0ZESA HOLDINGS [PVT] LTD
versus
CLOVGATE ELEVATOR COMPANY [PVT] LTD
and
JUSTICE L.G. SMITH [RTD] N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 16 & 22 September 2021

Date of written judgment: 17 November 2021

Opposed application

N.B. Munyuru, with him *B. Mahuni*, for the applicant
S.M. Hashiti, for the first respondent
No appearance for the second respondent

MAFUSIRE J

[1] These proceedings are two cases consolidated. They emanate from arbitration proceedings before the second respondent ["***the arbitrator***"]. The arbitrator has not filed any papers. Therefore, unless expressly stated, or unless the context suggests otherwise, any further reference to the respondent is a reference to the first respondent only. Any reference to the parties is a reference to the applicant and the respondent only.

[2] The one case to the consolidation is HC 722/21. The other is HC 1355/21. The order of consolidation by this court, on 16 June 2021, was at the instance, and with the consent of, the parties. In that order, HCC 722/21 would be the main application. HC 1355/21 would be the counter application. This was a misnomer. The applicant is the applicant in HC 722/21. It is also the applicant in HC 1355/21. In both cases, the applicant seeks

practically the same relief. Thus, in reality there is no counter application. However, nothing material turns on this. The details shall soon emerge.

[3] The applicant is a private company wholly owned by Government. In HC 722/21 it seeks the setting aside of what it terms an arbitral award. Whether or not it is in fact an arbitral award is contested. The setting aside is sought in terms of Article 34[2][b][ii] of the Arbitration Act [*Chapter 7:15*] ["***the Arbitration Act***"]. In paraphrase, this provision empowers this court to set aside an arbitral award only if, among other things, this court finds that the award is in conflict with the public policy of Zimbabwe.

[4] The respondent vigorously opposes the application. Distilled, its major ground of opposition is that what is sought to be set aside is not a final award, but merely an interim order directing the applicant to file further submissions for the arbitration proper. The respondent further argues that the arbitral award in question is not at all contrary to the public policy of Zimbabwe.

[5] The case history is chequered. The dispute now goes back some seven to eight years to this date. It is still raging. Given the rights of appeal, the end may not yet be in sight. Frankly, the case makes nonsense of the notion of arbitration as an expedient and cheaper form of alternative dispute resolution mechanism. However, this is besides the point. Truncated, the facts of the dispute are these. The respondent is a private company. Among other things, it installs, refurbishes and maintains elevators. The parties' association with each other and their relationship goes back to 2013. In that year the applicant floated a tender for the supply, installation and subsequent maintenance of four elevators to its headquarters in Harare. The respondent won the tender. A formal contract was executed between the parties. The contract price was a princely USD930 165-54.

[6] The contract had specific time lines for certain deliverables. The start date was 14 August 2013. The end date was 28 July 2014. But from the onset, there were teething problems. For example, the applicant had been required to make a down payment of 50% of the contract price against the inception by the respondent of a performance

guarantee from a commercial bank. The 50% down payment translated to a significant US465 082.77. The applicant paid the amount, but only forty one days after the contract had started running. The respondent alleged the delay was occasioned by the time taken by the applicant to vet and do a due diligence on the commercial bank the respondent had obtained the performance guarantee from. That bank was the Metropolitan Bank of Zimbabwe ["***Metbank***"]

[7] The contract envisaged that execution would be completed in July 2014. That did not happen. By October 2015 the respondent had managed to install only one elevator. Three were still outstanding. The equipment for them had still not been paid for, let alone shipped in.

[8] The respondent cited *force majeure* for its failure to execute the project on time. It alleged Metbank was in financial and operational dire straits. The 50% down payment had been deposited into the respondent's account with Metbank. However, the respondent had failed to access it all at once, or whenever it needed to make withdrawals. The respondent had wanted to pay the manufacturers and suppliers of the equipment in the United States of America. But Metbank had been unable to make any remittances due to its parlous state. The respondent alleged it had to use another commercial bank for those remittances. But it could only make small withdrawals in dribs and drabs to fund its account with the alternative bank. Metbank was unable to fund one time huge withdrawals. The result was that it took significant amounts of time for the first respondent to build up sufficient deposits in its account at the alternative bank before it could be able to remit the funds to America. Not unexpectedly, the envisaged time lines were all lost.

[9] The respondent alleged the parties were in constant communication over the missed targets. It alleged the applicant understood its plight and would promise to assist. Among other things, the time lines would be revised. A draft amendment had actually been drawn up. However, relations broke down. No such amendment was ever signed. The applicant eventually reneged on its promises. It began to insist on the old contract

and to bind the respondent to the original time lines. In due course, the applicant purported to cancel the contract. It re-tendered the job and awarded the contract to someone else.

[10] The contract had an arbitration clause. The respondent referred the dispute to arbitration. The arbitrator found in favour of the respondent. In essence he ruled that in purporting to cancel, the applicant had breached the contract. The contract had provision for a *force majeure* situation. A *force majeure* is an 'act of God' situation. It vitiates a contract. In terms of that clause, a party's non-performance would be excusable. If the *force majeure* was temporary but caused a delay, the time for performance would be extended by the period of the delay. If the *force majeure* continued beyond seven days, the aggrieved party could cancel the contract upon fourteen days' notice.

[11] In finding for the respondent, the arbitrator held that the problem the respondent was facing with Metbank constituted *force majeure*. He made a finding that despite the time lines given for the right to cancel, the applicant did not do so until more than a year later. That could not have been cancellation in terms of the contract. The arbitrator made a further finding that the applicant had failed to remit further payments to the respondent when called upon to do so. That was what had led to the collapse of the project. The arbitrator rendered his award on 25 July 2017.

[12] The arbitral award set aside the purported cancellation of the contract by the applicant. The respondent was re-instated as the service provider to complete the project. The applicant would pay the suppliers of the elevator equipment that the respondent had allegedly ordered. The applicant would also pay the freight charges and the attendant taxes that would be incurred in bringing the equipment into the country. The balance of any contract price due by the applicant to the respondent would be paid within fourteen days of the completion of the contract. Finally, the applicant would reimburse the respondent all its legal costs, comprising the arbitration fees and the legal practitioners' charges.

[13] Following that award, the respondent applied to this court to have it registered in terms of the Arbitration Act. The applicant vigorously opposed the application. In addition, the applicant, in two sets of separate proceedings, also applied for the setting aside of the award. All the cases were consolidated and heard together. By a judgment of this court dated 10 June 2020 the award was registered. That completed the first episode of the dispute. But it did not resolve it. In fact, it was the start of another.

[14] The respondent alleged that when it went back to the project site to commence work in accordance with the arbitral award, the applicant advised that it had re-tendered the project and that another company had already completed the job. The elevators had been installed. The respondent alleged that its efforts to engage the applicant to discuss the way forward in the light of those developments were fruitless. As a result, it went back for another arbitration. This time around, the arbitration would be for the purposes of quantifying the damages the respondent claimed to have incurred by reason of the applicant's failure or default to comply with the first arbitral award.

[15] For damages, the respondent sought a significant USD1 922 511-16 under various heads. In addition it sought reimbursement of the legal costs. The breakdown was as follows:

- USD201 310-95 as damages for the loss of the elevator maintenance business;
- USD426 750-00, being an amount required by the American manufacturer for the cost of the elevator equipment;
- USD250 125-00, being the cost of freight to Zimbabwe;
- USD42 964-12, being the replacement cost for the respondent's tools that it failed to retrieve when the applicant had ordered its workforce off the site after the respondent had marshalled labour and machinery to re-start the project following the arbitral award;
- USD102 957-00, being a refund of the monies advanced by the respondent on behalf of the applicant in some set off arrangement between the parties in connection with the implementation of the delayed project;

- USD881 280-00, being a reimbursement of the costs incurred by the respondent as remuneration for the specialist team assembled by it to execute the project before the applicant's cancellation of the contract;

- USD8 567-99, being storage costs incurred at the airport by the respondent in respect of the equipment for the one elevator that the respondent had managed to install.

- USD4 278-00 for some special barricades fitted on all landings on entrances to the pre-existing elevators, and

- the taxed costs of suit

[16] The applicant strenuously refused to submit to another arbitration. Among its reasons were that the arbitrator was now *functus officio*. He had no jurisdiction to entertain this new dispute which was an attempt to correct his original arbitral award which was evidently faulty. The applicant argued that in essence, the arbitrator was trying to open up the original arbitration proceedings in order to assist the respondent. He could not do that. The arbitral award was now an order of court. In that award, by ordering specific performance against the applicant without a concomitant order of damages in the event of a default, the arbitrator had made a mistake. In terms of the Arbitration Act, any such mistake can be corrected. However, such correction has to be sought within thirty days of the award. It was now more than three years after the award. Therefore, the time to seek correction had long since expired.

[17] The parties filed extensive submissions before the arbitrator. The respondent's founding papers were titled 'Application for Quantification of Registered Arbitral Award'. The applicant's response was titled 'Response to Application for Quantification of Registered Arbitral Award'. The respondent filed a Replication. In it, among other things, there was material added as proof of the damages sought. In its Submissions, the applicant questioned the propriety of the respondent adding new material in its Replication when it knew that the applicant would not be able to respond. To the applicant this was further evidence of the whole impropriety of the so-called quantification proceedings. It alleged a breach of the *audi alteram partem* rule of natural justice because its right to be heard was being violated.

[18] The arbitrator dismissed the applicant's objections. In substance, he upheld the propriety of the new arbitration proceedings on the basis that they were not a correction of the original arbitral award which could only be held within the thirty day period. Instead he was re-opening the original proceedings. He said the issue of damages had arisen after the award. His order for specific performance could not be performed because the applicant had already got another company to complete the project. He was not *functus officio*. The respondent's application for quantification became necessary only because the applicant had advised that it could not re-appoint the respondent to install the three remaining elevators.

[19] Subsequently, the arbitrator disposed of the matter this way. In arbitration proceedings strict rules of procedure of the courts are not applicable. Therefore, the applicant would be entitled to make Submissions in answer to the issues raised by the respondent in its Replication. He ordered that the applicant was to file that response within seven days of the handing down of the order. That completed the second episode of the dispute. Another began soon thereafter.

[20] The arbitrator's order aforesaid was on 2 December 2020. The applicant did not comply. On 6 April 2021 the arbitrator wrote to the applicant. He ordered it to file the outstanding response by 12 April [2021] failing which he would continue dealing with the matter and make a final award. At this point, HC 722/21 was still pending determination.

[21] In response to the arbitrator's letter, the applicant filed an urgent chamber application under HC 1355/21. The interim order sought an interdict to bar the arbitrator from continuing with the arbitration proceedings pending the determination of HC 722/21. On 14 April 2021 this court granted the interim order. Therefore, what remains of the provisional order in HC 1355/21 is its confirmation on the return day. The final order sought on the return day is the setting aside of the interim order by the arbitrator. This was that order by the arbitrator on 2 December 2020 directing the applicant to file its Submissions in answer to the evidence on quantum adduced by the respondent in its

Replication. As said at the beginning, HC 722/21 and HC 1355/21 were consolidated. In HC 722/21 the applicant prays that the interim award issued by the [arbitrator] on 2 December 2020 be set aside. In HC 1355/21 the applicant also prays that the same interim award by the arbitrator be set aside. That is the case before me.

[22] The case before me is somewhat convoluted. There is yet another small episode, but potentially with significant consequences. On 20 April 2021, i.e. after the grant of the interim order by this court as aforesaid, the arbitrator filed a document with this court in HC 1355/21 titled 'Withdrawal of Award'. In it he stated that an arbitrator must make an award that can be implemented; that the arbitral award that he handed down [evidently on 25 July 2017] reinstated the respondent as the company to supply, deliver and maintain the four elevators in question and that by reason of the fact that the applicant had given the job to someone else to complete, his award was incapable of implementation. The arbitrator also stated in the document that he had made an interim award that the respondent could make a claim for damages since the first award could not be implemented. He said a final award would be made when the applicant responded to the request that he had made. Accordingly he was withdrawing the arbitral award that he had handed down.

[23] It is not altogether clear which of the two arbitral awards made by him the arbitrator was withdrawing, or purporting to withdraw. The withdrawal is in the last paragraph of the 'Withdrawal of Award' document. It is the operative part. But in the narrative leading to the withdrawal, the document makes reference to both awards. The operative part does not identify the exact award being withdrawn.

[24] In their papers before me, both parties seem to be *id idem* that it is the first award on 25 July 2017 that the arbitrator withdrew, or purported to withdraw. They say or imply this despite the fact that this award has since been registered as an order of this court. Mr *Hashiti*, for the respondent, urges the court to ignore the purported withdrawal by the arbitrator or to treat his actions in doing so as of no consequence. I should agree. Other than merely adding more confusion and unnecessary density, this side development

does not decide the real issue between the parties. The real issue between the parties is whether this court can step in at this stage to set aside the arbitrator's ruling or award on 2 December 2020. To arrive at a decision, the court has to first of all identify and characterise the nature of the ruling by the arbitrator on that day. Only then will it go on to apply the arbitration laws and come up with a decision whether or not to step in and set aside the ruling or allow it to stand.

What is the true nature of the ruling by the arbitrator on 2 December 2020?

[25] The applicant's case lacks precision. It does not crisply identify the exact nature of the arbitral award or ruling by the arbitrator on 2 December 2020. The applicant's averments seem to suggest that its own disgruntlement with that award is that part of it that directs the applicant to file further Submissions in answer to the evidence of quantum adduced by the respondent in its Replication. If that be the case, then its position is untenable. That part of the award was merely directive. It was merely procedural. It was not a final award. I shall explain.

[26] To compound the issue further, the heading to the arbitrator's ruling on 2 December 2020 is not titled 'Arbitral Award' as the first one on 25 July 2017 is. It is titled 'Propriety of Hearing'. I wonder why. However, it is the content of the award, rather than its nomenclature, that determines whether an arbitrator's decision on any point is a final award or an interim or procedural one.

Categories of awards

[27] There are many categories of awards: see **Redfern & Hunter** on *International Arbitration*, 6th ed., Oxford University Press, Chapter 9. There are 'final' awards. These are final and binding. They are dispositive of the issues referred for arbitration. They complete the mission of the arbitral tribunal. With final awards, arbitration tribunals

become *functus officio*, subject to some exceptions. Such awards have *res judicata* effect on issues submitted for arbitration. They are susceptible to challenge in the state courts.

[28] The next lot of awards are partial or interim or provisional awards. These are issued in the course of a determination. They effectively deal with matters that are susceptible to determination during the course of proceedings. Once such issues are disposed of, time [and money] are saved considerably. A partial award may deal with the issue of the jurisdiction of the arbitral award. It makes no sense for an arbitration to go on for months on end dealing with all the rest of, and the substantive issues submitted for arbitration, only for the tribunal to decide at the end of it all that it had no jurisdiction. Partial or interim awards, if they are the last word on the particular issue rendered for determination, are also susceptible to challenge.

[29] The next lot of awards are procedural or interlocutory awards. These may be merely directive. They are concerned with the conduct of the arbitration. They help to move the arbitration forward: see **Redfern & Hunter**, *op cit*, at pp 503 – 504. They deal with such matters like the exchange of written evidence, the production of documents, the manner the hearing will be conducted, and so on. They are not final awards. They may not be susceptible to challenge before the end of the arbitration. The arbitral tribunal does not become *functus*. The award has no *res judicata* effect on the substantive issues for arbitration

[30] The list of categories of awards above is not at all exhaustive. There are several other types of awards, like 'consent awards', 'awards on agreed terms' and 'default awards'. These have no relevance to this case. What is relevant to this case is whether what the arbitrator issued on 2 December 2020 was a 'final award' or a 'partial award' or a 'procedural award'. If it was a 'final award' or a 'partial award', then it is susceptible to challenge, even at this stage. This court can intervene at the instance of an aggrieved party, in this case the applicant. But if it was merely a 'procedural award', then it may

not be susceptible to challenge at this stage. This court may not intervene despite a party's invitation to do so.

Provisions of the Arbitration Act

[31] The Arbitration Act does not define the term 'award'. Apparently nowhere else in the world has this term been defined. DUBE J, as she then was[1], in *ZETD Co [Pvt] Ltd v Masawi & Anor* HH 404-20 notes of an abortive attempt to define the term 'award' that was made in a module in preparation for the promulgation of the Model Law of the United Nations Committee on International Trade Law [UNCITRAL]. The Committee gave up. **Redfern & Hunter**, at p 502, say that there is no internationally accepted definition of the term 'award' and that no definition is to be found in the main international conventions dealing with arbitration, including the New York Convention and the Geneva treaties. It is left to the state courts to define 'award' on a case by case basis and to determine whether a particular award is, or is not, susceptible to challenge.

[32] Thus, the Arbitration Act, without defining 'award', simply provides for what can be done with it. It says an award can be recognised as binding [Art 35]. It can be enforced [Art 35]. Recognition and enforcement can be refused [Art 36]. It can be set aside [Art 34]. Article 16 provides for the competence of an arbitral tribunal to rule on its jurisdiction. Relevant portions read as follows:

> "*Competence of arbitral tribunal to rule on its jurisdiction*
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract…….. ….. ……
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. … …. …. …. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. … … … ….

[1] Now Dube JP

(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."

Categorising the ruling on 2 December 2020

[33] Plainly, and notwithstanding the heading "Propriety of Hearing", the arbitrator's ruling on 2 December 2020 was both a partial or interim or provisional award and a procedural or interlocutory award. The applicant challenged his jurisdiction to conduct another arbitration over the same subject matter. It alleged he was now *functus officio*. It alleged the new arbitration was an attempt to correct his previous award but that the ability or power to do so had prescribed because corrections of arbitral awards have to be sought within thirty days. However, the arbitrator ruled that the new arbitration was not meant to correct the previous award. It was not meant to interpret the previous award. The thirty day time limit did not apply. He was not *functus officio.* Because the award that he had made could not be complied with, it had to be amended in order for the respondent to quantify the damages that it had incurred. No one else but him could make the first award effective. That was his ruling. It was an interim order.

[34] Thus, although the above ruling was interim or partial, it was finally dispositive of the issue of the arbitrator's jurisdiction. As such, it is susceptible to challenge at this stage. But the applicant's grounds of challenge are tenuous. There is nothing contrary to public policy in the arbitrator's ruling of 2 December 2020. The threshold for upsetting a ruling by any arbitrator on the grounds of public policy is very high: see *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S). The arbitrator's reasoning and conclusion sought to be impeached must go beyond mere wrongfulness of fact or of law. It must go beyond mere faultiness or incorrectness. It must constitute a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards as to offend and hurt intolerably the conception of justice in Zimbabwe.

[35] Such a conclusion is not possible in the present case. Arbitration is an acceptable alternative dispute settlement process. It is all about party autonomy. The parties to a contract agree to take out from the state courts the resolution of any or all disputes as may arise from their contract. The state courts will respect their decision. They will give effect to their choice. That also is the thrust of the Arbitration Act. *In casu*, the relevant portion of the arbitration clause read as follows:

> "10.1 Any disputes or differences arising out of this contract or in connection therewith which cannot be amicably settled between ZESA and the Supplier, shall be referred to arbitration and settled in accordance with the Arbitration Act … … …."

[36] Plainly, the arbitration has not completed. It is not true that the respondent did not claim damages in its Statement of Claim in the first arbitration. It did. For it, the issues for arbitration were whether or not there had been a breach of contract by itself; whether or not the contract had lawfully been cancelled and the remedy thereof. In its prayer, the respondent claimed that it be reinstated as the service provider for the supply, fix and maintenance of the applicant's elevators. It went further to claim that in the event that re-instatement was not an option, it would have to be paid $102 957 as reimbursement of its funds that it had paid for airfreighting of the equipment of the one elevator supplied to the respondent; $230 000 to remit to the American manufacturer for the equipment for the remaining elevators, including freight; $50 000 as damages for breach and unlawful cancellation of the contract, plus costs.

[37] Admittedly, the new figures submitted by the respondent for the new arbitration on quantification have increased phenomenally. But that is an issue for the arbitrator. He has invited the applicant to answer to them. But it cannot be a ground to stop the arbitration. The first arbitration merely granted specific performance. It did not quantify the damages in the event that specific performance was no longer possible. Therefore, the process must complete. Clause 10.1 of the contract, the arbitration agreement, is wide enough to allow the completion of the arbitration process by the quantification of the damages the respondent may have incurred by reason of the applicant having given

the job to someone else to complete. If the applicant should consider that it also suffered damages by whatever the respondent did, I assume, without deciding the issue, that there is nothing precluding it from tabling those damages before the arbitrator in mitigation or in setting off.

[38] The arbitrator's ruling on 2 December 2020 was also a procedural award. He merely asked the applicant, contrary to its perceived procedural disability, to file further Submissions in rebuttal of the evidence of quantum tendered by the respondent in its Replication. This was purely an interlocutory order. It was manifestly designed to facilitate the smooth conduct of the arbitration. Such an award is not susceptible to challenge at this stage. It does not have any *res judicata* effect on any issue submitted for arbitration. But for the provisional order by this court on 14 April 2021 barring the arbitrator from continuing with the arbitration proceedings in the face of HC 722/21 that was then pending, it was perfectly permissible in terms of Article 16[3] of the Arbitration Act for the arbitration to proceed despite the pendency of those proceedings. The arbitrator had in fact indicated by his letter of 6 April 2021 that he would proceed.

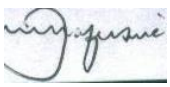
[39] In the circumstances, the applicant cannot succeed in the two cases. The following orders are hereby issued:

i/ The application in HC 722/21 is hereby dismissed.

ii/ The provisional order in HC 1355/21 is hereby discharged.

iii/ The costs of suit in both cases shall be borne by the applicant.

17 November 2021



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