkenberg.

32. Ad para 23
It is not disputed that Mr. Falkenberg, Second Respondent, and myself were involved in the scheme. What is disputed is the nature of that involvement. I reiterate that the Second Respondent was never employed by myself personally, by Unity Insurance Company, or by the First Respondent. I had never met Second Respondent when he was appointed by Paul Falkenberg to oversee the Cary crop damage, and when Second Respondent was consulted to Paul Falkenberg in respect of the Idube Farm claim I had already left Unity Insurance Company and First Respondent was not involved in that claim.

33. Ad para 24
I have never denied past business ties between the Second Respondent, myself, and Mr. Falkenberg, and I refer to my above averments in this respect. I have dealt with Mr. Falkenberg in his professional capacity as

> an assessor, and with Second Respondent indirectly through Mr. Falkenberg. My dealings with Second Respondent could never be described as a close business relationship. I cannot agree that such a tenuous business relationship would or could in any way influence Second Respondent's judgment and award in the arbitration."

These admissions confirm that throughout the earlier exchanges between the parties, the first applicant had been evasive and cagey about the true nature of the prior association. It was however unable to dispute the evidence presented to it in the applicant's founding affidavit. This also confirms my earlier finding that when confronted about the prior association, the first respondent had denied any such association.

Dr Campbell did not respond to any of the correspondence copied to him by either the applicant or the first respondent. That correspondence however shows that Dr Campbell was aware, not only that his impartiality was being challenged, but also that efforts were being made to commence fresh proceedings before a new arbitrator.

Dr Campbell filed an opposing affidavit as did the first respondent, but his affidavit did not deal with the merits of the dispute between the applicant and the first respondent: it dealt only with the allegations made against him. The preambular part of the affidavit gave his resume`. He highlighted that he has practised as an agricultural consultant (being a holder of a doctorate in Agriculture) in Zimbabwe for over 37 years. During that period he has associated with a large number of persons in agriculture in Zimbabwe and has conducted many arbitrations and came to know many persons involved on one side or the other and sometimes on both sides. He said that he has always conducted these arbitrations impartially and professionally and that "until this case no-one has ever questioned my impartiality in any way",

Dr Campbell confirmed that on 18 September 2000 he had been approached by the applicant's legal practitioner about his association with the first respondent, Adams and Falkenberg and that he was asked to withdraw as the arbitrator in the

matter. His response, he said, was that his association with Falkenberg and Adams was solely professional and that he had been at school together with Falkenberg as his junior by about six years which was immaterial. He said that he had told the applicant's legal practitioner that he had not disclosed the prior association because he did not believe it was a close one and, in any case, he was a professional who conducted arbitrations, whatever the association with the parties, professionally and objectively. He averred that when confronted with the allegation of the prior association he had not denied it. Dr Campbell admitted most, if not all, of the averments in paragraphs 19 – 24 of applicant's founding affidavit in the same way as did the first respondent. He however disputed that he had breached any provision of the Arbitration Act. He stated his belief that there was no reason for his award to be set aside and prayed that the application should be dismissed with costs.

From the foregoing, the prior association between Dr Campbell, the first respondent and Adams and Falkenberg was a fairly close business association. They had been involved with each other in at least three insurance claims. Falkenberg had hired Dr Campbell as his consultant, no doubt for a fee, which in one or two cases was in reality paid by the first respondent. I find as accurate the applicant's description in its answering affidavit of the nature of the association between first respondent, Dr Campbell, Adams and Falkenberg. I may in brief describe the relationship as follows.

The first respondent, Mr Adams, Dr Campbell and Mr Falkenberg knew each other well. They had associated with each other on more than three occasions at least. The relationship between Falkenberg and Dr Campbell in particular was even closer, in that the former had hired the latter as a consultant before. The relationship arising out of their business contacts was, in my view, such that it can properly be concluded that Dr Campbell enjoyed Falkenberg's patronage in their business dealing. There were business dealings or activities which definitely connected Mr Adams, and through him, the first respondent, Mr Falkenberg and Dr Campbell. I

do not think that the schoolboy connection by itself is material, but it is not inconsequential when viewed against the business liaison which developed between Falkenberg and Dr Campbell later in their adult lives. The prior association was indeed largely a business relationship which, was by any criteria, a close one.

What I have stated above answers several of the issues which I have identified for determination. Answered is the question whether the applicant challenged Dr Campbell as to his impartiality. Clearly the applicant did so, as is amply demonstrated by the verbal exchange on 18 September and the correspondence which later passed between the parties and in particular between the applicant and the first respondent.

Did Prior Association give rise to Justifiable Doubts as to Arbitrator's Impartiality?

I turn now to decide whether the prior association was such as was likely to give rise to justifiable doubts as to Dr Campbell's impartiality or independence. If it was, it called for disclosure.

The test to be applied in such a determination was expounded upon by KORSAH JA in *Leopard Rock Hotel Co (Pvt) Ltd & Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S). The learned judge of appeal referred to many authorities and accepted that the test to be applied was an objective test where, after investigating the actual circumstances of the case, the court must impute knowledge of those circumstances to the reasonable man and decide whether there was a real danger on the part of the arbitrator unfairly to regard with favour the case of a party to the issue before him. He quoted with approval *R v Gough* [1993] 2 All ER 724 (HC) and in particular the passage at 737j where LORD GOFF said:

> "Finally for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, there was a real danger on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard

> (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him. …"

It is clear from the authorities that the applicant's view of his own ability to be impartial, or the fact that others may consider his standing in society to lend him an air of impartiality, is immaterial to a determination of the issue of bias. It is also clear that the court should not concern itself with an investigation as to whether or not bias has been established nor should it concern itself with an inquiry into the state of mind of the arbitrator. In its answering affidavit the applicant attempted to show in para 36 how in reality Dr Campbell may have been biased. That was not called for: it is sufficient in a case such as the present to adduce reasonable evidence to satisfy the court that there was a real danger of bias. That evidence has been adduced to my satisfaction in this case. That evidence has established that the first respondent, Mr Adams, Dr Campbell and Mr Falkenberg had a close business relationship. It also established that in the arbitration Dr Campbell was called upon to decide on the adequacy or otherwise of the assessment of the hailstorm damage made by Falkenberg. In my own view, a reasonable man, having knowledge of the prior association I have found existed, not only between Dr Campbell and Falkenberg, but also between the two of them and the first respondent and Mr Adams, would conclude that there was a real danger of bias. Dr Campbell was at pains to say that he could not possibly have been biased. But as stated in *Leopard Rock* (*supra*) at 275A - B:

> "One does not inquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus the character, professionalism, experience or ability to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration."

What must be appreciated is that bias operates in an insidious manner and that the person being challenged may be quite unconscious of it – *Gough's* case (*supra*) at 740a. Another case on the applicable test – that of the reasonable man – is *Parys*

Municipality v Ahier & Anor 1991 (2) SA 6-8 at 619B. The law therefore requires that arbitrators must not place themselves in such a position that the reasonable man might assume that they may be biased. They must be above any such assumption. The provisions of Article 12 of the Model Law are designed to ensure that arbitrators are above any such assumption. I construe the phrase - "circumstances likely to give rise to justifiable doubts as to his impartiality or independence" in the said Article 12 - to be subject to the same test as the one I have outlined above – the reasonable man test. The duty of the court under the said Article 12 is to inquire into the circumstances (as I have done) and to determine whether those circumstances give rise to justifiable doubts as to the arbitrator's impartiality or independence. The test to be applied therefore, is whether a reasonable man would entertain a reasonable (justifiable) doubt as to the impartiality or independence of the arbitrator. I am satisfied that the relationship which existed between the first respondent, Mr Adams, Dr Campbell and Mr Falkenberg gives rise to such doubts.

Did Dr Campbell Disclose his Association with the Other Parties

Article 12 of the Model Law enjoins an arbitrator to disclose any circumstances which may give rise to justifiable doubts as to his impartiality or independence. The arbitrator may not disclose any such circumstances if he does not think that the circumstances give rise to justifiable doubts as to his impartiality or independence. Reasonableness, I think, is the standard which the arbitrator is required to apply in determining whether he should disclose the circumstances or not. Where the circumstances are such that a reasonable man would disclose them, then the failure by an arbitrator to disclose them would be in breach of Article 12 of the Model Law. It is not in dispute that Dr Campbell did not disclose his prior association with Mr Adams, the first respondent and Falkenberg despite that the association, as I have determined it to have been, was a circumstance that gave rise to justifiable doubts as to Dr Campbell's impartiality. He should have disclosed the prior association. He did not. His belief that the prior association was

inconsequential and immaterial was unreasonable. His failure to disclose the association serves only to heighten the reasonable man's apprehension of a real danger of bias.

Did the Arbitrator Decide on the Challenge

Dr Campbell was, as I have already shown, challenged as to his impartiality. He however did not decide on the challenge as required of him under Article 13(2) of the Model law. His decision would have triggered further action by the party challenging him if that decision was against the challenge. In terms of Article 13(2) of the Model Law, if the challenge is unsuccessful then the challenging party may, within thirty days of his receipt of the decision rejecting the challenge, request the High Court to decide on the challenge.

Dr Campbell appears to have simply ignored the fact that he had been challenged as to his impartiality. He proceeded to make an award.

The applicant appears to have been quite uncertain whether it could be said that Dr Campbell rejected the challenge or that he simply did not decide on it. Article 13(2) of the Model Law may be construed to mean that a challenge is unsuccessful only if the arbitrator has rejected it. A rejection, in context, would follow a consideration of the merits and the making of a decision that the challenge has no merit. Dr Campbell did not consider the challenge at all. He merely proceeded with the arbitration proceedings as if no challenge had been made and in circumstances where the challenger thought he would decide on the challenge. I agree with the submission made in the applicant's heads of argument that Dr Campbell did, indeed, reject the challenge because he made an award without considering it, which, in other words, is a suggestion that he rejected the challenge by implication. Viewed from this perspective the challenge was unsuccessful.

Applicant's submissions on Article 34

Mr *Nherere* submitted that the consequence of the failure by Dr Campbell to decide on the challenge was that the trigger for the applicant to request the High Court to decide on the challenge was not set off as the applicant could not proceed in terms of Article 13(3) of the Model law until it was clear that the challenge had been unsuccessful. That only occurred when the award was handed down. In my view, Mr *Nherere* had to make alternative submissions based on Article 13 as read with 34 because of a lack of clarity as to procedure. I am however satisfied that it was the appropriate course of action to proceed only in terms of Article 12 and 13 in the circumstances of this case.

The relevant provisions of article 34 have been cited above. Mr *Nherere* submitted that Dr Campbell's failure to decide on the challenge made it impossible for the applicant to pursue his remedy in terms of Article 13(2) of the Model Law and that the only option that remained for the applicant to adopt was that of applying to set aside the award in terms of Article 34 of the Model Law. He also submitted that Article 34(2) provides that the High Court may set aside an award if a party to any arbitral proceedings was otherwise unable to present his case and that, by refusing to decide on the challenge, Dr Campbell disabled the applicant from presenting his case. I do not think that these are relevant or correct submissions. In my view, the inability to present his case must relate to some aspect of a party's case which is intrinsic to the proceedings and not to the making of a challenge as to the arbitrator's lack of impartiality. I would therefore, without being firm on this construction of the phrase "unable to present his case", not find favour with this submission.

Mr *Nherere* further contended that the award was in conflict with the public policy of Zimbabwe in that a breach of natural justice occurred in connection with the making of the award. This, as a ground for the setting aside of an award, is provided for in Article 34(2)(b)(ii) as read with 34(5) of the Model Law. In *Zimbabwe*

Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S) GUBBAY CJ discussed the meaning of "public policy of Zimbabwe" and said at 464F –

> "Articles 34(5)(b) and 36(3)(b) also make it clear that if:
>
> "a breach of the rules of natural justice occurred in connection with the making of the award"
>
> that would render the award in conflict with the public policy of Zimbabwe."

And at 464H – 465A he went on and said:

> "It is also a rule of natural justice that the arbitrator must not be a judge in his own cause; nor must he act with bias against a party. He should scrupulously disclose any interest he has in the dispute or might reasonably be thought to have. See *Leopard Rock Hotel Co (Pvt) Ltd v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 at 270E – G; and generally Christie *Business Law in Zimbabwe* at 474; Butler and Finsen *Arbitration in South Africa* at 165.".

Mr *Nherere*'s submissions based as they were on Article 34 of the Model Law would have been appropriate only if the applicant had not made a challenge in terms of Articles 12 and 13. I have dealt with his submissions on Article 34 only for the purposes of emphasising the difference in procedure under that article on the one hand and under Articles 12 and 13 on the other hand.

In this case I have shown that Dr Campbell did not disclose his prior association with the other parties. I have also shown how he laid himself open to a reasonable suspicion that he may have been biased. His failure to disclose the prior association was compounded by the failure to decide on the challenge which was also a failure to comply with Article 13(2) of the Model Law. Although I do not have to decide that Dr Campbell was actually biased, I think that his failure to disclose his association and to decide on the challenge would have been sufficient grounds for setting aside his award under Article 34 on the reasoning that his award was, within the meaning of Article 34(5)(b), in conflict with the public policy of Zimbabwe because he also breached the rules of natural justice. But the application was not and, should not, have been founded on Article 34 of the Model Law. As such, therefore, Mr *Nherere*'s submissions on this score were superfluous.

Costs

The question of costs is one in respect of which Mr *Phillips* submitted that, whatever the outcome, Dr Campbell should not be ordered to pay them. It is the approach of these courts that an arbitrator who "takes a backseat and leaves the fight to the two protagonists" (*Leopard Rock (supra)* at 283A) should not be mulched with costs. In this case, however, I found that Dr Campbell did not immediately admit his prior association with the other parties. I found that he in fact initially denied the existence of such an association as did the first respondent. He has also, in effect, opposed the relief sought by the applicant and, in fact, in para 29 of his affidavit he prayed for the dismissal of the application with costs. In my view, contrary to Mr *Phillips'*s submissions in this regard, Dr Campbell descended into the arena and, as stated by KOSAH JA in *Leopard Rock supra* at 283B, he "joined in the battle, he cannot pray to be spared 'the slings and arrows of outrageous fortune"'.

Disposition of Case

Accordingly it is ordered that:-

1. The second respondent's mandate is hereby terminated in terms of Article 13 of the First Schedule to the Arbitration Act [*Chapter 7:15*] ("the Model Law").

2. For the avoidance of doubt the award made by the second respondent, which appears as Annexure "D" to applicant's founding affidavit be and is hereby set aside as being a nullity.

3. A fresh arbitration be held within a fortnight of the granting of this order, to be presided over by an arbitrator to be appointed in terms of Article 15(1) of the Model Law and in the event of failure to do so by an arbitrator to be appointed by the President or Chairman of the Commercial Arbitration Centre.

4. A copy of this order shall be served upon the President or Chairman of the Commercial Arbitration Centre by the applicant's legal practitioners.

5. The first and second respondents, jointly and severally, the one paying the other to be absolved, shall pay the costs of this application.

Coghlan, Welsh & Guest, applicant's legal practitioners.
Atherstone & Cook, 1st respondents' legal practitioners.
Wintertons, 2nd respondent's legal practitioners.