DURCO (PVT) LTD v DAJEN (PVT) LTD 1997 (2) ZLR 199 (H)

Citation	1997 (2) ZLR 199 (H)
Case No	Judgment No. HH-133-97
Court	High Court, Harare
Judge	Chatikobo J
Heard	10 July 1997
Judgment	20 August 1997
Counsel	*F Girach*, for the applicant *P Nherere*, for the respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Arbitration — *award — effect — whether award final or whether rights under that award can be waived and matter can be submitted to fresh arbitration proceedings — whether it would be contrary to public policy to enforce second arbitration* C *award*

Headnote

The applicant wished to sell maize on the Zimbabwe Commodity Exchange (Zimace) and the respondent wished to buy maize. The applicant's broker concluded a contract with the respondent's broker, in terms of which the D applicant was to sell maize to the respondent. However, the respondent refused to take delivery of the maize, claiming that its broker had not been authorised by it to conclude this contract. Because of the respondent's refusal to take delivery of the maize, the applicant was obliged to dispose of the maize to a third party at a loss. As a result there was a dispute between the applicant and the respondent as to whether the respondent's broker actually had E the authority to conclude the contract, and if it did, whether the respondent was liable for the loss suffered by the applicant. By agreement between the applicant and the respondent, the matter was referred to arbitration. The outcome of the arbitration was that the respondent was found not liable because it was found that the respondent's broke did not have authority to conclude the contract on behalf of the respondent.

Subsequently, a representative of Zimace discussed with an arbitrator the implications of possible further arbitration proceedings between the applicant and the respondent's broker. If it was found at this second arbitration that F respondent's broker was authorised to act on behalf of the respondent, the applicant would then be left without a remedy as it would have no recourse against the respondent's broker, because he would have been found to have acted with authority and he would have no recourse against the respondent who was not a party to the second arbitration. To avoid this possible end result, it was decided that a second arbitration should be held involving the applicant, the respondent and the respondent's broker. The three parties agreed to submit to this second arbitration. At the second arbitration, the arbitrators found by a majority that that the respondent's broker did have G authority to act for the respondent and that the

respondent was thus liable to the applicant. When the applicant then deanded payment from the respondent, the latter refused to pay. The applicant applied to court for the enforcement of the second arbitration award. The respondent opposed the application on two grounds, namely that the second award was not valid and enforceable and, even if it was valid, it would be contrary to public policy to enforce it.

Held, that the enforcement of the second award would not be contrary to public policy. In terms of the Arbitration Act 6 of 1996, a court may refuse to enforce an arbitration award if it H

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would be contrary to public policy to do so because it was induced by fraud or corruption or if the proceedings A breached the rules of natural justice. In the present case, there had been no fraud or corruption. The representative of the respondent had submitted to the second arbitration on behalf of the respondent, knowing the implications for the respondent of what he was doing, the implications having been carefully explained to him. There had been no breach of the principles of natural justice. There was no allegation of bias on the part of the arbitrators and the respondent had been legally represented at the second arbitration. Although the respondent's legal representatives objected to the second arbitration on the ground that the matter has been conclusively settled by the first B arbitration, the legal representatives ten fully participated in the proceedings.

Held, further, that although an arbitral award is final and binding between the parties to the arbitration and although it is in the interests of public policy that there should be finality in a case where a matter has been submitted to arbitration, one of the parties who had acquired rights as a result of the award was free to surrender or waive those rights. In the present case, the respondent, with full knowledge of his rights, had abandoned his rights by signing the submission of the matter to the second arbitration. This had had the effect of extinguishing the rights acquired as a C result of the first award. The respondent was not entitled after the second arbitration unilaterally to withdraw its waiver.

Held, therefore, that the application to have the second arbitration award enforced must succeed.

Cases cited

Austen v Joubert 1910 TPD 1095

Bheka v Disablement Benefits Bd 1994 (1) ZLR 353 (S) D

Laws v Rutherfurd 1924 AD 261

Schoeman v van Rensberg 1942 TPD 175

Stambolie v Commissioner of Police 1989 (3) ZLR 287 (S)

Stumbles & Rowe v Mattinson; Mattinson v Stephens & Ors 1989 (1) ZLR 172 (H)

Verhagen v Abramowitz 1960 (4) SA 947 (C)

Statutes referred to E

Arbitration Act 9 of 1996, First Schedule, arts 35 & 36

Case information

F Girach, for the applicant

P Nherere, for the respondent

Judgment

Chatikobo J: In March 1996 the applicant, "Durco", engaged the services of a broking company "Croplink", to F dispose of its maize on the Zimbabwe Commodity Exchange ("Zimace"). The respondent "Dajen", was at the same time descious of procuring substantial quantities of maize for its milling activities; it engaged the services of Atrax Commodities (Pvt) Ltd ("Atrax"), another broking firm, to act on its behalf. The result was that a contract was G concluded by Croplink and Atrax in terms of which Durco sold to Dajen, who agreed to buy 240 metric tonnes of maize. Dajen however refused to take delivery of the maize, contending that it had not authorised Atrax to conclude the contract. The refusal by Dajen to accept delivery of the maize forced Durco to dispose of the consignment to a third party at a loss. H

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As a consequence, a dispute arose between Durco and Dajen as to whether Atrax had the requisite authority to A conclude the contract for the purchase of the maize on behalf of Dajen and, if so, whether Dajen was lable for the loss suffered by Durco in selling the maize consignment in question at a loss. This dispute was by agreement of both Durco and Dajen, referred to arbitration in terms of the Zimace rules of arbitration. The result of the reference was B that Dajen was found not liable because the arbitrator held that Atrax did not have authority to conclude the contract on behalf of Dajen. Thereafter Durco set in train steps to recover its loss from Atrax on the basis of a breach of a warranty of authority.

While Durco, Zimace and Atrax were mooting the possibility of referring the dispute between Atrax and Durco to arbitration to determine whether or not Atrax had acted with the authority of Dajen in concluding the contract for C the purchase of maize from Durco, the parties decided, it seems at the behest of Zimace and Ian Donovan, that a meeting should be held between Durco, Dajen, Atrax, Croplink, Zimace and Donovan himself. I should say that Donovan is an officer of this court who is currently not practising but has been involved in a number of Zimace arbitrations. D

Donovan has deposed to an affidavit in support of Durco in which he explains that he was contracted by a Mr Goggin who is the administrator for Zimace. They discussed the possible implications of further arbitration proceedings between Durco and Atrax. It was feared that the second arbitration would be called upon to reconsider the question of Atrax's authority to conclude the contract on behalf of Dajen. The possibility existed that E the second arbitral process might find that Atrax was authorised to act on behalf of Dajen. If that happened Durco would be left without a remedy because Atrax would be exonerated and Dajen, which had already been cleared could not be held responsible on the basis of findings made at the second arbitration to which it was not a party. Donovan, who considered such a conundrum to be undesirable, thought that it was in the best interests of all three parties, namely Durco, Dajen and Atrax to submit to arbitration proceedings which involved all three parties F at which the arbitrator wuld be asked to consider whether Dajen was liable to Durco for breach of contract or whether Atrax was liable to Durco for a breach of a warranty of authority on the basis that it was not authorised to act for Dajen. In other words, the issue of Dajen's liability had to be considered afresh. G

A meeting was convened to discuss the possibility of such a fresh submission to arbitration. At that meeting, which was held on 25 November 1996, Dajen was represented by David Sydney Dryer. At the conclusion of that meeting, the agreement, annexure "A" to the founding papers, was signed by representatives of Durco, Dajen and Atrax. Fresh arbitration H

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proceedings were subsequently conducted in terms of that agreement and an award was made on 23 January A 1997. The arbitrators found, by a majority, that Atrax did have the authority of Dajen to conclude the contract and accordingly that Dajen was liable to Durco in the sum of $92 577,44 being the amount of the loss. Dajen was also

to pay interest at the rate of 25% *per* annum with effect from 16 December 1996 to date of payment.

When Durco demanded payment from Dajen in terms of this award, the latter refused to pay, contending that the B award made on 23 January 1997 was invalid because when it was made there was no dispute which existed between the parties, such dispute having been conclusively resolved by the earlier award which had been made at the first arbitration proceedings. This prompted Durco to bring the present proceedings in which it prays the court to enforce the award made on 23 January 1997. C

Dajen seems to peg its opposition on two related grounds. The first is that the award made on 23 January 1997 is not a valid and enforceable award and the second ground is that if it is a valid award it would nevertheless be contrary to the public policy of Zimbabwe to enforce it.

An application to enforce an arbitral award is governed by Chapter VIII, Articles 35 and 36 of the Model Law, D which is contained in the First Schedule to the Arbitration Act 1996. In art 35(1) it is provided that an arbitral award shall upon application to the High Court, be enforced subject inter alia to the provisions of art 36. Article 36 lays down the grounds upon which a court may refuse to enforce an arbitral award. The only ground upon which reliance is placed by Dajen is art 36(1)(b)(ii) which provides that the High Court may refuse to enforce an arbitral E award if it finds that the recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

Article 36(3) provides that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if the award was induced by fraud or corruption or if the rules of natural justice were breached in F connection with the making of the award. It can thus be seen that the circumstances under which the court may refuse to enforce an arbitral award on the ground that to do so would be contrary to public policy is circumscribed by the Act. Although the definition of public policy contained in art 36(3), if it be a definition, is not intended to limit the generality of the phrase "contrary to the public policy of Zimbabwe" in art 36(1)(b)(ii), it is wide enough to G encompass most, if not all situations, which would offend against public policy. Most other situations apart from those foreshadowed in art 36(3) would largely fall under the other specific grounds adumbrated in art 36(1).

In casu no allegation of fraud or corruption has been made nor is there any H

evidence upon which a finding of fraud or corruption can be made. Dryer says he signed the submission, annexure A "A" to the papers, because he was confused as to whether he was doing so to assist Durco to recover from Atrax or whether he was agreeing to reopen the question of Dajen's liability. Donovan and Goggin are adamant that Dryer was not at all under any illusion as to what he was signing. In particular, Donovan says he went out of his way to explain to Dryer the implications of what was being discussed. Not only does Dryer's allegation of B confusion fly in the face of cogent evidence of rebuttal, but the allegation of confusion does not amount to an accusation of fraud.

The independence of the arbitrators has not been impugned. The respondent, Dajen, was legally represented at the arbitral proceedings. Although its legal representative objected to the proceedings on the ground that the matter C had been conclusively settled by the previous arbitration, Dajen and its legal representative did participate fully in the proceedings. There was therefore full compliance with the rules of natural justice.

The foregoing remarks are better understood in the context of the factual averments made on behalf of Dajen. These are: D

1. that the first arbitral award made on 21 August 1996 was final and disposed of the parties' dispute. That arbitration was conducted in terms of the Zimace rules of arbitration which provided inter alia that the arbitrator's decision shall be final and binding upon the parties. That being so, the parties were not at liberty to re-submit the same dispute to a second arbitration; E
2. that to recognise and enforce the second arbitration would be contrary to public policy because the time honoured practice of the ordinary courts of law, of stressing the importance of the need for finality to litigation, applies to arbitral proceedings as well;
3. that the second submission to arbitration, annexure "A" to the papers is invalid; and F
4. that the conduct of Zimace in both arbitrations was tainted with impropriety.

FINALITY OF THE FIRST AWARD

It admits of no doubt that as between the parties, an arbitral award is final and binding. In this regard, there is a G similarity of approach between the courts of England and those of South Africa. The English position is aptly summarised in Halsbury's Laws of England 4 ed vol 2 para 611:

> "As between the parties to the arbitration agreement, the award gives rise to an estoppel *inter partes* with regard to the matters decided therein analogous to that created by the H

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> judgment in an action in *personam*; thus if the award was in respect of a breach of a contract, it may bar further A proceedings even though fresh damage has flowed from the breach. Once an award has determined the construction of a contract, the parties are bound by that construction even though a new source of difference raising the question occurs. Since it is the duty of a party to bring forward his whole case where the reference is of all matters in difference, he will, generally speaking, lose his right of action in respect of any matter of difference not brought to the arbitrator's attention to the same extent as if it had been included in the matters actually determined. B
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> The publication of the award thus extinguishes any right of action in respect of the former matters in difference but gives rise to a new cause of action based on the agreement between the parties to perform the award which is implied in every arbitration agreement."

And Joubert LAWSA vol 1 para 479 puts it thus:

> "When an award is made it is the equivalent to lis finita and as between the parties is *res judicata*. For an award to be *res judicata* there must have been a full and final adjudication." C

What emerges with unmistakable clarity from these two passages, and from cases such as Austen v Joubert 1910 TPD 1095 at 1096; Schoeman v van Rensberg 1942 TPD 175 at 177 and Verhagen v Abramowitz 1960 (4) SA 947 (C) 950, is that estoppel or *res judicata*, as a form of defence or plea in bar, can be raised by a party to an arbitral award who is sued on a cause of action which has been finally determined by an arbitrator's award. The D cause of action is extinguished but only as between the parties.

The thrust of Mr Nherere's attack on behalf of Dajen was that, as long as the original award remained extant, the parties were not free to submit to another arbitration. I think there is a fallacy in this submission. The original award conferred certain rights on one of the parties to the submission which led to that award, namely Dajen. Dajen, as E the holder of the right, was at all material times free to surrender the right if it so wished, as long as the surrender or waiver of that right was done in the full knowledge of the facts. All that needs to be shown is that Dajen, "with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it": *per* Innes CJ in Laws v Rutherfurd 1924 AD 261 at 263. F

In this case, the evidence of waiver of its rights by Dajen is to be found in the second submission to arbitration signed on its behalf on 25 November 1996. It is clear from

the depositions of Donovan that Dryer signed this agreement in the full knowledge of what rights Dajen would forfeit if it submitted to a fresh arbitration. As I will further demonstrate below, there is nothing upon which I can hold that the second submission was invalid, and, G once the validity of the second submission is established, as I think it has been established then -

> "It also follows from the contractual nature of waiver that as soon as the contract to waive a contractual right is concluded that right is irrevocably destroyed. It may be replaced by H

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> a new right (and if the new right is identical with the old right there is no harm in saying that the old right is revived) by A agreement between the parties, but a waived right cannot be resuscitated by a purported unilateral withdrawal of the waiver": Christie Law of Contract in South Africa 3 ed p 487.

By signing the submission to a fresh arbitration on 25 November 1996 Dajen did, by contract, destroy its rights under the original submission, and, by refusing to discharge its obligations under the second submission, it B purported to unilaterally withdraw the waiver. It cannot be allowed to do so. Once it waived its rights under the first submission the finality of the award made under that submission fell away. Any rights which had accrued to Dajen under that submission have been extinguished.

FINALITY OF LITIGATION C

It is correct that public policy demands that there should be finality in litigation. See *Stumbles & Rowe v Mattinson; Mattinson v Stephens & Ors* 1989 (1) ZLR 172 (H); *Stambolie v Commissioner of Police* 1989 (3) 287 (S) at 299 and *Bheka v Disablement Benefits Board* 1994 (1) ZLR 353 (S) at 358. I am prepared to accept that this principle applies to arbitral proceedings, as evidenced by the authorities to which I have already referred to as well D as the further passage from Russell in Russell on Arbitration 18 ed p 312 that -

> "A valid award on a voluntary reference operates between the parties as a final and conclusive judgment upon all matters referred unless there is an express provision in the arbitration agreement that it shall have a temporary effect only, or, it is an interim award."

But that is as far as the principle goes. It does not supplant or destroy a party's power to waive any rights derived E from an award. It is crystal clear to me that the finality of an award and, by a parity of reasoning, the finality of the litigation, is no more than a shield of defence which can be raised by a party to the lis where, for example, he is sued by one of the parties on the same cause of action which had been determined by an arbitral award. It is not intended to provide a willing contracting party with an avenue of escape from the consequences of a deliberate F waiver of its rights.

VALIDITY OF THE SECOND SUBMISSION

The second submission of 25 November 1996 was a separate independent reference. Its validity does not depend on the status of the original submission. Rather, it depends on the freedom with which holders of rights under the G first submission abandoned those rights in favour of fresh arbitral proceedings. As I have attempted to demonstrate, the parties possess untrammelled powers to abandon any rights conferred by the first submission and the award following upon that submission. I find no substance in this ground of attack as well. H

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THE PROPRIETY OF ZIMACE'S CONDUCT A

Zimace is a non profit-making agricultural commodity exchange. The nature of its business has not been detailed on the papers but there is enough upon which one can hold that they do not have a direct interest in a transaction conducted through their

exchange. Even if they had, that would not necessarily mean that the second award was not valid. Both arbitrations were conducted under their auspices in terms of their arbitration rules. The fact that they B facilitated the arbitral process is no ground for impugning the validity of the awards. The complaint is made, in a somewhat veiled fashion, that one of the deponents to the answering affidavit, Ivor John Prior, acted improperly. It is said that Prior is not only director of Zimace but is also a director of Croplink, the broker for Durco. He signed the second submission on behalf of Durco. This set of facts, it is contended, invalidated the submission. I fail to see how. Prior says he was authorised to sign the agreement by Durco. The question of who C Durco choe to represent it in negotiating the terms of the second submission can hardly be said to have swayed Dryer's volition when he signed the second submission. I find no substance in this line of attack either. Still further, I do not see how the participation of Zimace as an organisation and Prior as an individual could be contrary to the public policy of Zimbabwe. D

I hope I have demonstrated that whether one looks at the grounds of opposition from the point of view of the provisions of arts 35 and 36 to the First Schedule to the Act, or from the point of view of the line of attack mounted by Dajen, the conclusion remains inescapable that the case for Durco is unassailable. The application succeeds and it is ordered as follows: E

1. The arbitral award issued on 23 January 1997 in favour of the applicant against the respondent be and is hereby recognised and enforced.
2. The respondent shall pay to the applicant the sum of $92 577.44 together with interest thereon at the rate F of 25% *per* annum from 16 December 1996 to date of payment.
3. The respondent shall pay the costs of this application.

Winterton Holmes & Hill, legal practitioners for the applicant

Coghlan, Welsh & Guest, legal practitioners for the respondent H