PORTNEX INTERNATIONAL (PROPRIETARY) LIMITED
versus
ZIMASCO (PRIVATE) LIMITED
and
C.H. LUCAS N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 18 and 23 November 2021

Urgent Chamber Application-Urgency

T. Mpofu, for the applicant
D. Tivadar, for the 1st respondent

MUSITHU J:

This urgent chamber application is an offshoot of arbitration proceedings pending before the second respondent. The applicant seeks the following relief:

> "**TERMS OF THE FINAL ORDER**
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
> 1. An order staying of any kind of hearing or conduct of proceedings pending the determination of the application filed under Article 16(3) of the Arbitration Act [Chapter7:15].
> 2. Respondents opposing the application to pay costs of suit.
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> **INTERIM RELIEF**
> Pending the hearing of this urgent chamber application and the main application HC.5959/21, the Applicants pray for:-
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> 1. An order staying the arbitral proceedings set down for hearing on 17 November 2021 or any date thereafter before Second Respondent.
> 2. Respondents opposing the application to pay costs of suit of this urgent chamber application.
>
> ……..."

The application was placed before me around 09:00hours on 17 November 2021. Having considered the papers, I was of the view that the matter was not urgent, and had the parties informed of my decision. During the course of the day, I received a letter from the applicant's legal practitioners of record requesting to address me on the issue of urgency. I set the matter down for hearing on 18 November 2021 at 14:30hours to allow the parties to address me on the issue of

urgency. Before I turn to the parties submissions on the issue, it is pertinent that I give a brief background to the dispute.

Brief Facts

The applicant is a company incorporated in terms of the laws of South Africa. It is currently under business rescue in accordance with the laws of that country. The first respondent is a local entity, incorporated in accordance with the laws of Zimbabwe. A contractual dispute arose between the parties, and it was referred to arbitration. In the arbitration proceedings, the first respondent herein is the claimant, while the applicant is the respondent. Apart from defending the claim, the applicant also filed its own counterclaim under the same proceedings. The applicant raised a preliminary objection challenging the propriety of the arbitration proceedings. The nub of the objection was that the first respondent's claim was incompetent in the absence of a special dispensation to institute proceedings against the applicant on account of its status. Consequently, the second respondent did not have jurisdiction to preside over the claim. The respondents were put on notice of the intended objection.

Around 27 September 2021, the parties presented arguments on the point before the second respondent. The second respondent dismissed the objection with costs around 4 October 2021. The applicant claims that the decision to dismiss the objection was outrageously wrong. The applicant instituted proceedings under HC5959/21 to set aside that award. That application is pending before this court. The applicant's legal practitioners wrote to the second respondent advising that they were under instructions to stay the arbitration proceedings pending the outcome of HC5959/21. The applicant contends that its letter of 8 November 2021 was only a notice of the application intended to be made before the second respondent when the hearing resumed. The applicant further contends that the second respondent misunderstood its letter and made a decision to proceed with the hearing on 17 November 2021, without hearing submissions from the parties. The urgency of the matter was grounded on the need to suspend the hearing scheduled for 17 November 2021, pending the determination of HC5959/21. The applicant averred that HC5959/21 would be rendered academic if the hearing was allowed to proceed.

A decision by an arbitral tribunal on a preliminary point maybe challenged in terms of Article 16(3) of the Arbitration Act[1]. The article states as follows:

> "ARTICLE 16
> *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. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
> (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 party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of an arbitrator. 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. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
> (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."

Article 16(3) reposes an arbitral tribunal with discretion to halt or continue with proceedings pending the outcome of the High Court challenge. I considered the matter not urgent based on my interpretation of article 16(3). If the second respondent in the exercise of his discretion decided that proceedings shall continue notwithstanding the challenge of his decision then clearly the matter was not urgent. The applicant would suffer no prejudice as it had an alternative remedy to make the same challenge after the final award was rendered. The approach of this court is not to unnecessarily interfere with incomplete proceedings or the exercise of discretion by tribunals. Such interference is only warranted where there will be grave injustice to the party seeking the court's intervention in those incomplete proceedings.

In his submissions on this point, Mr *Mpofu* for the applicant averred that the second respondent did not comply with article 16 in that he denied the parties an opportunity to make submissions before deciding on the request to stay proceedings. According to Mr *Mpofu*, the letter of 8 November 2021 was only a notice of the applicant's intention to apply for stay of proceedings pending the determination of the High Court application. The second respondent however mistook it for the actual application to stay proceedings. In doing so he clearly misdirected himself by

[1] [*Chapter 7:15*]

denying the parties an opportunity to make representations before the tribunal. He submitted that the second respondent's email of 11 November 2021 which states that *'....I have determined and ordered that the hearing of oral evidence in this matter shall proceed on the 17th November 2021....',* pointed to a decision that was made without hearing the parties. While accepting that article 16(3) clothed the second respondent with discretion on whether or not to suspend proceedings, Mr *Mpofu* submitted that such discretion should not be exercised capriciously. He further submitted that article 16(3) only protected the second respondent if he himself acted within the confines of that law. By denying the request for stay of proceedings without hearing the parties, the second respondent clearly acted outside the provisions of that law.

When engaged by the court to explain the prejudice that the applicant would suffer if the arbitral proceedings were allowed to continue, Mr *Mpofu* submitted that the court should not allow its processes to be abused. It was not just about prejudice being occasioned to the applicant. The second respondent had acted arbitrarily in total disregard of the law.

In response, Mr *Tivadar* submitted that the second respondent did not act improperly. He made a decision based on the submissions made by the parties. In any case, the applicant had not raised a jurisdictional challenge in its statement of defence as required by article 16(2). At any rate, the preliminary objection on the issue of jurisdiction was way out of time. Article 16 was therefore not engaged at all. Mr *Tivadar* further submitted that the parties had agreed that in the event that the preliminary point failed, the hearing would proceed on 17 November 2021. In any event, the applicant had still not approached the second respondent with an application for stay of proceedings. Mr *Tivadar* further submitted that the applicant still had several remedies at his disposal which included an application to set aside the award under article 34.

In his reply Mr *Mpofu* maintained that article 16(3) required an arbitrator to weigh the parties' submissions on an application for stay of proceedings before proceeding to make a ruling. The hearing penciled for 17 November 2021 was supposed to be preceded by an application for stay of proceedings. The second respondent therefore committed a fatal error by proceeding to make a determination without hearing the parties.

Analysis

As I stated earlier, I declined to hear the matter on an urgent basis after a consideration of article 16. Superior courts are generally slow to interfere with uncompleted proceedings of lower courts and tribunals. In *Attorney General* v *Makamba*[2] , MALABA JA (as he then was) held:

> "The general rule is that a superior court should interfere in uncompleted proceedings of the lower courts only in exceptional circumstances of proven gross irregularity vitiating the proceedings and giving rise to a miscarriage of justice which cannot be redressed by any other means or where the interlocutory decision is clearly wrong as to seriously prejudice the rights of the litigant." (Underlining for emphasis).[3]

Article 16(3) accords the arbitral tribunal discretion on whether to proceed with the arbitral proceedings pending the determination by the High Court of a challenge on the tribunal's decision. The court will still not interfere even in those instances where there is a proven gross irregularity if such an irregularity can be addressed through other means. In *casu*, the finding by the tribunal on the preliminary point on absence of jurisdiction prompted the application for the setting aside of that interim award. The applicant claims that the second respondent ought to have heard submissions on its application for stay of proceedings. In his submissions, Mr *Tivadar* seemed to confirm that such application was never entertained by the second respondent because none was ever made by the applicant. What is clear however is that the second respondent determined that he would proceed to hear oral evidence on 17 November 2021, and directed that the matter must proceed on the day.

The issue that arises is whether the alleged irregularity cannot be redressed through other means. As already stated, article 16(3) permits the second respondent to continue with the arbitral proceedings pending the determination of the High Court matter. It does not clearly state that he must have heard submissions on an application for stay of proceedings. Article 34 permits a party to approach this court for the setting aside of an arbitral award when it is rendered at the conclusion of the arbitral process. Mr *Mpofu* stated that considerations were not just limited to prejudice likely to be occasioned to the applicant. The court was urged to jealously guard against the abuse of its processes especially where an arbitral tribunal clearly abused its powers. In the court's view, the alleged irregularities can be effectively dealt with in terms of article 34. The applicant can seek

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[2] 2005 (2) ZLR 54 (SC) at 64 C
[3] See also *Prosecutor General of Zimbabwe v Intratrek Zimbabwe (Private) Limited & Another* SC 67/20: *Masedza & Ors v Magistrate Rusape and Another* 1998 ZLR 36

redress under article 34 once the arbitral proceedings are terminated. This is clearly not one of the cases where the alleged irregularity will seriously prejudice the rights of the applicant if the proceedings are not stayed.[4] Indeed the applicant has failed to point to any prejudice that it will suffer if proceedings are allowed to continue in terms of article 16(3). In any case, the applicant also made a counterclaim to the first respondent's claim. Both claims are ready to be determined by the tribunal.

I also pause to observe that the proceedings that the applicant sought to have stayed were already underway when the parties appeared before me. It was for the foregoing reasons that I declined to deal with the matter on an urgent bases.

Resultantly it is ordered that:

The application is not urgent and it is hereby removed from the roll of urgent matters.

Madzima Chidyausiku Museta, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners

[4] See *Masedza* supra