ZIMBABWE SCHOOLS EXAMINATION COUNCIL
versus
MOSES H CHINHENGO (FORMER JUDGE) N.O
and
TARCH PRINT ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 5 February 2018 & 28 March 2018

Opposed

Z T Zvobgo, for the applicant
A F Majachani, for the 2nd respondent

MATANDA-MOYO J: Applicant sought the setting aside of part of the arbitral award in terms of Article 34 of the Arbitration Act [*Chapter 7:15*].

The brief facts are that the second respondent sometime in 2011 won a tender for the binding of applicant's 'O' Level and 'A' level result slips for the year 2004 to 2010. Subsequent to that a contract was entered into between applicant and second respondent. In terms of the contract the p[rice was fixed at $71 620.50 for the binding exercise which was agreed to take 21 days. Applicant only managed to provide all the batches in 2014. By that time applicant had paid $69 255.00 leaving a balance of $2 365.85 in terms of the contracts. However the second respondent raised invoices which had a balance of $43 708.35 from a new figure of $112 963.35. The applicant refused to pay the revised figure but offered to pay $2 365.85. The parties declared a dispute and the matter was referred for arbitration. The arbitrator made the following award;

a) That the applicant pays to the second respondent the sum of $18 129.80 including VAT, for the additional costs occasioned by the extension of the Agreement signed on 18 January 2012 from March 2012 to August 2014 and

b) That applicant pays to the second respondent the sum of $2 365.85 including VAT, being outstanding balance of the contract price.

Applicant now seeks the setting aside of the first part of the arbitral award ordering it to pay $18 129.80, arguing that such award is contrary to public policy. Applicant averred that the award is contrary to public policy in the following respect;

1) That even parties having agreed that even "in the event that the applicant delayed in submitting the necessary materials to the second respondent, the second respondent would be liable for any additional costs that maybe incurred by the applicant to meet the agreed 21 days deadline."

The applicant submitted that the Arbitral Tribunal's conclusion that such agreement was too restrictive and its further determination of additional costs outside the agreed period of 21 days fell outside the terms of referral. Secondly after having found that the second respondent had failed to prove the alleged additional costs, the Tribunal ought to have dismissed the claim.

The respondent opposed the granting of the order sought by the applicant on the following grounds;

a) That the applicant totally misconstrued the issues referred for arbitration. The issue referred for arbitration was the determination of the monetary value of additional costs incurred by the second respondent as a result of failure by applicant to provide all materials for binding within the agreed 21 days. Such claim was in terms of clause 4.2.6 of the contract.
b) That the award is based on evidence both oral and documentary provided by the second respondent.
c) That the arbitrator determined issues referred to him and never determined issues outside scope of referral.
d) That the award cannot be said to be contrary to public policy

Applicant raised a point *in limine* that the notice of opposition is invalid in so far as it does not comply with r 227 (2) (d) of the High Court Rules 1971 which provides;

> "(2) Every written application and notice of opposition shall–
> where it comprises more than 5 pages, contain an index clearly describing each document included and showing the page number or numbers at which each such document is to be found."

Applicant averred that the respondent's opposing documents comprise of 10 pages and yet have no index, one not paginated and fail to clearly describe each document. In that respect applicant argued that the opposition filed is fatally defective. For that proposition, counsel for the applicant referred me to the case of *Chikura N.O & DPC* v *Al Sham's Global BVCI Ltd* SC 17/17 and *Chasweka* HH 42/08.

The second respondent conceded the fact that its opposition papers contains no index contrary to r 227 (2) (d), but implored the court to exercise its discretion in terms of r 4 C to condone the departure from the rules.

Rules of court are made for the convenience of the court. Rule 227 (2) (d) is especially meant to guide the court in easily finding papers filed and the description of such papers. The court can easily identify a document as per the index filed. Indexes are filed when papers filed comprise of more than 5 pages for ease of reference. The respondent failed to <u>so</u> file an index with its opposition papers. The question is whether the remedy is to expunge the opposing papers from the record and treat the matter as unopposed. It is my views that whilst it is imperative for litigants to comply with rules of court, non-compliance should not automatically result in dismissing the offending litigant's case where other remedies are available in the interest of justice. The interest of justice demand that matters be determined on merits rather than on technicalities. Applying the rules stringently may lead to injustices to litigants and would go against the principles and purpose of encouraging persons to follow the law.

The court should consider the degree of non-compliance, prejudice suffered by the other party due to non-compliance with the rules and if such prejudice cannot be remedied by ordering compliance with an order of costs. I do agree with what the court said in *Zimbabwe Open University* v *Mozambique* 2009 (1) ZLR 101 (H) that not every infraction to the rules is fatal to the proceedings. The same goes for the infraction in the present case. Non-compliance with r 227 (2) (d) of the rules is not fatal to the proceedings. There is no evidence of prejudice to the applicant. The non-compliance caused inconveniences though to the other party and to the court. A consolidated index has since been filed by the applicant though. The court in the circumstance exercise its discretion in terms of r 4 C of the rules and condones the non-compliance.

Coming to the merits of the matter applicant argued that the first part of the award offends Article 34 (1) (iii) and (iv) of the Arbitration Act. Article 34 provides;

> "(1) 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 this article.
> (2) an arbitral award may be set aside by the High Court only if (a) the party making the application furnishes proof that–
> -----
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration
> ----
> (b) The High Court finds that–
> (ii) the award is in conflict with the public policy of Zimbabwe."

The applicant submitted that part (1) of the award constitutes a palpable inequity and is so outrageous in its defiance of logic and intolerably injures the concept of justice in Zimbabwe. Applicant argued that that part of the award offends the principle of freedom of contract. It is applicant's argument that the arbitrator took away applicant and second respondent's right to freedom of contract and contracted on behalf of the parties by introducing new terms

The portion complained of reads;

> "Clause C4.2.6 provides that–
>
> "If the client delays in submitting any materials, reports or other documents to the Contractor, the client shall be liable for any additional costs may be incurred by the contractor to meet the agreed deadlines."
>
> The respondent has interpreted this clause to mean that the additional costs for which the respondent would be liable are those, if any, incurred only over the 21 days. <u>I think this interpretation is overally restrictive.</u> I note however that the claimant accepted the respondent's interpretation because it is one of the agreed facts (para 3.6):
>
> "In the event that respondent delayed in submitting the necessary materials to claimant, respondent would be liable for only additional costs that maybe incurred by the claimant to meet the agreed 21 days deadline."

The applicant argued that the above matter had not been submitted to the arbitrator for interpretation. The parties agreed on the interpretation of that provision of the contract.

It is true that an Arbitral Tribunal's powers are limited to the scope of matters brought before it for determination. The case of *Inter-Agric (Pvt) Ltd* v *Mudavanhu andOrs* SC 9/15 which I was referred to by the applicant is quite instructive on the above principle. GOWORA JA had this to say;

> "In addition, at law, the arbitrator was only competent to determine the dispute between such parties as had been referred to him by the labour officer. Thus, he was confined to his terms of reference. He had no mandate beyond that which had been referred to him."

The issues referred to the arbitrator for determination are on pages 137 – 138 of the record and are as follows

"1. Whether the cost of hiring the Binding Machine in the sum of US$18 810.00 from March 2012 to April 2016 should be borne by the respondent.

2. Whether the cost of hiring casual workers by claimant in the sum of US$17 450.00 from March 2012 to April 2014 should be borne by the respondent.

3. Whether claimant is entitled to an inflation adjustment for increased prices of raw materials for the extended period of the contract between March 2012 to April 2016."

In determining the above, the arbitrator was to be guided by the statement of agreed facts by the parties. The parties had no dispute pertaining to interpretation of Clause 4.2.6 of the contract. If follows that the interpretation of that clause was not an issue. Whether "restrictive or not" the parties were comfortable with their interpretation of that clause. It is therefore my view that in further interpreting Clause 4.2.6 above the arbitrator violated s 34 (2) (iii) of the Arbitration Act.

The applicant also sought the setting aside of the arbitral award on the basis that if offends the public policy of Zimbabwe. The court is obliged to set aside an award which is contrary to public policy if it is satisfied that "the reasoning or conclusions in any award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so for reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award." See *ZESA* v *Maposa* 1999 (2) ZLR 452 (S).

The applicant complained that the arbitrator did not interpret the contract between the parties but went on to make a new contract for the parties, thus violating the principle of sanctity of contracts. It is an accepted principle that judicial offices have a duty to interpret contracts and not to contract on behalf of litigants. See *Old Mutual Shared Services (Pvt) Ltd* v *Shadaya* HH 15/13 where the court made it clear that it is not the duty of courts to create another contract for the parties. The courts must simply give effect to such contracts – See also *S.A. Savings and Credit Bank* v *Bradbury and Others* 1975 (10 SA 936 (T).

What is meant by "contrary to public policy" was set out in *ZESA* v *Maposa* 1999 (2) ZLR 452 (S) in the following;

> "the court will only interfere with an award on the grounds of public policy if "the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable

> inequity that is so far reaching and outrageous inn its defiance of logic on accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably heart by the award."

The arbitrator after analysing evidence came to the conclusion that the respondent never raised any complaint against the delay by applicant in supplying the result slips. Respondent continued accepting the slips. The arbitrator made a finding that the respondent through its conduct clearly elected to abide by the contract. He went further in para 9 of the award to say;

> "There is no indication that the claimant (respondent hereby) ever contemplated holding the respondent in breach or terminating the agreement---. The claimant (respondent herein) tacitly waived its contractual rights. The respondent (applicant) correctly states that its breach was condoned and that the breach cannot now provide the claimant with a legally sustainable cause of action."

The arbitrator also found that the respondent failed to quantify its claim. The arbitrator observed the following;

> "The claimant (respondent herein) does not establish the cost was reasonably incurred in light of sporadic delivery of examination results. It does not show why the cost of hire is a basis of computing the loss particularly having particular regard to the fact that the claimant did not advise the respondent that it would hire the sold foiling machine from South Africa."

From the above the arbitrator seemed to be saying the amount of work remained the same though delayed. And the respondent waived its rights to claim breach of contract. The arbitrator also found that the respondent had failed to discharge the onus on it of proving its claim.
Having made such findings the arbitrator was supposed to end there and dismiss respondent's claim. By going further to award damages not proven the arbitral award become outrageous. It then goes beyond mere faultiness and clearly does not fall under those damages which are by their very nature difficult to assess with certainty. The respondent was claiming extra costs of hiring equipment and hiring labour and an adjustment in terms of inflation, which damages are easily quantifiable to then place such damages in the class of damages referred to in *Mavheya* v *Mutangiri and Others* 1997 (2) ZLR 426 (H) is untenable. To allow the present decision to stand will erode and undermine the concept of justice in Zimbabwe.

In the result I am satisfied that this award warrants to be set aside in terms of s 34 of the Arbitration Act.

In the result I order as follows;

1. The application succeeds and para (a) of the operative part of the arbitral award handed down by first respondent on 21 March 2017 be and is hereby set aside.
2. The second respondent shall pay costs of suit.

Dube, Manikai & Hwacha, for the applicant
Mberi Chimwamurombe Legal Practice, for the 2nd respondent