

DISTRIBUTABLE (40)
Judgment No. SC.43/06
Civil Appeal No. 311/04

BURDOCK INVESTMENTS (PRIVATE) LIMITED V (1)
WINSLEY MILITALA (2) C A BANDA N.O.

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GARWE JA
HARARE, JULY 11 & OCTOBER 16, 2006

F M Katsande, for the appellant

A Mugandiwa, for the first respondent

No appearance for the second respondent

CHEDA JA: This is an appeal against the judgment of the High Court which dismissed an application by the appellant to set aside an arbitration award.

The parties entered into an agreement of sale of a subdivision of immovable property which was registered in the name of the appellant. The property was not developed.

The parties entered into another agreement for the construction of a house on the property.

It was also stipulated in the agreements that in the event of any dispute the parties would refer such dispute to arbitration.

A dispute did arise and was accordingly referred to arbitration.

The second respondent was appointed as the arbitrator.

On 28 August 2003, the arbitrator issued the following award on the dispute between the parties:

- “1. The respondent shall pay the claimant an amount of money being the equivalent of the current market value of Stand number 2937 Bluff Hill Township of Stand 1120 Bluff Hill less the value of the buildings thereon.
2. The President to the Estate Agents Council shall appoint an estate agent/property consultant to do an evaluation of the property and the valuation of the estate agent so appointed shall be final and binding on the parties.
3. The arbitrator’s fees amounting to \$165 000-00 shall be shared in equal parts by the parties, that is \$82 500-00 each.
4. Each party shall pay its own legal costs”.

Following this award the appellant made a court application to have the award set aside and that the Commercial Arbitration Centre be directed to refer the dispute to a different arbitrator for arbitration.

The High Court dismissed the application. The appellant now appeals against that decision.

In his founding affidavit, Mr Mutunami, who deposed to the affidavit on behalf of the appellant, raised the following main grounds for objecting to the award -

1. That the proposed settlement should have been formulated by both parties to arbitration but it was formulated by the respondent to the total exclusion of the applicant, in breach of Article 34 of the Arbitration Act No 7:02 of 1996 (“the Act”).

2. That it was not true that the parties came to an agreement and no settlement was reached in contemplation of Article 30 of the Act.
3. That the principles of natural justice were breached as the applicant did not participate in the formulation of the proposed settlement.
4. That the award failed to state the place of arbitration as required by Article 31(3) as read with Article 20(1) of the Act.
5. That as he represented the applicant at the arbitration he had to seek the resolution of the Board of Directors regarding the terms and conditions of the proposed settlement.
6. That the award was in conflict with the public policy of Zimbabwe as it contravened Article 34(2)(b)(ii) of the Act.
7. That the applicant had proved that it had lawfully terminated the two inseparable agreements between the parties.

In Zimbabwe arbitration is governed by Act 7:02 of 1996.

Article 34 sets out grounds on which an arbitral award may be set aside.

"APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE AGAINST ARBITRAL AWARD

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (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-

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(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 submissions to arbitration provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may not be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law; or

(b) the High Court finds that -

- (i) the subject-matter of the dispute is not capable of settlement
- (ii) the award is in conflict with the public policy of Zimbabwe.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(5) 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".

As can be seen from the appellant's application to the High Court, the only relevant grounds on which the award could be challenged by the appellant are that the award is in conflict with the public policy of Zimbabwe, and that a breach of the rules of natural justice occurred in connection with the making of the award.

Subsection (5) of Article 34 declares or defines what is meant by an award that is in conflict with the public policy of Zimbabwe as follows:

"(1)f -

- (a) the making of the award was induced or effected by fraud, or corruption
- (b) a breach of the rules of natural justice occurred in connection with the making of the award."

When the appellant approached the High Court, it did not allege or show that the award had been induced by either fraud or corruption.

Neither did it show that the rules of natural justice were breached.

According to the arbitrator's award the parties attended a hearing held on 21 August 2003 and an agreement was reached. It is not for this appeal court to decide whether this is true or not.

On the other hand, the letter from Ziweni & Company, addressed to the arbitrator on 21 August, indicates that it is one of the directors of the appellant who was not present at the arbitration who rejected the terms of the settlement. If there had been no hearing and no settlement terms, the legal practitioners would not have addressed a letter to the arbitrator in those terms.

This puts beyond doubt the fact that there was a hearing which was attended by both parties.

A settlement detailed in the letter from Wintertons dated 21 August 2003 was reached, and the award was based on that settlement.

In the circumstances there was no basis for challenging the award or suggesting that the rules of natural justice were breached.

There is therefore no legal basis for attacking the award.

The other ground concerning the failure to mention the place where the hearing was held is insufficient to invalidate an award that was agreed to by both parties.

I do not consider that the failure to mention the place is fatal to the award made.

The other complaints raised by the appellant fall away once it is clear that the parties appeared before the arbitrator and reached a settlement. For the other director to reject a settlement also confirms that at least there was a settlement which was reported to him by those who attended before the arbitrator.

I therefore see no merit in the appeal. It is dismissed with costs.

MALABA JA: I agree.

GARWE JA: I agree.

F M Katsande & Partners, appellant's legal practitioners

Wintertons, first respondent's legal practitioners