

DISTRIBUTABLE (44)
Judgment No. SC 38/06
Civil Appeal No. 394/05

Wonder Ropa
V
(1) Reosmart Investments (2) Stanbic Bank Zimbabwe Limited

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, JULY 24 & NOVEMBER 13, 2006

F Piki, for the appellant

E Matinenga, for the respondent

GWAUNZA JA: Following an urgent application in which the respondent *in casu* sought to have the appellant interdicted from withdrawing the amount of ZW\$2.3 billion from his Stanbic Bank account, the High Court issued an order in these terms:

"IT IS ORDERED BY CONSENT -

1. (a) That the respondent is hereby interdicted from withdrawing or utilizing the \$2 300 000 000.00 (Two billion and Three Hundred Million Zimbabwe Dollars) that was deposited by the Applicant into his Stanbic Bank Account (No. 012 109014970 1, Belgravia Branch) pending the determination of this matter by Arbitration;
- (b) Stanbic Bank Belgravia Branch be and is hereby directed to invest the amount referred to in paragraph 1 above to best advantage pending finalisation of this matter, by arbitration as set out in paragraph 2 of this order.
2. (a) That the matter shall be referred to an Arbitrator. The Arbitrator's decision shall be binding on the parties and shall accordingly be registered as an Order of this Honourable Court for execution;

- (b) The Arbitrator shall be appointed through the Centre for Arbitration;
- (c) The Arbitrator's terms of reference shall be to determine the party which is entitled to the money in issue; and
- (d) The Arbitrator's decision shall be binding on the parties and shall accordingly be registered as an order of this Honourable Court for execution."

The matter was duly referred to an arbitrator who, on 14 December 2005, made an arbitral award in favour of the respondent.

The appellant seeks to appeal to this Court, against the arbitral award.

Even though a preliminary issue had been raised by the respondent, that the "appeal" was not properly before this Court, we invited argument from both parties, on both the preliminary issue and the merits of the appeal.

I propose to consider the preliminary issue first and, depending on my determination thereon, may proceed to consider the merits of the appeal.

It is submitted for the respondent that the High Court order, which was granted by consent of both parties, clearly stated in its paras 2(a) and (d) that the arbitrator's decision would be final. Further, that such decision would be registered as an order of the High Court for purposes of execution only and not for any other purpose, like the noting of an appeal to the Supreme Court.

The appellant disputes this interpretation of the provisional order and argues that the appeal has been filed in terms of s 19A of the High Court Act

[Cap. 7:06] as read with the Second Schedule (s 7) of the Arbitration Act [Cap. 7:02].

The section provides *inter alia* as follows:

- "19A (1) ...
- (2) the High Court may adopt, wholly or partly and with or without modification the report of a referee appointed under subsection (1) or may remit the report to him for further consideration or may take such other action in regard to the report as the High Court considers necessary or desirable.
- (3) any part of a referee's report which has been adopted by the High Court under subs (2) shall have effect as if it were a finding by the High Court in the civil proceedings in question."

The appellant argues on the basis of this provision that the arbitral award is appealable, since it is deemed an order of the High Court.

I am not persuaded there is merit in this contention.

The High Court issued an order by consent, to the effect among others, that the arbitrator's terms of reference were:

"... to determine the party which is entitled to the money in issue."

In its paras 2 (a) and (d) the consent order stated clearly that the arbitrator's decision was to be binding on the parties (my emphasis) and was to be registered as an order of this honourable court for execution.

From a simple reading of the consent order, it cannot, in my view be disputed –

- (i) that the dispute between the parties was referred to an arbitrator, not on the basis of s 19A of the High Court Act, but by consent of the parties.
- (ii) that the parties agreed to be bound by – that is, to accept - the decision of the arbitrator as to which one of the parties was entitled to the money; and
- (iii) that the decision of the arbitrator was to be regarded as an order of the High Court and was to be registered with it for purposes of execution only.

By extension of reasoning, therefore, the arbitrator's decision was to become a consent order of the High Court. By its nature, a consent order is a final order and one normally does not appeal against such an order. To the extent that s 19A(3) of the High Court Act gives an option to the High Court to either reject or adopt any part of a referee's report it has, in my view, no relevance to the circumstances of this case. The consent order makes it clear that the High Court was to have no further say in the matter, after its referral to the arbitrator, beyond seeing to the registration and execution of the arbitral award. This is not the situation envisaged in s 19A(3) of the High Court Act.

In addition to this, I found to be persuasive the submission made for the respondent, that the effect of an arbitral award is to bring to finality the dispute between the parties. The respondent relied for this submission on the following passage set out in Butler and Finsen's *Arbitration in South Africa Law & Practice* at p 271:

"The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award; unless their arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata*

and neither party may reopen those issues in a fresh arbitration or court action.”

This position applies with equal force in Zimbabwe. Applied to the circumstances of this case, it is evident that the parties’ “arbitration agreement” that is, the consent order, did not provide for a right of appeal to another tribunal. To the contrary, the order in question effectively provided that the arbitrator’s decision would bring finality to the dispute, by “binding” the parties.

As correctly contended for the respondent, s 19A of the High Court Act, which addresses a situation different from the one *in casu*, does not detract from the legal position concerning the effect of an arbitration order.

I am satisfied, in the light of the foregoing, that the respondent is correct in its contention that the “appeal” is not properly before this Court, and must be dismissed.

It is, in view of this finding, not necessary for me to consider the merits of the case.

It is accordingly ordered as follows -

“The appeal be and is hereby dismissed with costs.”

ZIYAMBI JA: I agree.

GARWE JA:

I agree.

IEG Musimbe & Partners, appellant's legal practitioners

Lofty & Fraser, respondent's legal practitioners