REPORTABLE (72)

Judgment No. SC 86/06
Civil Appeal No. 397/05

DELTA OPERATIONS (PRIVATE) LIMITED v

ORIGEN CORPORATION (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, NOVEMBER 20, 2006 & SEPTEMBER 7, 2007

R Y Phillips, for the appellant

A P de Bourbon, SC, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which set aside an arbitral award made in favour of the appellant.

The background facts are as follows. In 2002 the appellant ("Natbrew") and the respondent ("Origen") signed a contract which, in relevant part, reads as follows:

"**Reciprocal Deliveries of Barley**

1.1 During the months of June and July 2002 Natbrew shall supply to Origen at the Northern Products grain silos in Chinhoyi a quantity of not less than 2,400 metric tonnes and not more than 2,450 tonnes of barley.

1.2 The Natbrew Delivery shall comprise of barley unsuitable for brewing purposes but suitable for use as stock feed.

1.3 During the month of October 2002 Origen shall deliver to Natbrew at Northern Products or GMB Banket a tonnage of barley grown in the 2002

winter season and of an exactly equivalent tonnage to the Natbrew Delivery.

1.4 In the event that, and to the extent that, Origen may fail to deliver the tonnage of barley required to be delivered by it in terms of clause 1.3 then, recognizing that Natbrew shall suffer loss as a consequence of such breach, Origen shall pay to Natbrew the sum of $75 000 per tonne in respect of each tonne which Origen has failed to deliver in terms of clause 1.3."

In terms of clause 6, any dispute between the parties arising out of the agreement was to be referred to arbitration.

Following the conclusion of the agreement, Natbrew delivered to Origen 2 019.28 tonnes of barley suitable for stock feed, but Origen delivered to Natbrew 1 127.848 tonnes of barley grown in the 2002 winter season, leaving a shortfall of 891.432 tonnes. That shortfall gave rise to a dispute which the parties agreed to refer to arbitration, and an arbitrator was appointed.

In its statement of claim, Natbrew averred as follows:

"6. In the circumstances (the) claimant seeks an award that (the) respondent forthwith deliver to it 892 tonnes of barley of a specification in compliance with the Agreement.

Alternatively to paragraph 6 above, and if it be found that (the) respondent was entitled to elect not to deliver barley but instead to pay (the) claimant $75 000.00 per tonne of undelivered barley, which is denied, then -

7. (The) claimant seeks an award that (the) respondent pay to it the sum of $66 900 000.00, together with interest thereon calculated from 1 November 2002 at a rate to be determined at the hearing as being calculated to put (the) claimant in the same position it would have been had payment been made not later than 31 October 2002."

The sum of $66 900 000.00 stated in para 7 of the statement of claim was arrived at as a result of an error in the calculation, and should be $66 857 400.00, i.e. the shortfall of 891.432 metric tones multiplied by $75 000.00.

Subsequently, on 21 January 2004, the parties held a preliminary meeting with the arbitrator at which it was agreed that the issues to be determined by the arbitrator were:

> "(a) Whether the claimant (i.e. Natbrew) is entitled to an order for specific performance, *viz.* that Origen deliver 2 019.28 metric tones of barley to the claimant; and if not
>
> (b) Whether the claimant is entitled to interest on the amount awarded and, if so, from what date and at what rate."

Thereafter, on 23 April 2004, the arbitrator conducted a hearing and four days later, on 27 April 2004, made the following award in favour of Natbrew:

> "It is ordered that:
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> A. On or before 30 May 2004, Origen Corporation (Private) Limited shall deliver to Delta Operations (Private) Limited 891.432 tonnes of barley of the quality specified in the contract signed by the parties on 21 August 2002.
>
> B. Failing compliance with Order A, Origen Corporation (Private) Limited shall pay to Delta Operations (Private) Limited, promptly on demand, the full amount expended by Delta Operations (Private) Limited in purchasing the tonnage of barley not delivered by Origen Corporation (Private) Limited in accordance with Order A."

Dissatisfied with that result, Origen filed a court application in the High Court on 7 June 2004, in terms of article 34(2) of the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on 21 June 1985, which is set out, with modifications, in the First Schedule to the Arbitration Act [*Cap. 7:15*] ("the *Model Law*"), seeking an order setting aside the award made by the arbitrator on 27 April 2004.

Four days later, on 11 June 2004, Natbrew filed a court application in the High Court, in terms of article 35(1) of the *Model Law*, seeking an order enforcing the arbitral award made in its favour.

The two court applications were subsequently heard together on 1 February 2005, and on 23 November 2005 the learned Judge in the court *a quo* granted the following order:

> "IT IS ORDERED THAT:
>
> 1. The arbitrator's arbitral award of 27 April 2004 be and is hereby set aside in its entirety.
> 2. Delta's application for the enforcement of the arbitral award be and is hereby dismissed.
> 3. The parties are left to proceed as they deem fit.
> 4. Delta shall bear the costs of these proceedings."

Aggrieved by that decision, Natbrew appealed to this Court.

The learned Judge in the court *a quo* set aside the arbitral award in terms of article 34(2)(b)(ii) of the *Model Law* which, 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."

The main issue in this appeal is whether the learned Judge correctly found that the award was in conflict with the public policy of Zimbabwe.

The test to be applied in determining whether an award is in conflict with the public policy of Zimbabwe was set out by this Court in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S). At 466 E-G GUBBAY CJ, with whom EBRAHIM JA and I concurred, said:

> "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."

Applying that test to the facts of the present case, I am satisfied that the learned Judge in the court *a quo* correctly found that the award was in conflict with the public policy of Zimbabwe. I say so for four main reasons.

The first reason is that the arbitrator granted remedies which were not available to Natbrew in terms of the contract.

The first such remedy is that of specific performance. This remedy was not available to Natbrew because clause 1.4 of the contract provided that if Origen failed to deliver the barley which it was required to deliver to Natbrew in terms of clause 1.3, Origen would pay to Natbrew the sum of $75 000.00 in respect of each tonne of barley not delivered.

Quite clearly, clause 1.4 means that the parties agreed that if Origen failed to deliver the barley to Natbrew, for whatever reason, Origen would pay to Natbrew the sum of $75 000.00 for each tonne of barley not delivered. In effect it means that Natbrew agreed that in return for the barley which it delivered to Origen in June and July 2002 it would take either the same quantity of the barley grown in the 2002 winter season, or the sum of $75 000.00 in respect of each tonne of barley not delivered by Origen.

The remedy of specific performance was not, therefore, contemplated or agreed upon by the parties, and was not available to Natbrew in terms of the contract.

The second remedy granted to Natbrew, but which was not available to Natbrew in terms of the contract, was the alternative relief granted in the second part of the award. This provided that if Origen failed to comply with the order of specific performance, Origen was to pay to Natbrew the full amount paid by Natbrew in purchasing the quantity of barley which Origen had not delivered.

This remedy was not available to Natbrew in terms of the contract, because the contract did not provide that if Origen failed to deliver the barley which it was required to deliver to Natbrew in terms of clause 1.3 of the contract Natbrew would itself purchase the barley elsewhere and recover the cost thereof from Origen.

As already stated, clause 1.4 of the contract provided that if Origen failed to deliver the barley to Natbrew, Natbrew's remedy was payment by Origen of the sum of $75 000.00 for each tonne of barley not delivered, and not payment of whatever sum Natbrew would have spent in purchasing the quantity of barley not delivered by Origen.

Indeed, Natbrew recognised this and sought payment of the sum of $66 900 000 if the order of specific performance was not granted, although there was an error in the calculation of the sum payable. Nevertheless, Natbrew's alternative claim was disregarded by the arbitrator.

Accordingly, by granting the alternative relief the arbitrator disregarded the remedy agreed upon by the parties, as well as Natbrew's alternative claim, and granted a remedy which had not been contemplated or agreed upon by the parties. The measure of damages awarded to Natbrew, in lieu of specific performance by Origen, therefore, fell totally outside the ambit of the contract.

In the circumstances, by granting the remedy of specific performance, and, alternatively, a measure of damages falling totally outside the ambit of the contract, the arbitrator completely disregarded the contractual terms agreed upon by the parties, thereby in effect creating a new contract for them. By doing so, he violated one of the most important tenets of public policy, i.e. the sanctity of contracts.

As JESSEL MR said in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465:

> "If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract."

The second reason why the award is in conflict with the public policy of Zimbabwe is that by granting the alternative relief the arbitrator deliberately ignored or disregarded a provision of the Contractual Penalties Act [*Cap 8:04*] ("the Act").

The provision that if Origen failed to deliver the barley which it was required to deliver to Natbrew in terms of clause 1.3 of the contract, Origen would pay to Natbrew the sum of $75 000 for each tonne of barley it failed to deliver was not an ordinary term of the contract, but a penalty stipulation in terms of s 2 of the Act.

In terms of s 4(1) of the Act, such a stipulation is enforceable in any competent court, unless the court finds, in terms of s 4(2) of the Act, a basis for declining to enforce the penalty stipulation or for reducing it. No such basis exists in the present case, and none was found by the arbitrator.

There is no other provision in the Act in terms of which a court or an arbitrator may ignore or disregard a penalty stipulation in a contract, and grant some other relief which had not been within the contemplation of the parties at the time they concluded their contract.

By granting the alternative remedy, the arbitrator deliberately ignored or disregarded a provision of the Act. The public policy of Zimbabwe does not permit him to do that.

The third reason why the award is in conflict with the public policy of Zimbabwe is that the arbitrator created an issue between the parties which did not arise from their submissions.

As already stated, on 21 January 2004 the parties held a preliminary meeting with the arbitrator at which it was agreed that the issues to be determined by the arbitrator were whether Natbrew was entitled to an order of specific performance, and if not, whether it was entitled to interest on the amount awarded, and if so, from what date and at what rate.

There was no dispute between the parties as to the amount to be paid by Origen in the event that Origen failed to deliver the barley to Natbrew. What was in issue was whether interest was payable on that amount, and if so from what date and at what rate. The reason is not difficult to see.

Quite clearly, the parties knew that in the event that Origen failed to deliver the barley to Natbrew the amount to be paid by Origen to Natbrew was to be determined in terms of clause 1.4 of the contract, i.e. $75 000 for each tonne of barley not delivered. But as clause 1.4 did not deal with the question of interest on the sum payable, that was an issue to be determined by the arbitrator.

It is clear from what the arbitrator said in para 5 of the award that he, too, was of the same view. The paragraph reads as follows:

> "The first issue to be determined is whether Natbrew is entitled to an order that Origen deliver 891,432 metric tones of barley to Natbrew. The parties are agreed that if I conclude that Natbrew is not entitled to this order for specific performance, then Natbrew is entitled to be awarded the sum of $66 857 250. In that event, the further issue to be determined is whether the claimant (i.e. Natbrew) is entitled to interest on the amount awarded and if so, from what date and at what rate."

However, notwithstanding that clear statement of the alternative remedy available to Natbrew, and for no apparent reason, the arbitrator went on a frolic of his own, created an issue which did not arise from the submissions made by the parties, and awarded a measure of damages which went so far outside the contract as to create a new contract for the parties. The public policy of Zimbabwe does not permit an arbitrator to do that.

Finally, in terms of article 31(2) of the *Model Law*, the arbitrator is obliged to state the reasons upon which the award is based. *In casu*, no reasons were given by the arbitrator for granting the alternative relief. In my view, this is in conflict with the public policy of Zimbabwe and invalidates the alternative award.

In the circumstances, by granting the remedy of specific performance, which was not available to Natbrew in terms of the contract, or alternatively, a measure of damages falling totally outside the ambit of the contract, and by creating an issue which did not arise from the submissions made by the parties, the arbitrator's reasoning or conclusion in making the award went:

> "… 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 …".

It would, therefore, be contrary to public policy to uphold the award.

The appeal is, therefore, devoid of merit and is dismissed with costs.

CHEDA JA: I agree

MALABA JA: I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Costa & Madzonga, respondent's legal practitioners