HB 212/17
HC 2947/15
X REF HC 230/16

ELPHAS MAVUNE MAPHISA

Versus

BULAWAYO MUNICIPAL COMMERCIAL UNDERTAKING t/a INGWEBU

And

GORDEN GEDDES

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 14 OCTOBER 2016 & 13 JULY 2017

Opposed Application

Applicant in person
Advocate Nkomo for the 1st respondent
2nd respondent in person

TAKUVA J: This is a court application for review of a determination of the arbitrator (2nd respondent) on a point *in limine* raised by the applicant in arbitration proceedings between applicant and 1st respondent. This application is pursuant to sections 26 and 27 of the High Court Act [Chapter 7:06] as read with O33 of the High Court Rules 1971.

The background facts which are to a large extent common cause are as follows:

The applicant and the 1st respondent entered into a franchise agreement on 23rd of April 2013 (see annexure "M" to the founding affidavit). In terms of the agreement the 1st respondent as franchisor granted to the applicant as franchisee the right to operate the business of one of 1st respondent's beer outlets known as Pata Pata Tavern. In that agreement the parties are stated as; Bulawayo Municipality Commercial Undertaking (BMCU) t/a Ingwebu Breweries (a commercialized entity of the City of Bulawayo herein represented by Reginald S. Ndlovu in his capacity as Managing Director he being authorized thereto by resolution of the Board of Directors)" as the franchisor and "Elphas Mavune Maphisa" as the franchisee.

Applicant operated Pata Pata Tavern in terms of the franchise agreement between the parties for approximately two years. He then breached the terms of the agreement by failing to honour his obligations thereunder, particularly the payment of owner's rates and royalty fees to the 1st respondent. As at May 2015 the outstanding amount was US$23 365,99. Faced with the breach 1st respondent initiated arbitration proceedings pursuant to clause 8.1 of the franchise agreement.

At the arbitration hearing the applicant raised preliminary points for determination by the arbitrator, namely that:

1. The franchise agreement between the parties is *null* and *void* because, "Ingwebu Breweries" and "Bulawayo Municipal Commercial Undertaking" are not legal entities;
2. There was no resolution of the Board of BMCU authorising Mr R. S. Ndlovu to act on its behalf.

After hearing argument, the arbitrator made three findings on 20 October 2015 on the points *in limine* namely;

1. The process leading to the appointment of the arbitration tribunal complied with the franchise agreement.
2. The preliminary point raised by the applicant on the legality of the BMCU to enter into a franchise agreement and the authority of R. S. Ndlovu to represent the undertaking as the managing director is rejected.
3. The franchise agreement between the parties signed by R. S. Ndlovu as managing director of BMCU on 23rd of April 2003 is an enforceable contract.

Aggrieved by this determination the applicant filed this application seeking a review of the arbitrator's determination. The sole ground of review relied upon is couched in the following terms:

> "The arbitrator reached a decision so grossly irregular and illogical that no other reasonable tribunal would have, if it had regard to the same facts and arguments raised, ruled similarly".

However, this is inconsistent with the relief sought which is fourfold. Applicant sought relief as follows:

1. The arbitrator's ruling on the issues *in limine* raised by applicant be set aside.
2. The applicant be discharged from paying any amounts due to the respondent in terms of the franchise agreement between the parties.
3. The court must order the City of Bulawayo to negotiate a new agreement with the applicant;

   Alternatively
4. The City of Bulawayo and Mr R. S. Ndlovu restitute the applicant the initial fee in the sum of US$26 600,00 and all costs and losses incurred to date and yet to be quantified.

I must point out that after filing this application, the applicant did not seek interim relief staying the arbitration proceedings pending the determination of the review application *in casu*. The result was that the arbitration hearing on the merits continued with full participation of the applicant.

The respondents opposed this application arguing that it is incompetent in light of Article 34 of the First Schedule to the Arbitration Act (Chapter 7:15) ("Model Law"). Secondly, it was contended that the application itself is incompetent by virtue of the fact that the arbitration has been heard on the merits. Respondents also challenged the competence of part of the relief sought. Finally, it was argued that the ground for review is without merit.

The respondents took the 1st two points *in limine*. As regards the 1st point it was contended that since the application for review is made pursuant to sections 26 and 27 of the High Court Act (supra) as read with Order 33 of the High Court Rules, 1971, the application for

review is incompetent in light of the provisions of article 34 of the Model Law which stipulates the only and exclusive recourse to a court against an arbitral award. This is the question that arose for determination by the Supreme Court in *Mtetwa and Anor* v *Mupamhadzi* 2007 (1) ZLR 253 (S). At p 245G-255C, GWAUNZA JA with whom SANDURA and GARWE JJA concurred, had this to say:

> "In the court *a quo* the applicant sought an order that 'the arbitration order in this matter and the order of the High Court registering it be and are hereby set aside.' It is contended for the appellants that they were perfectly within their rights to file an application for review/setting aside of the decision of the arbitrator in terms of o33 r256 of the High Court Rules, since there is nothing in that rule which precluded them from bringing such application. This contention, I find has no validity. As discussed below, the Model Law, in its Article 34 (1), makes it clear that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) thereof …
>
> The use of the words 'exclusive' and 'only', in my view, suggest that there is to be no compromise when it comes to an attempt to have an arbitral award set aside. The application must be made in terms of the provisions cited. That provision quite simply precludes the applicants from filing their application for the setting aside of an arbitral award, otherwise than in terms of paras (2) and (3) of Article 34."

PATEL J (as he then was) echoed the same sentiments in *Star Africa Corporation Ltd* v *Sivnet Investments (Pvt) Ltd and Anor* 2011 (2) ZLR 123 (H) at p 123F in the following words:

> "An arbitration award cannot be challenged or set aside by way of review proceedings. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of art 34 of the Model Law. …
>
> The differences between an application under art 34 and review proceedings under the High Court Act [Chapter 7:06] generally are (a) that the interventionary powers of the High Court are confined to setting aside the impugned award and do not extend to any other corrective measure; and (b) that the time limit for a review application is eight weeks, subject to extension for good cause, while the period stipulated under art 34 (3) is three months without the possibility of extension."

See also *Courtesy Connection (Pvt) Ltd & Anor v Mupamhadzi* 2006 (1) ZLR 479 (H).

What was held to be impermissible in the above cases is exactly what the applicant requests this court to do. Quite clearly the application for review of an arbitrator's decision is incompetent and it is hereby dismissed with costs for that reason.

Assuming I am wrong, the application would still be incompetent for reasons hereunder. Generally, a determination of a tribunal on a point *in limine* is reviewable on the ground of gross irregularity if here was an error of law causing the tribunal to erroneously refuse or decline jurisdiction on the merits of the matter. The reason for the determination on a point *in limine* to be reviewable is that the applicant would have been deprived of his right to have the application considered in accordance with the law. This is not what happened *in casu* in that the applicant *in casu* was the "respondent" in the arbitration proceedings and the determination of the arbitrator dismissing his point *in limine* did not have the consequence of depriving applicant of the right to be heard on the merits.

In fact, after the arbitrator dismissed the point *in limine*, applicant fully participated in the arbitration proceedings and was heard on the merits. The hearing of the arbitration on the merits means that the application for review was overtaken by events. Consequently, the application for review presents the court with duplication of proceedings and a moot cause. The courts are not there to decide moot points – see *Mpukuta* v *Motor Insurance Pool & Ors* 2012 (1) ZLR 192 (H) at 194F.

On the merits, the sole ground for review raised by the applicant lacks specificity regard being had to the arbitrator's determination sought to be reviewed. The determination consists of three findings, yet the applicant does not specifically allege gross procedural irregularity in respect of any of the three. Instead, his ground for review amounts to a bald assertion that the decision reached by the arbitrator is "so grossly irregular and illogical" that no reasonable tribunal faced with the same facts and arguments could have arrived at it.

The nature of judicial review was succinctly put by MALABA J (as he then was) in *Bridges and Hulme (Pvt) Ltd* v *The Magistrate, Kwekwe & Anor* 1996 (1) ZLR 189 (H) at p 201B-C. The learned judge had this to say;

> "The High Court does not have to concern itself with the correctness or otherwise of the decision itself. A review of a decision involves going behind it and tracing the route taken by the inferior court leading up to the decision. In the performance of its review powers to see whether the inferior court followed he correct path, defined for itself the correct legal issues, adopted the correct interpretation of the provisions of the statute, and based its decision to exercise its jurisdiction on legitimate grounds, the High Court is concerned with establishing the validity of the decision. In so doing it does not have to be fastidious. It must be accommodative of minor mistakes, because setting aside a decision of another court should be done when it is absolutely necessary in the interests of justice."

In casu, the applicant's ground for review challenges the substantive correctness or otherwise of the arbitrator's decision. This is evident from applicant's founding affidavit in paras 3.1, and 2.15 and further, the applicant added the following unsubstantiated deposition which are totally unrelated to the sole ground for review raised;

> "2.14 following from the preceding arguments it can be summerised among other matters that:
>
> (a) Bulawayo Municipal Commercial Undertaking BMCU t/a Ingwebu Breweries are non-existent entities
> (b) The authority of R. S. Ndlovu from non-existent entities was not effective in terms of the franchise agreement
> (c) The arbitrator grossly misrepresented submissions presented to him by both the applicant and the respondent and consequently grossly misdirected himself in his findings.
> (d) The arbitrator omitted more relevant information presented to him by the respondent
> (e) The arbitrator did not follow the principles of law and/or used incorrect biased principles of law.

(f) The arbitrator was grossly biased."

Applicant makes it abundantly clear in par 2.15 of his founding affidavit that what he is not happy about is that his point *in limine* was rejected. It is this decision that he is aggrieved with. It is trite that the "gross irregularity" ground for review under section 27 (1) (c) of the High Court Act relates to the procedural aspects of the proceedings under review, not the substantive correctness of the decision. Only by way of appeal can a party challenge the substantive correctness of the decision arrived at by the tribunal – see the *Bridges'* case *supra.*

Consequently, in so far as the ground for review raised seeks to challenge the substantive correctness of the arbitrator's determination, it cannot be said that there is a proper application for review.

Further part of the relief sought by the applicant for example that he be released from the duty to discharge his contractual obligations under the franchise agreement, that a mandatory interdict be issued directing 1st respondent to negotiate a new agreement with the applicant and that applicant be restituted by the City of Bulawayo and R. S. Ndlovu in the sum of US$26 600,00 being the "initial fee" as well as "all costs and losses incurred to date" is incompetent in that it is not provided for under section 28 of the High Court Act which stipulates competent relief in court applications for review. The section provides:

> "On a review of any proceedings or decision other than criminal proceedings the High Court may, subject to any other law, set aside or correct the proceedings."
>
> The relief sought by applicant has nothing to do with setting aside or correcting proceedings but has everything to do with "other corrective measures" which are not claimable by way of review proceedings" – see *Star Africa Corp Ltd* case *supra.*

Applicant's contention that the arbitrator's determination on the point *in limine* is so grossly irregular and illogical that no tribunal faced with the same facts and arguments could arrive at has not been substantiated. In my view, it is untenable and manifestly unsound.

In *Bridges'* case *supra* it was held that:

"The High Court has power to review decisions of inferior courts on the ground of error of law if the error amounts to a gross irregularity, that is, if it is substantial, material or manifest in that it causes a miscarriage of justice, further, that an error of law on the part of an inferior court or tribunal is likely to constitute a gross irregularity in the following circumstances:

(a) where the court or tribunal asks a wrong question of law, causing it to misunderstand the nature of the inquiry and misdirecting its mind;
(b) where the error of law causes the court or tribunal to fail to appreciate the nature of discretionary powers vested in it;
(c) where a misconstruction of the provisions of a statute causes the court or tribunal to misconceive the extent of its jurisdiction;
(d) where the decision of the court or tribunal was dependant on the error of law or was substantially or manifestly influenced by it that is to say, where the error was the *raison detre* of the decision;
(e) where the error of law on a point *in limine* or a preliminary application causes the court or tribunal erroneously to decline jurisdiction."

In dismissing the point *in limine* raised by the applicant the arbitrator made the following findings;

1. In terms of section 4 (8) of the Urban Councils Act [Chapter 29:15] a municipality as a corporate body is capable of suing and being sued and performing juristic acts affecting the municipality;
2. The Charter of the City of Bulawayo empowers the City of Bulawayo to establish commercialized entities under the control of a business committee;
3. The process of approving the franchise agreement is supported by:
   3.1 the minutes of the BMCU meeting of 5 may 2011 which resolved to approve the criteria for selection of franchise applicants.
   3.2 the City of Bulawayo Town Clerk's recommendation to the Business Committee of BMCU dated 8 December 2011 recommending the franchising of 32 outlets.
   3.3 the minutes of the BMCU Business Committee meeting of 14 December 2011 which resolved that the BMCU be allowed to franchise earmarked outlets for 1 January 2012.

3.4 Mr R. S. Ndlovu as managing director was present at the meetings of the BMCU and it is clear that he was following the resolutions of the BMCU based on deliberations and recommendations.

In view of the above findings, the determination of the arbitrator on the point *in limine* cannot be said to be:

> "… beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and far minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award …" See *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) at p 88E.

Also applicant's contention that the franchise agreement is invalid and unenforceable because "Ingwebu Breweries" and "Bulawayo Municipality Commercial Unit" are not legal entities is untenable because of the following:

(a) The franchise agreement has been performed substantially by applicant himself for over two years since he took over Pata Pata Tavern in 2013 to date. Applicant is estopped from contending that the franchise agreement which he has performed for over two years and continues to enjoy the benefits under its terms is invalid and unenforceable.

(b) Applicant's denial that BMCU t/a Ingwebu Breweries is a commercialized entity of the City of Bulawayo is illogical and *mala fide* since that patent fact is evident *ex facie* the first page of the franchise agreement which applicant signed.

(c) Applicant's observation that Mr R. S. Ndlovu had no authority to enter into the franchise agreement when the City of Bulawayo confirmed that he had the authority to do that is hollow and *mala fide* in that it is actuated by a burning desire to escape from performing his obligations under the franchise agreement as is clearly shown by the relief sought in the 2nd paragraph of the draft order.

In any event the applicant's contention that the City of Bulawayo cannot enter into a valid enforceable contract through its trading units or entities is unsound. Order 2A rule 8C of the High Court Rules, 1971, provides that: "Subject to this order a person carrying on business in a name or style other than his own name may sue or be sued in that name or style as if it were the name of an association …"

In casu applicant has sued the City of Bulawayo in its trading name or style pursuant to rule 8C *supra*. It would be extremely insincere for applicant to turn around and contend that the City of Bulawayo cannot lawfully contract through its trading units.

All in all I find that applicant's argument is totally devoid of merit.

In the result, the application for review is hereby dismissed with costs.

Messrs Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners