REPORTABLE ZLR (12)

Judgment No. SC 22/03
Civil Appeal No. 382/2000

ARTHUR ERNEST HENRY NICHOLAS ROBIN BEAZLEY N.O. v

(1) TERRENCE COLIN KABELL
(2) HIPPO VALLEY ESTATES LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, MALABA JA & GWAUNZA JA
HARARE, JULY 21 & SEPTEMBER 11, 2003

J C Andersen SC, for the appellant

No appearance for the first respondent

A P de Bourbon SC, for the second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed the appellant's application for an order setting aside the determination by the first respondent ("the arbitrator") that the termination of the contract involving the construction of Mteri Dam ("the dam") was valid.

The factual background is as follows. In May 1994 the second respondent ("Hippo") and Main Contracting (Private) Limited ("Main"), now in liquidation, concluded an agreement in terms of which Main undertook to construct the dam in Chiredzi District. The consulting engineer responsible was Hart Frost ("the engineer").

It was expressly agreed that Main was to build the retaining wall so that it would store water by 1 October 1995, that the dam construction had to be advanced to the stage where water could be released into the canal by 31 January 1996, and that all the work had to be completed by 31 May 1996.

Subsequently, after the work had commenced and a number of site meetings had been held, at which concern about the rate of progress had been expressed, the engineer wrote to Hippo on 15 June 1995 as follows:

> "It is with extreme regret that it is necessary for us to advise you that in our opinion Main Contracting (Pvt) Ltd have failed to proceed with Mteri Dam construction in accordance with the contract and we do not consider it possible for them to complete the work by the required completion date.
>
> With reference to their contract programme they are, on various critical items, from 3.5 months to 7.5 months behind, after being on site for approximately twelve months. They have repeatedly revised their programme but in every instance they have failed to maintain their programmed production rates.
>
> We hereby certify, in terms of clause 65 of the General Conditions of Contract, 4th Edition, … that in our opinion Main Contracting (Pvt) Ltd, the Contractor, has failed to proceed with the Works with due diligence and is not executing the Works in accordance with the Contract and is persistently neglecting to carry out his (*sic*)
> o S' Sœ S§ S¨ S´ Sµ S¶ S· S¸ S¹ Sº SÅ
>
> SÆ SÐ SÛ SÜ SÝ SÞ Sß Sàý ý
>
> û ý ý
>
> û ù û ù
>
> û ý ý
>
> ý ý û ù
>
> û û û

 ì¥Á 3 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

S¸ S¹ Sº SÅ SÆ SÐ SÛ SÜ SÝ SÞ Sß Sày

ý û ý

ý û ù û

ù û ý

ý ý ý û

ù û û

û

  ì¥Á 3

 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fi

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

S¸ S¹ Sº SÅ SÆ SÐ SÛ SÜ SÝ SÞ Sß Sàý

ý û ý

ý û ù û

ù û ý

ý ý ý û

ù û û

û

 ì¥Á 3

 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

ù û ý

ý ý ý û

ù û û

û

 ì¥Á 3

 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

ù û ý ý

ý ý û

ù û û

û

 ì¥Á 3

 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

 i¥Á 3 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

 ì¥Á 3 ð¿ ÞS

jbjb ^ ^

-p h< h< ›E X

ÿÿ ÿÿ ÿÿ

1 " " " " " "

" fl fl fl fl

8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

fl fl fl fl 8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÌ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

fl fl fl fl 8

a fl

þ Ò Ò :

f … … … …

… … ,

,

` ±] "

± è " "

Ò è è è

F "

"

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

f è 6 N

" " " "

f è è

V @ " "

o Æ

7ÐÏ» fl fl R –l W

o

c

Œ

èÍ Œ

o è

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

 Ã usal to set aside the arbitrator's finding that the contract had been validly terminated, the appellant appealed to this Court.

Article 34(2)(b)(ii) of the UNCITRAL Model Law, in relevant part, reads as follows:

> "An arbitral award may be set aside by the High Court only if –
>
> (a) …
>
> (b) the High Court finds that –
>
> (i) …; or
>
> (ii) the award is in conflict with the public policy of Zimbabwe."

Expanding on what is in conflict with the public policy of Zimbabwe, Article 34(5) states:

> "For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if –

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

It has been the policy of this Court to restrictively construe what is in conflict with the public policy of Zimbabwe in order to recognise the basic objective of finality in arbitrations. Thus, in *Zimbabwe Electricity Supply Authority v Maposa*, 1999 (2) ZLR 452 (S) at 465 C-D, GUBBAY CJ, with whom I concurred, said:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of law or morality or justice is violated. This is illustrated by *dicta* in many cases …".

Emphasising the fact that under Article 34 the High Court does not exercise an appeal power, the learned CHIEF JUSTICE said the following at 466 E-G:

> "Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, 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 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, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

The learned judge in the court *a quo* was aware of the above test and applied it in determining the application before him. The issue which now arises is

whether he correctly applied the test when he declined to set aside the award. I have no doubt in my mind that he did.

The first issue which I shall deal with is the appellant's contention that before the contract was terminated in terms of clause 65(1) for slow progress, a notice in writing should have been served upon Main in terms of clause 46. That clause, in relevant part, reads as follows:

> "… Should the Engineer at any time be of the opinion that the rate of progress of the Works or any part thereof is too slow to ensure the completion of the Works or any part thereof by the prescribed time or extended time for completion, he shall so notify the Contractor in writing and the Contractor shall thereupon, with the approval of the Engineer, take such steps as the Contractor may think necessary to expedite progress so as to complete the Works by the prescribed time or extended time for completion. …"

It was common cause that no notice was given to Main by the engineer in terms of clause 46 before Hippo terminated the contract in terms of clause 65(1) of the contract. Clause 65(1), in relevant part, reads as follows:

> "… if the Engineer shall certify in writing to the Employer that in his opinion the Contractor –
>
> (a) - (b) …, or
>
> (c) has failed to proceed with the Works with due diligence, or
>
> (d) …, or
>
> (e) is not executing the Works in accordance with the Contract or is persistently or flagrantly neglecting to carry out his obligations under the Contract, or
>
> (f) - (g) …,
>
> then the Employer may, after giving seven days' notice in writing to the Contractor, … enter upon the Site and the Works and expel the Contractor therefrom …".

After considering the provisions of clauses 46 and 65(1), the learned judge concluded that compliance with clause 46 was not a necessary prerequisite to the termination of the contract in terms of clause 65(1), but that ordinarily clause 46 would be applied. He added that the arbitrator was wrong in finding that the engineer should not have given proper notice to Main. He, however, found that no substantial injustice had resulted because the documents placed before the arbitrator reflected continuous warnings and complaints about the slow progress. In this regard, the learned judge said:

> "… there was a very substantial amount of evidence before the Arbitrator that the Applicant Company was very much behind in its work programme. There was substantial documentation, including various site minutes, reflecting this to be the case. There was various detailed documentation indicative of substantial inability of the Applicant Company to keep anything like up-to-date with the time requirements in what is common cause was a very tight contract. The documentation clearly reflects continuing warnings and complaints given to the Applicant's Company and indicates revised programmes being put in place which were not adhered to. So while I am of the view that the Arbitrator was wrong in not requiring Clause 46 to have been followed, I am not satisfied that the failure shows any substantial injustice to the Applicant."

I entirely agree with those comments and observations. The documents before the arbitrator graphically indicated that Main had fallen behind schedule in a serious way.

In addition, I am satisfied that compliance with clause 46 is not a necessary prerequisite to the termination of a contract in terms of clause 65(1). That opinion is supported by the learned author Philip Loots who, at p 212 of *Engineering and Construction Law*, comments on clause 46 as follows:

"**Notification of Slow Rate of Progress**

If the Engineer does not warn the Contractor under this Clause, that by itself will not affect the Employer's right of forfeiture or to penalties for delay in completing."

In the circumstances, the failure by the engineer to notify Main of the slow rate of progress in terms of clause 46, before the contract was terminated in terms of clause 65(1), cannot be a basis for the conclusion that the arbitral award made in favour of Hippo is in conflict with the public policy of Zimbabwe. I am satisfied that the test set out in *Maposa's* case *supra* has not been satisfied in this regard.

The second issue which I wish to consider relates to a preliminary application for leave to adduce further evidence which was made to the learned judge by the appellant and which was dismissed. It was in the form of a Chamber application filed on 24 September 1999.

The additional evidence which the appellant intended to adduce was in documentary form and essentially related to the unavailability of core material in certain designated areas. The core material is an impervious material required in the construction of the dam wall. The documents consisted of correspondence between the engineer, Hippo and Stocks & Stocks (Private) Limited, the company which replaced Main on the dam project, and were dated between July 1995 and January 1996.

In the exercise of his discretion, the learned judge did not consider it appropriate to grant the application to lead further evidence for two main reasons.

The first reason was that the application had been filed very late. The additional evidence was available when the application for an order setting aside the arbitral awards was filed on 13 November 1998. It was only on 24 September 1999, virtually a year later, and close to the initial date set for the hearing of the main application (i.e. 5 October 1999) that the Chamber application for further evidence to be adduced was filed.

The second reason given by the learned judge was that since the most important aspect of the application related to the shortage of core material which was imminent when the contract was terminated, and the documents before the arbitrator clearly indicated that the shortage had been noted, commented upon and raised as a serious problem, the arbitrator must have been fully aware of the problems relating to the shortage of the material and the consequence of such a shortage on the contract.

It is well established that this Court will not interfere with the exercise of a judicial discretion unless it was exercised on wrong principles or the primary court mistook the facts or did not take into account some relevant considerations or allowed extraneous or irrelevant matters to guide it. See *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S) at 62F-63A. In the present case, I am satisfied that the appellant has not shown that the learned judge exercised his discretion improperly.

The application for leave to adduce further evidence was, therefore, properly dismissed.

The third issue, which I now deal with, is the refusal by the arbitrator to allow certain documents to be produced by Main at the hearing. These documents were in respect of what happened after the contract had been terminated. They included the contract between Hippo and Stock & Stocks, the company which replaced Main on the dam project, and correspondence between the engineer, Hippo and Stocks & Stocks. The arbitrator excluded these documents because, in his view, whatever took place after the termination of the contract was not relevant to the proceedings before him.

Commenting on the arbitrator's decision to exclude the documents, the learned judge said:

> "In my view, the Arbitrator should have allowed the documents that Mr *Andersen* requested to be placed before him to be included in the Arbitration proceedings. As a general principle, all papers wanted by each party should have been placed before the Arbitrator. I am, however, satisfied that the papers filed covered all the main issues which the Arbitrator needed to consider. Although it was wrong for the Arbitrator not to allow the additional papers to be filed, I am satisfied that this did not in any way preclude him from fairly determining the matter. It did not result, in my view, in a failure of justice to either party to any material extent.
>
> I would once again emphasise that there was a profusion of detailed papers put before the Arbitrator. Each party had substantial opportunity to reply to the other party's submissions and re-reply and put forward any documents and the arbitrator had a large volume of documents before him."

I agree entirely with the views expressed by the learned judge. However, I wish to add that when the arbitration proceedings commenced in January

1996 the parties were given an opportunity to lead further evidence and call witnesses if they wished, but both chose not to do so. If Main considered the unavailability of the core material to be crucial to its case, it should have led further evidence on the matter. Instead, it left unsubstantiated the suggestion in its papers that the engineer, on whose recommendation Hippo terminated the contract, had an ulterior motive for the termination of the contract, which was the avoidance of the consequences of his own failure to designate areas with sufficient core material.

In the circumstances, I agree with the learned judge that the refusal by the arbitrator to allow Main to produce the documents in question did not result in a failure of justice to either party to any material extent. It, therefore, follows that the said refusal cannot be a basis for the appellant's contention that the arbitral award is in conflict with the public policy of Zimbabwe.

Finally, I would like to consider whether, taking into account all the facts in this case, the finding by the arbitrator that the termination of the contract was reasonable, justified and valid is in conflict with the public policy of Zimbabwe according to the criteria set by this Court in *Maposa's* case *supra*. I have no doubt that it is not.

In my view, bearing in mind, *inter alia*, that there was overwhelming evidence before the arbitrator that Main was very much behind its work programme, that revised programmes were put in place by Main, but were never adhered to, and that many complaints had been made to Main about the slow rate of progress at

various site meetings without yielding any positive results, I do not think that it can be said that the award made by the arbitrator "constitutes a palpable inequity that is so far 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".

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Scanlen & Holderness, second respondent's legal practitioners