ZIMBABWE NATIONAL WATER AUTHORITY
versus
PELLAVIN MARKETING (PRIVATE) LIMITED
and
TECLA MAPOTA N.O.

HIGH COURT OF ZIMBABWE
MUSHURE J
HARARE, 19 September & 4 November 2024

Opposed Matter- setting aside of an arbitral ruling

B Mahuni, for the applicant
B D Ndoro, for the 1st respondent
No appearance for the second respondent

MUSHURE J:

Introduction

[1] The applicant in this matter seeks an order to set aside an arbitral ruling

[2] issued by the second respondent on 16 May 2024 in the arbitration proceedings between the applicant and the first respondent. Specifically, the applicant prays for the substitution of the arbitrator's finding that she had jurisdiction to hear the dispute between the applicant and the first respondent with an order that the arbitral tribunal did not have jurisdiction to hear the dispute.

Factual background

[3] The facts on which the decision of the arbitrator was made can be summarized as follows:- Sometime in January 2022, the applicant and the first respondent engaged in a business transaction for the supply of branding services. The terms of their agreement were reduced to writing. The agreement contained an arbitration clause. The first respondent signed the agreement on 26 June 2022 and transmitted it to the applicant on 26 July 2022 for signing. However, the agreement was never returned.

[4] Despite the fact that the agreement was not signed, the first respondent alleges that it rendered some services to the applicant on the strength of that unsigned agreement. The first respondent consequently sought payment for the services. When it became clear that the applicant was not willing to pay for the services rendered, the first respondent then referred the matter for arbitration.

[5] At the first pre-arbitration hearing, the applicant raised a preliminary point to the effect that the arbitrator did not have jurisdiction to hear the matter. The basis for the objection was that the agreement had not been signed by both parties therefore, the first respondent could not rely on an unsigned agreement to refer the matter to arbitration.

[6] The second respondent made a finding that she had jurisdiction to hear the matter. In reaching this decision, the second respondent commented that the applicant had waived its right to file any further submissions on the preliminary point. She concluded that it was common cause that there was an agreement between the parties. She found that the relationship between the applicant and the first respondent was based on this unsigned agreement. She ruled that although the agreement was unsigned, it was a binding agreement between the parties and in terms of which the parties operated.

[7] Aggrieved by the arbitrator's decision, the applicant filed the present court application.

The application before this court

[8] The applicant has approached this court in terms of Article 16 (3) of the Model Law. It reads:-

> "(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the *High Court* to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

[9] In support of the application the applicant has advanced two arguments. The first is that the second respondent erred at law in dismissing the challenge to her jurisdiction to entertain the dispute between the applicant and the first respondent. The applicant contends that the basis for the challenge was that there was no signed agreement between the parties yet a written and signed agreement was a prerequisite for such a referral. The applicant argues that the ruling by the second respondent ought to be vacated because it is contrary to public policy. While the

applicant confirms that there was a written agreement between the parties, it contends that such agreement was never signed by the parties and is therefore not binding.

[10] The applicant's second argument is that the second respondent ruled that the applicant had waived its right to reply to the first respondent's allegations in circumstances where the second respondent did not afford the applicant an opportunity to rebut them.

[11] It is the applicant's position that arbitration proceedings are by their nature consensual, and it was clear from the facts of the matter that there was no signed agreement between the parties. Finally, the plaintiff contends that the parties were still in negotiations and had not finalised the terms of the agreement. For these reasons, the applicant submits that the second respondent's ruling is contrary to the law and in conflict with the public policy of Zimbabwe.

[12] *Per contra*, the first respondent contends that there was a valid agreement between the parties. Certain services were rendered in terms of the agreement. The first respondent further submits that Article 7 of the Model Law admits of no doubt that an arbitration agreement shall be in writing or in exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

[13] The first respondent supports the second respondent's finding that the applicant waived its right to reply to its opposition to the preliminary objection. The first respondent argues that the second respondent allowed the parties to agree on timelines within which to file pleadings. All communications were to be done via email. Further changes to the timelines were communicated through email and the applicant acknowledged receipt of the email. The first respondent's argument is that if the applicant wished to respond to the first respondent's response, it would have made such an indication. It did not.

Oral submissions by the parties

[14] At the hearing of the application, Ms. *Mahuni* argued on behalf of the applicant that once a written agreement is not signed by both parties, it becomes invalid despite its provisions. The agreement in *casu* had a clause which provided its effective date as the date on which the last signature would be appended by either of the parties to the agreement. Due to the fact that the contract was not signed by the applicant, it could not be deemed to be a valid agreement between the parties. Ms. *Mahuni* further argued that the arbitrator's jurisdiction is founded on a valid arbitration agreement. She contended that given that the agreement only contained one

party's signature, it was improper for the second respondent to find that she had jurisdiction to deal with the dispute.

[15] She emphasized that the law is clear that arbitration proceedings are hinged on the consent of the parties. Once parties fail to agree, that should be the end of the matter. The applicant insisted that the parties were engaged in ongoing negotiations and the contract had not been concluded.

[16] Ms. *Mahuni* also maintained that the applicant had not waived its right to reply. There was a change in submission dates which had been caused by the first respondent, but there was no further opportunity to reply.

[17] In response, Mr. *Ndoro* for the first respondent urged the court, in determining whether or not the unsigned agreement was binding on the parties, to consider that services were rendered. To this, the applicant argued that it could not be concluded that the services were being rendered on the basis of the unsigned agreement.

Issues for determination

[18] In my view, two issues fall for determination in this matter namely:-

i. Whether or not the second respondent had jurisdiction to deal with the dispute between the applicant and the first respondent; and

ii. Whether or not the applicant waived its right to file any further submissions in relation to the preliminary point.

[19] I pass now to deal with the highlighted issues arising in the matter.

Whether or not the second respondent had jurisdiction to deal with the dispute between the applicant and the first respondent

[20] From the written and oral submissions by the parties, it is common cause that there was an unsigned contract between the applicant and the first respondent. It is also common cause that the unsigned agreement contained an arbitration clause. In terms of Article 7 (1) of the Model Law, the arbitration clause in the contract constitutes an arbitration agreement. The point of departure between the parties is the validity and binding nature of an unsigned agreement.

[21] The essential elements of an arbitration agreement are set out in Article 7 (2) of the Model Law in the following terms:-

> "(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

[22] As to the test to be applied to determine if the writing requirement in Article 7 (2) has been satisfied, I am guided by the words of CHAREWA J in the case of *Telone (Pvt) Ltd* v *Capitol Insurance Brokers (Pvt) Ltd* 2016 (1) ZLR 169 (H) at p. 175 C-E where she noted that:-

> "The commentary in the I A Donovan *et al*[1], at p 5-12 observed, correctly, in my view, that the writing requirement provided under Article 7(2) can be met in one of four ways which I restate as follows:
>
> 1) agreement in a document signed by the parties;
> 2) exchange of letters, telex, telegrams or other means of communication which provide a record of agreement;
> 3) exchange of statements of claim and defence alleging the existence of an agreement which is not denied by the other party; and, fourthly
> 4) reference in a contract to a document containing an arbitration agreement so long as the agreement is in writing and the reference makes it a part of the contract.
>
> Consequently, I am of the firm view that the correct position is that Art 7(2) recognises that an arbitration clause may be presumed to exist in the absence of a written and signed arbitral clause where an undoubted exchange of letters, faxes documents or other communication provides a record of an agreement to arbitrate."

[23] On appeal, the Supreme Court[2] expressed much the same thought:-

> "In making a determination that the parties had agreed to refer any dispute between them to arbitration, the court *a quo* made reference to Article 7 (2) of the Arbitration Act outlined above. As already stated the provision makes it clear that a court can accept that there was an arbitration agreement if a statement to that effect is contained in an agreement signed by the parties, or recorded in an exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement or in an exchange of statements of claim or defence in which it is alleged by one party and not denied by the other." (At p15 of the cyclostyled judgment)"

[24] It is the applicant's contention that the key point is whether there is a record of the agreement that falls within the statutory provisions listed in the *Telone* case *supra*. The applicant further contends that the absence of a signed agreement by the applicant means the first statutory requirement of a signed agreement is not satisfied. The applicant relies on the decision of this

---

[1] Donovan IA, MacMillan AR and Masunda MA *Arbitration Sourcebook* (Commercial Arbitration Centre, Harare 1996).
[2] Tel-One (Private) Limited v Capitol Insurance Brokers (Private) Limited SC60/18

court in *Olcraft (Private) Limited t/a Flora Unlimited* v *FC Platinum* HH529/15 as authority that the Arbitration Act [*Chapter 7:15*] makes it mandatory for the arbitration agreement to be in writing.

[25] However, the *Telone* case *supra* has already settled the position that there are four standalone instances which can be resorted to in testing whether writing requirement in Article 7 (2) has been satisfied. In any event, the applicant's reliance on the *Olcraft* case *supra* does not take its case any further because it is common cause that the arbitration agreement in the present case is in writing. The issue of whether or not the agreement was in writing does not fall for determination before this court. The real issue is whether the unsigned agreement constitutes a valid agreement.

[26] The applicant's further argument is that because there was no exchange of letters, telex, telegrams or other means of communication which provide a record of the agreement, the second rung of the alternative requirement to prove the existence of an arbitration agreement is not satisfied. Additionally, the applicant submits that the pleadings do not show an acceptance of an arbitration clause, which negates the possibility of satisfying the third requirement. I hold a different view.

[27] In concluding that there was an arbitration agreement between the parties, the second respondent reasoned that:-

> "The first question to ask is whether there was an agreement between the parties which confers jurisdiction on the arbitrator. In Paragraph 6 to its Plea, Respondent states as follows:
>
> > "It is further submitted that there is an arbitration agreement for the defined work. In terms of the addendum as both parties did not sign the agreement as has been pleaded…."
>
> The Respondent alludes to an unsigned agreement and absence of an addendum for the defined work. I must hasten to say that if a party wishes that its matter be decided on the papers, it is important that it provides all the relevant documentary evidence to support its case. Respondent's Plea to jurisdiction is fraught with references to legislation and case law without the necessary facts to support the assertion that there was no arbitration agreement between the parties. The only facts disclosed by the Respondent are contained in Paragraph 6 to their Plea quoted above. A reading of Paragraph 6 to Respondent's Plea suggests that there was indeed an agreement between the parties which agreement was not signed.
>
> The Respondent also makes reference to an addendum for defined works. The Respondent did not attach a copy of the unsigned agreement nor the addendum. In the matter of *Zimbabwe Revenue Authority* v *Amandiz Architects (Pvt) Ltd & James McComish N.O* HH657/23 the Honourable Mhuri J had this to say when considering similar facts where the applicant had filed an application in terms of Article 16 challenging the jurisdiction of an arbitrator:

> "Addendum as the word clearly states, is an additional document added to a document or a contract setting out extra terms as what happened in *casu*. It must be signed by both parties to the main contract for it to have a binding effect. In *casu*, the addendum was signed only by one party. The memorandum of Agreement was between applicant and first respondent. The addendum equally was between applicant and first respondent."
>
> What is clear from Respondent's Plea is that:
> 1. There was/is an agreement between the parties.
> 2. The agreement is not signed.
> 3. There is an addendum to the unsigned agreement for defined work.
> 4. The Respondent does not deny the fact that the unsigned agreement contained an arbitration clause or agreement."

[28] In my opinion, the second respondent's reasoning cannot be faulted. The proceedings before her showed that the applicant did not deny that the contract contained an arbitration clause. The applicant also did not deny that the contract was in writing. The issue was on the fact that the contract was not signed.

[29] This is the same argument that the applicant has maintained throughout the current proceedings. I have already alluded to the fact that the issue before the court does not relate to the existence of the arbitration agreement, as this is common cause. The issue relates to the validity thereof by virtue of the contract not having been signed by both parties.

[30] In approaching this issue, courts in this jurisdiction have traditionally followed that:-

> "It may also be noted that the fact that a contractual document was not signed by a party does not necessarily imply that no contract was concluded. The validity of an unsigned contract was considered in *Afritrade International Limited* v *Zimbabwe Revenue Authority* SC 3/21 on p 11 and this Court aptly stated as follows:
>
> > "In principle, an unsigned agreement cannot ordinarily be relied upon as creating a valid and binding contract. However, the surrounding circumstances, including prior dealings between the parties concerned, may give rise to the *prima facie* presumption that the terms and conditions embodied in an unsigned agreement represent the true intention of the parties. The burden then shifts to the party disputing the authenticity of the agreement to show that it was not intended to be binding." (Emphasis added).
>
> See also *Associated Printing & Packaging (Pvt) Ltd & Ors* v *Lavin & Anor* 1996(1) ZLR 82(S) at 87B-D."
>
> (*Rainbow Tourism Group Limited* v *Nyaruwata* SC 87/24 at p.17).

[31] It seems to me that this is the same approach when it comes to an unsigned arbitration agreement. Peter Ramsden comments in *The Law of Arbitration, South African and International Arbitration* (2nd edn, 2018 Juta) that:-

> "….a document can constitute an agreement in writing even though it is only signed by one party or by neither party. The test is whether the parties deliberately intended to record their agreement in writing and whether it can be shown that the document so produced constitutes the agreement between them. It would be sufficient proof if the parties have adopted and acted on their agreement." (At p.47-48)

See also *Zimbabwe Revenue Authority* v *Amandiz Architects (Pvt) Ltd & Anor* HH657/23.

[32] Thus, the absence of a party's signature on a contract does not *per se* invalidate a contract, neither does it automatically lead to a conclusion that no contract was concluded. The argument that because the contract was only signed by the respondent means that there is no valid contract between the parties does not find support in the law. The position of the law is that a court seized with an unsigned contract is required to go further and look at the surrounding circumstances, including the prior dealings of the parties, in order to ascertain the true intention of the parties. The surrounding circumstances can attest to the existence of a valid contract, provided that all the necessary attributes of a contract are proved. The same applies to an arbitration agreement.

[33] The question of who bears the onus of proving an allegation that a contract was not intended to be binding is settled. Once the prior dealings of the parties and the surrounding circumstances create a *prima facie* presumption that the terms and conditions embodied in the unsigned agreement represent the true intention of the parties, the onus to prove that the contract is not authentic then shifts to the party who disputes its authenticity. In *casu*, the onus that the contract was not intended to be binding therefore fell on the applicant. I find the argument that the onus rested on the respondents to prove the existence of the agreement misplaced because firstly, it is not in dispute that there was an agreement. Secondly, it is not in dispute that the agreement contained an arbitration clause. Further, the submission by the respondent that the agreement was signed by the respondent and transmitted to the applicant for its signature has not been controverted.

[34] More critically, the applicant accepts that some services were rendered to it by the respondent. The applicant argues that those services were rendered outside the scope of the agreement because the agreement was still under negotiation. The applicant however does not state the scope within which the services were rendered.

[35] The inescapable conclusion is that although the applicant did not sign the contract, the external manifestations of the minds of the parties through the rendering of services lean in favour of a

finding that there was a valid contract between the parties. There is no merit in the argument that the parties were still negotiating the contract. The applicant conceded that the respondent rendered services. However, it does not explain under what circumstances those services were being rendered. In the absence of an explanation of the circumstances surrounding how the respondent ended up rendering services in terms of a contract which was under negotiation, I am not inclined to accept the applicant's submission that the services were rendered outside the scope of the agreement. I did not hear the applicant to argue that there was another agreement besides the disputed agreement empowering the respondent to render the services it did. I find it inconceivable that the respondent would just come and render services out of the blue, without any explanation on the basis upon which an external supplier could just do so.

[36] Two allegations which warrant comment arose in the papers and during argument. Firstly, it was the issue that the applicant is a procuring entity, so it is subject to the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*]. The applicant's argument is that the second respondent's findings contradict the said statute. How this is so, the applicant did not state, neither did it state the specific provisions offended by the second respondent's findings. The conclusion I have reached is that this argument was made as a matter of course. It was not substantiated and did not in any way assist to address the applicant's application before this court.

[37] The second allegation was that the second respondent rendered services which were not up to the expected standard. This cannot be a ground for arguing that the contract was invalid. The applicant's relief would lie elsewhere. This is not the question the court is being called upon to decide and is of no consequence to the current proceedings.

Whether or not the applicant waived its right to file any further submissions in relation to the preliminary point.

[38] The second issue taken by the applicant relates to the finding by the second respondent that the applicant waived its right to file any further submissions in relation to the preliminary point. The applicant argues that it was never given the opportunity to rebut the existence of the agreement because it was never afforded a chance to file its reply with the arbitrator. The

applicant accuses the second respondent of simply making a finding that the applicant had waived this right without any basis for doing so.

[39] The second respondent's ruling filed of record states that she gave certain directions to govern the filing of pleadings on the preliminary point. It further states that the applicant waived its right to file any further submissions regarding the preliminary point. However, the first respondent, who was the claimant in the arbitral proceedings, did not file its papers as directed. The applicant then wrote to the second respondent bringing to her attention the failure by the first respondent to comply with the directives she had given. The second respondent issued further directives via email, setting new timelines within which pleadings were supposed to be filed and a ruling on the preliminary point made. The ruling would be handed down on or before 28 May 2024.

[40] The applicant's legal practitioners responded to this email on 18 April 2024, simply stating that they had noted the 'new time table of filing of pleadings'. The applicant did not indicate that it wanted to file any reply. Nothing has been placed before the court to show that the applicant was barred from indicating that it needed to file a replication on the preliminary point. Neither has the applicant given any reason why the second respondent would state that the applicant had waived its right to file any further submissions when it did not. If the applicant had indeed not waived its right to reply when the first deadline was given, it surely ought to have corrected the 'misconception' when new timelines were set and the second respondent had not made provision for the deadline for filing the replication. The applicant did not do that, and instead opted to note the timelines.

[41] It may well be that the applicant had mental reservations on the 'omission' of the deadline within which to file its replication on the preliminary point, but as long as such mental reservations were not communicated, one cannot argue that it did not waive its right. Adjudged from the outward manifestations of the applicant's conduct pursuant to the email, it is plainly consistent with the finding of the second respondent that the applicant waived its right to file a replication on the preliminary point. It can properly be inferred from the applicant's response to the email that it acquiesced to the directives given by the second respondent. (See *Chidziva & Ors* v *Zimbabwe & Steel Co. Ltd* 1997 (2) ZLR 368 (S), *Barclays Bank of Zimbabwe Ltd* v *Binga Products (Pvt) (Ltd)* 1985 (3) SA 1041 (ZS) & *Nyemba NO* v *Chakabva NO* & 5 Ors HH 224-18.)

Disposition

[42] The applicant has prayed for a finding that the second respondent's ruling is contrary to public policy. For the reasons I have set out above, I do not see how by any reasoning it can be accepted that in the circumstances of this case, the decision of the second respondent was not only erroneous but was also contrary to public policy. In the matter of *Ferro-Alloys Employers Association of Zimbabwe* v *Zimbabwe Metal, Energy and Allied Workers Union & Ors* 2018 (2) ZLR 356 (H) it was held that arbitral award will be adjudged to be in violation of the public policy of Zimbabwe where its recognition has the effect of resulting in inequity of such a gross magnitude that it so defies accepted moral standards to such an extent that it offends any reasonable person's conception of justice. In my view, the same concept applies to an arbitral ruling.

[43] The decision of the second respondent cannot, by any stretch of imagination, be said to be in violation of public policy of Zimbabwe. Her reasoning cannot be faulted. The second respondent dealt with the preliminary point raised by the applicant in accordance with the law. The fact that the applicant does not agree with her reasoning does not give the ruling the complexion of a decision that is contrary to public policy.

[44] In the circumstances, and making a value judgment on the merits of this case, I am satisfied that the applicant has failed to make out a case to justify the relief sought.

Order

In the result, it is ordered that:

1. The application be and is hereby dismissed with costs.

MUSHURE J: .....

Muvingi & Mugadza Legal Practitioners, applicant's legal practitioners
Macharaga Law Chambers, first respondent's legal practitioners