

GOLD DRIVEN INVESTMENTS
versus
WILLEMSE FARMING ENTERPRISES (PVT) LTD
and
FREDRICK CHRISTIAN MULLER

HIGH COURT OF ZIMBABWE
MATHONSIJ
HARARE, 22 January 2015 and 11 February 2015

Opposed Application

L Uriri, for the applicant
Ms J Wood, for the respondents

MATHONSIJ: The applicant seeks an order setting aside the arbitral award made by an independent arbitrator, Justice A M EBRAHIM, on 4 December 2013 on the ground that it offends the public policy of Zimbabwe in terms of Art 34 of the Unicitral Model Law contained in the Arbitral Act [*Chapter 7:15*]. The said arbitration was conducted in terms of Clause 11 of the agreement entered into between the parties which provides:

“Any dispute arising from the interpretation or implementation of this agreement shall be forwarded to a mutually agreed arbitrator and the parties shall submit and bind themselves to the decision of such arbitrator. In the event that the parties are unable to agree on the appointment shall be made by Commercial Arbitration Centre in Harare under the terms and conditions of the Commercial Arbitration Centre in Harare.”

The facts leading to the arbitration appear *ex-facie* the arbitral award. The applicant issued summons against the first respondent in the High Court in July 2012 claiming the sums of \$1 227 557-00; \$155 534-00 and \$150 000-00 together with interest. The first 2 claims arose out of the supply of crop inputs for 2 consecutive seasons namely 2010-2011 and 2011-2012 growing seasons in terms of an agreement of the parties for the production of tobacco. The applicant maintained that those sums, save for a negligible amount of \$9 924-00 selling commission, were not repaid. The claim of \$150 00-00 arose as a result of the applicant standing as surety and co-principal debtor for the first respondent's faithful performance of its obligations in terms of a loan agreement it entered into with ZB Bank which the applicant was obliged to pay as a result of the first respondent's failure to repay the loan.

When the first respondent excepted to the High Court action on the basis that the dispute had to be resolved by arbitration, the parties agreed to proceed by arbitration. They agreed that the arbitration deals with both the applicant's claim and the first respondent's counter-claim and that the second respondent who is a director of the first respondent be joined as a party to the arbitration.

The arbitrator received the parties' respective statements of claim and took the *viva voce* evidence of the parties' witnesses and on that evidence, he drew the following conclusion at pp 1-2 of the award.

"In this matter, most of the facts are established by the pleadings or the evidence of Mr Muller. The only witness called by the claimants legal practitioner during the hearing gave evidence which took the matter no further forward. The claimants' principal representative, who was the person with whom the second respondent dealt with, was Mr James Liu. He was said to be unavailable and was not called to give evidence. This failure to call such an important witness did not assist the claimants' case.

There was nothing inherently improbable about Mr Muller's evidence, though he was a little vague or confused on a few points. I am satisfied though, that there was no intent on his part to mislead me. In so saying, I am not thereby casting Mr Liu in the role of villain of the piece. Mr Muller himself did not see Mr Liu as a villain; on the contrary he found Mr Liu charming and persuasive, and he felt that Liu wanted the venture to succeed. Whether the fact that the venture did not succeed was because of dishonesty, incompetence, circumstances beyond the control of either party, or just bad luck is not necessary to decide."

The arbitrator thoroughly considered the evidence and submissions made by the parties. He concluded that both claims must fail and dismissed them.

The applicant had argued before the arbitrator that in March 2009, it had entered into an agreement with the first respondent in terms of which it supplied crop in-puts for the productions of flue cured tobacco. Clause 6 of that agreement provided that the applicant was to supply inputs worth \$350 000-00 to support tobacco production on 70 hectares of land for the 2010 season. For the 2011 season the applicant was to supply \$320 000-00 to support tobacco production on 60 hectares of land.

Despite those agreements the applicant submitted that for the 2010-2011 planting season it granted a loan in the form of inputs to the first respondent valued at \$132 499-00 for production of tobacco on 70 hectares of land. Although the first respondent made profit, it only repaid a sum of \$9 924-00 during that season in breach of the agreement between the parties. It demanded the balance of \$122 575-00.

In respect of the 2011-2012 season, the applicant argued that it supplied further crop inputs to the first respondent valued at \$155 534-00. Note that it had committed to supply \$320 00-00 worth of inputs for production on 60 hectares. The applicant asserted that although the first respondent had made a profit, it had not repaid the loan in breach of the

contract thereby entitling the applicant to a payment of \$155 534-00 which was advanced.

The applicant's third claim related to a loan obtained by the first respondent from ZB Bank Limited in March 2010 in which the applicant was forced to pay to the bank the sum of \$150 00-00 on 11 November 2011 as it had stood as surety and co-principal debtor for the due repayment of the loan, the first respondent having failed to honour its obligations. The dispute over the ZB Bank loan is still pending in this court.

The applicant's claim was strongly contested by the respondents who made the point that the applicant had failed to supply inputs in terms of the agreement, only succeeding in making sporadic supplies which came nowhere near the values that had been agreed by the parties. Although the applicant was clearly in breach, the first respondent had religiously paid all the sums due until the applicant's defaults rendered it impossible for it to do so. It then cancelled the agreement.

Prior to that, at the instance of the applicant, the first respondent had been forced to take a loan of \$630 000-00 from ZB Bank Limited to assist the applicant meet its obligations to it as it was unable to do so being out of funds.

The agreement between the parties for the 2010-2011 and part of 2011-2012 seasons had continued in terms of the agreement signed in March 2009 which is why the agreements produced by the applicant had not been signed.

According to the respondent the working capital that should have been supplied by the applicant for the initial agreement should have been \$350 000-00 but in breach of the agreement the applicant only supplied \$132 499-00 inputs. For May 2011 the applicant had agreed to supply \$320 000-00. It only supplied \$155 534-06 worth of inputs.

The applicant's failure to provide adequate inputs resulted in lower yields of tobacco that would have been achieved. The situation was exacerbated by the applicant's failure to buy the tobacco from the respondents on time as it had no money. The respondents' bales were therefore held at Tobacco Sales Floor for extended periods affecting the quality and weight of the tobacco as the applicant battled to raise money. When it finally did, the applicant wanted to buy at ridiculously low prices. At some point, because of its precarious cash low position, the applicant was constrained to authorise the respondents to sell their tobacco elsewhere as it simply did not have the funds.

As a result of the applicant's flagrant breach of contract, the respondents suffered heavy losses. They counterclaimed for payment of the sum of \$711 823-00 representing the

loss incurred less the amounts of the loans claimed by the applicant.

Having considered the evidence and the submissions made by the parties, the arbitrator found as proven that the applicant had breached the agreement. At p 8 of the award, he reasoned as follows:

“It seems to me that GDI (applicant herein) breached the contract in two ways. The first is that it did not provide the inputs it said it would, nor did it provide them timeously. The evidence, both from Mr Muller and in the statement of claim, shows that sums of money were paid sporadically. They did not total what had been promised, and they often did not arrive in time to be of real benefit. All in all, the haphazard way in which the inputs were provided made it impossible for Willemse Farming to produce the crop it should have.

If I am wrong in finding above that there was performance *per acquipollens* in respect of the year 2010-11 was not permissible, the second fundamental breach of the contract was GDI’s failure to pay the full price for the tobacco for that season. The fact that it did not do so because it could not do so is irrelevant. This was a self-created impossibility which-

‘does not discharge the contract, but leaves the party whose act created the impossibility liable for the consequences.

This will be so whether the impossibility is complete or partial, and whether or not the act that causes the impossibility is wrongful (*Christe op cit* p 493).

A party who has caused the other’s breach by making it impossible or nugatory to perform cannot found any claim on the breach he has thus precipitated: *Christe op cit* p 516. If GDI wished to claim that it had not breached the requirements to pay the full price for the grade, it could only do so by saying that there had been an agreement by Willemse farming to accept a lower price, a position which would be quite incompatible with the approach it has taken in these proceedings.”

The applicant was aggrieved by that award and made this application to have it set aside in terms of Art 34 of the Model Law as I have already stated on the basis that it offends against the public policy of Zimbabwe. The applicant stated that in dismissing its claim, the arbitrator had not taken into account the undisputed fact that the first respondent received various sums of money from the applicant as in terms of the contract, there was no fixed sum to be provided to the first respondent. Having been provided with the inputs the first respondent failed to remit proceeds of the tobacco except for \$9 924-00. The dismissal of the applicant’s claim was contrary to the principle against unjust enrichment.

The applicant maintained that the arbitrator had not considered that the first respondent had requested inputs outside the normal tobacco season meaning that there was no legal obligation on the part of the applicant to perform as demanded. The arbitrator had also pre-empted the decision of the High Court in respect of the claim of money paid to ZB Bank Limited and the decision on that aspect obliges the applicant to meet that loan without regard to how the High Court will determine the matter.

In their opposition, the respondents took the view that the issue of unjust enrichment

had not been part of the applicant's case before the arbitrator, the applicant having premised its claim on breach of contract, the applicant can therefore not raise an argument in this application which was not before the arbitrator. The respondents also drew attention to the non-joinder of the arbitrator in this application which has incapacitated the court by reason that the record of proceedings before the arbitrator has not been availed to the court.

The respondents maintained that that what is contrary to public policy in the award has not been explained save for the vague reference to unjust enrichment, which argument was not made before the arbitrator. There is nothing in the reasoning of the arbitrator which is contrary to public policy. Given that the applicant had not led any evidence regarding the dispute, the evidence of Mr Muller had stood uncontroverted and the arbitrator correctly relied upon it.

Ms *Wood* for the respondents, while taking a number of points *in limine* in her heads of argument, appeared to abandon them in submissions. She had raised the issue of non-joinder of the arbitrator, the filing of the application outside the requisite 3 months after the award was made and the deposition of the founding affidavit by Tapiwa Moga, the applicant's Projects manager, when he had not been involved in the agreement of the parties.

I will consider the issue of non-joinder of the arbitrator. Mr *Uriri* for the applicant conceded that in applications of this nature it is necessary to cite the arbitrator as a nominal respondent. He however submitted that a failure to do so is not fatal to the application as it can be remedied by either the service of the papers upon the arbitrator or his joinder in terms of r 87.

In my view r 87 does not apply to application procedure which is provided for in Order 32 of the High Court of Zimbabwe Rules, 1971. The rule in question is located in Order 13 which deals with Joinder of Parties and Actions. That rule provides:

- “(1) No cause or matter shall be defeated by reason of the mis joinder or non joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter .
- (2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either on its own motion or on application-
 - (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
 - (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, to be added as a party;

but no person shall be added as a plaintiff without his consent signified in writing or in

such other manner as may be authorised.

(3) -----”

A party to a cause or action may be joined in terms of r 87. However this is an application made in terms of application procedure provided for in Order 32 which order does not provide for similar joinder as contained in r 87. In fact the rules of this court do not contain any rule dealing with joinder of parties in application procedure.

I do not agree with Mr *Uriri*'s submission that reference to a “cause or matter” in subrule (1) of r 87 should be taken to mean an application.

I am however prepared to accept that, to the extent that there is no similar provision in application procedure for misjoinder and non joinder, one has to relate to the issue having regard to r 87. The rules of court were created to assist the court in conducting its business. For that reason, there is nothing preventing it from borrowing from r 87 in order to achieve justice in Order 32 matters, especially in view of the fact that r 4 C gives the court a discretion to depart from the rules in appropriate circumstances.

In *casu* I am of the view that the issues are capable of determination in the absence of the arbitrator who, in any event, would not be a participant in the proceedings even if he had been cited and it is generally desirable to cite the arbitrator. I will therefore dismiss the point *in limine*.

This application has been brought in terms of Art 34 of the Model Law, it had to because the applicant having contracted out of all other rights it may have had by the inclusion of clause 11 in the agreement binding the parties to the decision of the arbitrator, it had no other remedy. Article 34 provides:

- “(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) -----
 - (b) the High Court finds that -
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe, or
 - (ii) the award is in conflict with the public policy of Zimbabwe.”

Article 34 takes the issue further by declaring what is contrary to the public policy of Zimbabwe. It states:

“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) the making of the award was induced or effected by fraud or corruption;
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

Mr *Uriri* for the applicant drew attention to para 17 of the first respondent’s response to the applicant’s statement of claim before the arbitrator in which the first respondent appeared to admit owing a sum of \$155 534-00 and suggested that it be deducted from its counter-claim, as a pointer to the fact that the arbitrator did not apply his mind. If he had he would have granted that which was admitted instead of dismissing the entire claim. I do not agree. In fact the entire case of the applicant misses the point. The arbitrator dismissed the applicant’s claim because the applicant had, admittedly breached the contract between the parties. He drew the conclusion, correctly in my view, that having breached the contract thereby inducing the respondents to also commit a breach, the applicant could not “found any claim on the breach he has thus precipitated?” In other words the applicant caused the first respondent to commit a breach by breaching the agreement itself, failing to supply adequate inputs, supplying inputs late and failing to purchase the product.

On the basis of contract, unjust enrichment had not been relied upon, the applicant could not claim from the first respondent as it did. The breach it committed vitiated any remedy it may have had. This is a basic principle of the law of contract which the arbitrator impressively propounded and relied upon it. I did not hear Mr *Uriri* to argue that it was a wrong or faulty conclusion of the law.

It was stated in *Zesa v Maphosa* 1999 (2) ZLR 452 (S) 466 E-G that:

“Under articles 34 and 36 the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where however, the reasoning or conclusion in any award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible or fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above.”

See also *Delta Operations v Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) 85 C-D; *Provincial Superior Jesuit Province of Zimbabwe v Kamoto & Ors* 2007 (2) ZLR 8 (S) 13 C-D; *Decimal Investments (Pvt) Ltd v Arundel Village (Pvt) Ltd & Anor* 2012 (1) ZLR 581 (H).

Clearly the standard set in the above authorities has not been matched by the applicant

in this matter. Quite to the contrary, the reasoning of the arbitrator cannot possibly be faulted at all. Parties who submit to arbitration agreeing that the decisions of the arbitrator shall be final and binding upon them should desist from such footling litigation the moment the outcome is not favourable to them. This court finds itself inundated by endless such applications which are informed, not by a desire to obtain justice but merely by obvious unwillingness to commit to what parties would have agreed upon. The time has come to admonish such litigants with an award of costs on a punitive scale.

Accordingly the application is hereby dismissed with costs on a legal practitioner and client scale.

Mutamangira & Associates, applicant's legal practitioners
Venturas & Samkange, respondent's legal practitioners