COURTESEY CONNECTION (PVT) LTD
and
STANLEY MTETWA
versus
DAVID MUPAMHADZI

HIGH COURT OF ZIMBABWE
MAKARAU J
Harare, 24 May 2006

Opposed Application

Mr *Nyakunika,* for applicants
Mr *Kasusu,* for respondent

MAKARAU J: On 1 September 2004, one C A. Banda, acting as an arbitrator between the above parties, made available his award in which he upheld the agreement of sale and construction between the parties. In his award, he ordered the applicants to transfer certain piece of land to the respondent and to complete the construction of developments on the piece of land as per the agreement.

The applicants were not impressed by the award. On 10 November 2005, they filed this application, which they styled: "APPLICATION FOR REVIEW AND LEAVE TO APPLY OUT OF TIME." In the application, the applicants sought to have set aside the arbitral award on the basis that it is grossly unreasonable.

After hearing submissions from counsel, I, on the turn, dismissed with costs the application for condonation and indicated that my reasons would follow. These they are.

Before I proceed to give my reasons, it is necessary that I set out in brief, the background facts to this application.

The parties had an agreement of sale of a certain piece of land and the construction of a residence on that piece of land. A dispute arose between the parties in connection

with the agreement, which dispute was submitted to C. A. Banda, the arbitrator, who made available his award as detailed above.

On 19 January 2005, the respondent approached this court for the registration of the award. This was duly granted and an order was issued on 19 July 2005. In the order registering the award, an order of costs on the scale pertaining to legal practitioner and client was made against the applicants. A notice to tax such costs was served on the applicants, setting the taxation down for 8 November 2005. On 10 November 2005, 2 days later, this application was filed.

Two issues immediately present themselves to me at this stage. Firstly, the application filed on the 10 November 2005 was not an application for review under sections 26 and 27 of the High Court Act [*Chapter 7.06*] as read with Order 33 of the High Court Rules, 1971.

It is now a settled point in this jurisdiction that arbitral awards made under the Arbitration Act [*Chapter 7.15*] ("the Act"), may only be set aside in terms of Article 34 of the Model Law set out as the First Schedule to the Act. (*See Zesa v Maphosa* 1999 (2) ZLR 452 (S), *Pamire and Ors v Dumbutschena* N O and Another 2001 (1) ZLR 123 (H) and *Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers Union and Anor* 2001 (2) ZLR 388 (S).

The decisions in the above matters clearly spell out that the Model Law sets out the sole grounds upon which an award made under the Act may be set aside. It thus follows that an arbitral award made under the Act may only be set aside in terms of the procedure set out in the Act as Article 34 sets out the procedure to be followed. It further follows that the review procedures set out in the High Court rules are not of direct application to applications to set aside arbitral awards made under the Act.

On the basis of the above, it would appear that the applicants approached the court using the incorrect procedures as an application to set aside an arbitral award is not strictly speaking, an application for review under the rules. The applicants appear

to have proceeded on the mistaken premise that the application filed was a review application in terms of the High Court Act and Rules. This appears not only from the tile given on the application and the grounds for setting aside the award given in the application. I was however hesitant to use this departure from the rules as the basis for my decision as the applicants did not even comply with rules 256 and 257 in that no grounds of review appear *ex facie* the application and the arbitrator, as the authority whose award is under attack, was not cited as a party.

Assuming then as I do in favour of the applicants, that the application before me was an application brought under Article 34 of the Model Law, I now turn to consider the application for condonation.

It is common cause that in terms of the Act, an application to set aside an award may be filed with this court within 3 months of receipt of the award by the party seeking to have it set aside. The application before me was filed 14 months after the award was made available, indisputably out of time and hence the application for condonation.

Article 34 (3) of the Model Law provides:

> "An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request has been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal."

In my view, the provisions of Article 34 (3) provide a period within which the right to set aside an arbitral award may be exercised at the discretion of the party unhappy with the award. It is my further view that once the period runs out, the right is lost irrevocably.

The language used in the paragraph of the article appears to me to be clear and admits of no ambiguity. The clear meaning of the paragraph is that an application to set aside an award may not be made later than 3 months of the date of receipt of the

award by the party seeking to have it set aside. The article does not provide for a possible extension of the period for good cause shown or on any other ground.

Thus, using the language of the statute, I find no basis for holding that the court has power in terms of the statute to grant an extension within which the right to have set aside an arbitral award may be enjoyed. Once it is not exercised within the stipulated period it is lost and irrevocably so. No application for condonation can be made once a party delays in bringing an application to have an arbitral award set aside in terms of Article 34 of the Model Law.

While it is trite that this court has inherent powers to grant condonation for departures from its rules, in instances where the legislature has spoken clearly, setting out a time limit within which certain actions can be brought, the court cannot exercise its inherent powers to extend such time limits unless such power is granted in the statute limiting the right to bring the action. One can think of the provisions of the Prescription Act [*Chapter 8.11*] and of the Customs and Excise Act [*Chapter 23.02*] which prescribe time periods within which certain actions have to be brought before the courts if they are not to be lost. It is trite that the court does not have power to extend such periods even on very good cause shown. I would therefore put Article 34(3) of the Act on the same level as such provisions and hold that the general power that the court has to control its procedures does not extend to granting condonation for the late filing of applications under this article. I would still hold the same view even if the Act does not describe the period given in the article as a prescription period. The effect of enforcing the article is in my view the same as enforcing a provision that prescribes an action.

I find some support for my view in the decision of SMITH J in *Murphy v Director of Customs and Excise* (1992) (1) ZLR 28 (H). In that case, the learned judge was dealing with the provisions of the Customs and Excise Act that then provided for a 3 month time limit within which certain actions in relation to goods forfeited to the

State by the Director of Customs had to be brought. He had no hesitation to hold that Murphy, the applicant was barred from bringing the action as he had delayed by some three weeks.

While the learned judge in the *Murphy* case elected to use the word 'barred" when describing what had happened to the applicant's right to being the action, the effect of his decision on that point was to hold that the applicant had lost his right to bring the action. The action had prescribed. It had been lost irrevocably by reason of the 3 weeks delay.

I am further persuaded to hold as I do by the fact that the Act is of international pedigree and certainty and finality of legal proceedings were paramount in its formulation. It would destroy both features if courts of the different countries adopting the Model Law were to be allowed to extend the period within which an award is to be set aside. Section 2 of the Act specifically provides that in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.

On the basis of the above, I would hold that the right to have set aside an arbitral award was irrevocably lost when the applicant failed to bring it on or before 1 December 2004, the last day of the 3 months period stipulated in the Act.

Assuming that I erred in dismissing the application on the above basis, I still would have dismissed it on another.

Firstly, the reason given for the delay is far from impressive. The applicant alleges that his retiring legal practitioners had a dispute with the arbitrator over the arbitrator's fees and pending settlement of this dispute, the reasons for the award were withheld. It is common cause that the dispute relating to fees was settled in October 2004 and thereafter, no reason has been advanced as to why the application to set aside the award was not filed.

Secondly, the applicants have sought to argue that they cannot afford to complete the building of the agreed residence on the stand purchased by the respondent and thus, for reasons of financial incapacity, the arbitrator should not have compelled them to put up the residence. Were such a defence acceptable at law, bad bargains would never found valid contracts and the doctrine of sanctity of contract would have no meaning in our law. In any event, the ground advanced by the applicants, that of financial hardship as a result of complying with the award, is not a ground recognized under Article 34 of the Model Law.

Thus, even if the applicant had the right to request this court to extend the period stipulated in the Model Law, which right I hold they do not have, they would not have persuaded me that their circumstances are such that the indulgence can be granted. They have neither good reason for the delay nor a bona fide defence to challenge the recognition of the award.

It is on the basis of the above that I dismissed the application for condonation.

Mutezo & Company, applicants' legal practitioners
Mantsebo & Partners, respondent's legal practitioners