ONEL ELECTRICAL ENGINEERS (PVT) LTD
versus
UNKI MINES (PVT) LTD
and
DAVID A WHATMAN N.O

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 22 October 2018 & 31 October 2018

Opposed Application

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

MUZENDA J: This is an application made in terms of Article 16 of the Arbitration Act, [*Chapter 7:15*] where the applicant is seeking for the following relief:

1. Second respondent's (the arbitrator) preliminary award of 5 March 2018 in which he declines jurisdiction to consider the adjudicator's determination in the matter between Onel Electrical Engineers (Pvt) Ltd and Unki Mines (Pvt) Ltd be and is hereby set aside in its paras 2, 3, 5 and 6.
2. The hearing of the substantive matter shall be proceeded with a different arbitrator which the parties shall choose in terms of the arbitration agreement.
3. First respondent shall bear the costs of suit.

The background of the events leading to this application is crisply set out by the Applicant. Applicant and first respondent, concluded a contract in terms of which applicant was to supply, install and commission an electrical plant associated with first respondent's housing project in Shurugwi. Applicant could not fully prestate in terms of the contract because certain

critical path-works were not made ready by first respondent. It was first respondent's obligation to ensure that the infrastructure thus required was made ready. This default yielded the issue by applicant of various compensation events. No dispute was raised by the first respondent in relation thereto. There were some other notifications which were supposed to have been made by the project manager, who is first respondent's own employee. As there was no dispute between the parties, first respondent indicated that it would acquit its obligations. It even asked for an invoice only to change its position after it alleges it had received legal advice.

The adjudicator appointed by the parties upheld the claim by the applicant. He held that first respondent had to pay applicant. First respondent issued a notice of dissatisfaction arguing that the adjudicator had no jurisdiction to grant a claim it had already agreed before whom the matter had come had no jurisdiction to hear the matter, notwithstanding that the hearing had been made possible by its own notice of dissatisfaction. The arbitrator held that he had jurisdiction to relate to the matter. He also concluded that the adjudicator had no jurisdiction to hear that matter. He dismissed the award made in favour of the applicant by the adjudicator. It is also pertinent to add that, before the adjudicator, first respondent raised a counter claim alleging that it had caused losses by what it perceived to have been applicant's delays. First respondent filed what it called a conditional counter claim being the counter claim which had been dismissed by the adjudicator.

The basis upon which the applicant has approached this court is that, once the second respondent came to the disputed conclusion that the adjudicator had no jurisdiction on the substance of the matter, he could not dismiss applicant's claims. The dismissal of applicant's claim is a judgment in favour of the first respondent and is accordingly substantive. The most that second respondent could do was to decline jurisdiction and leave the claims intact. The second basis relied upon by the applicant is that the determination rendered by the second respondent is contradictory. He seems to have dealt with issues of jurisdiction at two levels. Once he found that he had procedural jurisdiction, he could not turn around and deprive himself of subject matter jurisdiction in the manner he did, that by extension also means that the adjudicator also had subject matter jurisdiction. Thirdly second respondent failed to consider the fundamental fact that the relationship between the parties had come to an end. Procedural issues relating to notice, which he founds his decision upon could not be of any relevance, the termination of the agreement between the parties were considered. The adjudicator had the subject matter competence to relate to the claim.

Fourthly, once the first respondent had brought a counter claim before the adjudicator, it was not open for first respondent to claim that the adjudicator had no jurisdiction. Fifth ground was that the objections raised by first respondent which the second respondent found established on the question of jurisdiction were actually substantive issues going to the sufficiency of the claim. Having found that the applicant had a merited claim, the second respondent could not turn around and find on the basis of those objections that the Adjudicator had no jurisdiction. The sixth point was that there was no issue of jurisdiction which properly arose before the Adjudicator and by extension before him given that the applicant had sued in an agreement to pay. The seventh point was that the second respondent failed to appreciate that the applicant had nothing to establish. The applicant had an Adjudicator's determination in its favour. It was the first respondent who had issued a notice of dissatisfaction. It was the first respondent who was obliged to establish in contentions that the other way round as held by the second respondent. The eighth ground was that the issue of notification which the first respondent relied upon was a non-issue. It was for the Project Manager to make the relevant notifications, the Project Manager not having made the notifications, there could be no time bar whose effect was to affect jurisdiction. The final basis for the application advanced by the applicant is the second respondent failed to appreciate the simple yet fundamental distinction between a claim and a dispute. No time computation could therefore be made from the date of a claim. Any computation, the applicant submitted had to start with the existence of a dispute.

The first respondent is opposing the application. It raised a preliminary point to the effect that given that notice of the ruling was received on 5 March 2018. The applicant had 30 days from this date to file any application it wished to pursue under Article 16 (3). The last date for filing was 4 April, 2018. The applicant filed its application on 6 April 2018, accordingly the application cannot progress by virtue of it being out of the statutory time bar.

On merits the first respondent contend that the first respondent never questioned the Arbitrators jurisdiction to hear the jurisdictional challenge the first respondent states that it requested that a jurisdictional challenge be determined by the Arbitrator as a preliminary issue. The first respondent by and large relies on the record of proceedings. It denies that the award is irregular or incorrect in any way. There is no reason why the matter should be remitted to another Arbitrator. It prays for the dismissal of the application with costs.

Points *in Limine*

Advocate *Tivadar f*or the first respondent vehemently submitted that the present application of the applicant is made in terms of Article 16 (3) of Schedule 1 of the Arbitration Act. This Article provides as follows:

> "The arbitral tribunal may rule on a plea referred to in para (2) of this article either as a preliminary question or in an award on the merits of 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 …"

The first respondent argues that the relevant time limit is 30 days and this starts running once "notice of the jurisdictional ruling" is received. In the present case the first respondent submitted that the notice of the Tribunal's ruling was received when the arbitrator e-mailed his ruling to the parties on 5 March 2018. The first respondent also cited s 33 of the Interpretation Act and zeroed in on s 33 (2) and in terms of s 33 (2) one must not count 5 March 2018 as a day so the 30 days are to be counted from 6 March 2018 and that would take the applicant to 4 April 2018.

Pursuant to s 33 (3) the 4 April, as the last day, is to be included in the period. Article 16 (3) makes no reference to "midnight," weekday, "calendar month" "or year." Accordingly the last day on which the application could have been made was 4 April 2018. The application was only filed on 6 April and served on 9 April and was out of time. The first respondent cited the case of *Mtetwa and Anor* v *Mupamhadzi* (2007) ZWSC 35 and submitted that the Supreme Court in that matter has made it clear that the applicant's reference to the High Court rules is irrelevant and inappropriate.

On the point *in limine* the applicant submitted that it cannot be true that the award was rendered on 5 March 2018. It does not matter whether that e-mail was received or not. An unsigned award is not an award and the applicant cited Article 31 of the Model Law which provides as follows:

> "31 (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated."

The first respondent was required to have demonstrated that a signed copy of the award was received by the applicant on 5 March 2018. It has not placed any evidence to that effect. It

bore the onus to establish the factual basis upon which it relied upon. The applicant argued that there is a difference at law between a calendar month and thirty days. The first respondent had taken this objection because it has, in its computations used a calendar month as opposed to the statutorily provided for 30 days. Even on using the calendar month's computation. It gets it wrong. It cited the cases of *Pemberton* v *Kessel* (1905, T.S. p 194) and *Siffercling* v *Hemon Lime Co.* 1921 CRD p 439 and *Tropaizi Bulawayo Municipality* 1923 AD 317. The applicant also cited the matter of *Daktyl Automative (Pvt) Ltd t/a Autozone* v *Matebeleland Haulirs [Hauliers] (Pvt) Ltd* HB 129-11 which computed a calendar month as follows:

> "In terms of s 33 (b) (c) of the Interpretation Act [*Chapter 1:10*] a month is as it stands in the calendar e.g. 1December to 31 December 2008. In the circumstances no month begins form the middle of another. A calendar month runs from the beginning of a month to an end of that month."

According to the applicant a calendar months would have ended on 30 April 2018. The applicant added that s 33 of the Interpretation Act, itself makes it clear that time is reckoned either in terms of blocks (such as weeks; months and years) to in terms of clear days. (See s 33). Clear days exclude weekends and public holidays. That is the difference between providing for thirty clear days as opposed to a month. The intention is to exclude weekends and public holidays. As a result, using that computation, the applicant contended that the application is well within time; thus the point *in limine* is without merit and it prays that it must be dismissed with costs.

The first respondent raised the point *in limine* arguing that the application is belated. It argued that the notice was e-mailed on 5 March 2018 and the presumption is that the applicant became aware of the notice on that date. There is no factual basis established by the first respondent to convince the court that the notice of the ruling was indeed known by the applicant on 5 March 2018. The first respondent failed to prove that, it had the onus to prove that a duly signed award was served on the applicant at a public place and date which date of receipt was going to be used a cut-off date in computing the 30 days period contained in Article 16 (3) of Schedule 1 of the Arbitration Act. In any case I am convinced by the applicants argument based on the case law cited that the calculation it adopted in computing the 30 day period should be computed as was done in the *Daktyl Automative (Pvt) Ltd t/a Autozone* case (*supra*). Using that formula a calendar month would have ended on 30 April 2018. The point *in limine* is dismissed with costs.

On the merits, this application has been brought in terms of the Article 16 (3) of the Model Law which provides as follows:

> "16 (3) The arbitral tribunal may rule on a plea referred to in an award on the merits. If the arbitral tribunal rules on such a plea as preliminary question, any party may request, within 30 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."

The question which the court ought to ask itself is whether the second respondent rendered a correct determination.

I agree with Mr T *Mpofu*'s submission that when the second respondent found that the Adjudicator had no jurisdiction the second respondent could not have dismissed the matter. Once the adjudicator's determination is contested the matter should be heard afresh. It also follows that if the arbitrator disagrees with the adjudicator, he can only issue an award which the adjudicator ought to have granted. The second respondent's decision was astray on this point. The judicial officer should simply decline jurisdiction and not dismiss, the cause as that passes it in *rei judicatam* (See *Mariyapera* v *Eddies Pfugari (Private) Limited* SC-3-14).

The second respondent was occupying the position of the Adjudicator, he had to seal with jurisdiction at two levels. Once second respondent found that he had procedural jurisdiction, he was bound to find that he had subject matter jurisdiction. He was thus effectively making findings which should have been made by the adjudicator. It is not in dispute that in terms of the contract both parties had invested the adjudicator with the right to hear any disputes and or petitions which emanated from the agreement. Once the contractor alleged that there was a dispute between the parties, it was for the adjudicator to resolve it and no one else. There is no doubt that the adjudicator had the necessary legal capacity to hear the dispute between contractor and employer and the second respondent committed an error in this regard.

It is not also in dispute that at the time of the adjudication and resultantly the arbitration, the contract between the parties had terminated; what was to be dealt with was whether the delays which had been caused by the first respondent has resulted in applicant suffering financial prejudice. That issue was before the adjudicator and had been dealt with. The second respondent in this court's view had no basis for interfering with that determination or the matter. The first respondent admits bringing a counter-claim before both the adjudicator and subsequently the arbitrator. It is the view of this court that the first respondent willingly consented to the jurisdiction,

otherwise there is no point as to why the first respondent would want the adjudicator or arbitrator to decide on any issue the first respondent feels the tribunal has no jurisdiction. Not only did the first respondent file a counter-claim, it also pleaded to the matter on the merits and it is trite that pleadings to a matter on the merits confers jurisdiction.

(See *New York Shipping Co. (Pvt) Ltd* v *Emmi Equipment (Pvt) Ltd* 1968 (1) SA 355 (SWA) and once jurisdiction has been conferred it cannot be subsequently be withdrawn.

It is also this court's ruling that the arbitrator had no basis for setting aside the adjudication award without, considering the substance of the dispute. On the sixth basis of the application, the applicant's evidence under oath was to the effect that there was an agreement by first respondent to pay and that evidence is uncontroverted, the first respondent in her papers did not dispute that. A party who agrees to pay cannot reprobate and allege that the claim has been belatedly made and using that ground to question jurisdiction and I agree with counsel for the applicant that first respondent is virtually estopped from taking a position on the matter which is at variance with its own admission, it is clear that as long as this admission stands, the question of jurisdiction prescription or any related objection cannot stand. Surely the matter ought to be remitted to arbitration so that the effects of this undertaking are explored and determined and the second respondent was obliged to determine the matter on the undertaking made by the first respondent.

(See *Botes & Another* v *Nedbank Ltd* 1983 (3) SA 27 at 27H)

The eighth ground forwarded by the applicant was the issue of notification from the agreement it was for the project manager to notify and that point is pertinent in deciding whether the applicant participated in any delays or not. That aspect needs a full hearing of the parties so that that aspect can be resolved and the issue of notification centrally touches on the aspect of jurisdiction and will also have a bearing on the subject of the dispute on the merits. I further agree with Mr *T Mpofu*'s submission that the learned arbitrator failed to appreciate the dichotomy between a claim and a dispute, the fact that a claim could have inured to the benefit of the applicant does not mean that there was in existence a dispute. The operational need for rapid resolution of disputes could have easily resolved the exclusion of contractual obligations. The arbitrator did not deal with the essentials of the matter and as a result the matter was prematurely foiled. The arbitrator to deal with the matter again must deal with the vital components of the issue/dispute and ensure that both parties are heard and the matter resolved.

Accordingly, the following order is granted.

(1) Second respondent's preliminary award of 5 March 2018 in which he declines jurisdiction to consider the adjudicator's determination in the matter between applicant and first respondent be and is hereby set aside in its paras 2, 3, 5 and 6.

(2) The hearing of the substantive matter shall be proceeded with before a different arbitrator which the parties shall choose in terms of the arbitration agreement.

(3) First respondent to pay the costs of their application.

Mawere Sibanda Commercial Lawyers, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners