FSI HOLDINGS LTD v RIO TINTO ZIMBABWE LTD & ANOR 1996 (1) ZLR 356 (H)

Citation	1996 (1) ZLR 356 (H)
Case No	Judgment No. HH-42-96
Court	High Court, Harare
Judge	Smith J
Heard	2 April 1996
Judgment	10 April 1996
Counsel	*A P de Bourbon* SC, for the applicant *J C Andersen* SC, for the respondent
Case Type	Application to set aside arbitrator's award
Annotations	No case annotations to date

Flynote

Arbitration — *award — setting aside of — court reluctant to interfere with arbitration proceedings but may interfere if arbitrator has misconducted proceedings — what constitutes misconduct — arbitrator hearing each party* D *separately — whether arbitrator had breached rules of natural justice and had overlooked or misconceived what he was required to determine*

Headnote

The applicant sought to have arbitration proceedings set aside on the basis that the arbitrator had misconducted the E proceedings. The applicant argued that the arbitrator had breached a fundamental principle of natural justice and had overlooked or misconceived what he was required to determine. The arbitrator had indicated to both parties that he intended to hear the evidence and arguments from each party separately, in the absence of the other. No specific objection had been raised, nor did either party refuse to attend a meeting. When one party said that it had not been given an F opportunity to hear the other's representative, the arbitrator said he was willing to arrange a meeting. The party's representative then decided that such a meeting was not necessary. The submissions and arguments raised by each party were made known to the other party, which was given an opportunity to respond. G

Held, that where the parties have agreed that their dispute be settled by a chosen arbitrator, the courts are very reluctant to interfere with arbitration proceedings. However, the court may interfere where the arbitrator has misconducted the proceedings.

Held, further, that ordinarily all proceedings before an arbitrator must be H

A conducted in the presence of the parties to the dispute and it will be a breach of the *audi alteram partem* rule for evidence to be heard from one party without the other being present. The parties to a dispute submitted for arbitration are, however, free to agree to any procedure which they think is appropriate to the settlement of

their dispute. In the present case the arbitrator indicated clearly to both parties the procedure that he intended to adopt. As the applicant's B representatives had agreed to the procedures adopted by the arbitrator, the applicant could not now complain about those procedures.

Held, further, that the arbitrator had not overlooked or misconceived what he was required to determine.

Cases cited C

Chelsea West (Pty) Ltd v Roodebloem Invstmts (Pty) Ltd 1994 (1) SA 837 (C)

Cone Textiles (Pvt) Ltd v Commercial Union, Fire, Marine & General Ins Co Ltd 1989 (2) ZLR 152 (S)

Cone Textiles (Pvt) Ltd v Redgment & Ors 1983 (1) ZLR 88 (S)

D Re *Hopper* (1867) LR 2 QB 367

Landmark Construction (Pvt) Ltd v Tselentis 1971 (1) RLR 56 (G)

Shippel v Morkel & Anor 1977 (1) SA 429 (C)

Wilton v Gatanby & Anor 1994 (4) SA 160 (W)

Statutes referred to E

Arbitration Act [*Chapter 7:02*], s 12(2)

Case information

A P de Bourbon SC, for the applicant

J C Andersen SC, for the respondent

Judgment

F **Smith J:** The applicant (hereinafter referred to as "FSI") entered into an agreement of sale with the lst respondent (hereinafter referred to as "RTZ"), in terms of which FSI bought from RTZ the latter's beneficial share-holding in a company known as Tinto Industries Limited (hereinafter referred to as "TI"). In terms of the agreement of sale FSI was G required to pay RTZ $40 million for the shares and cession of the loan accounts, of which $13 million was payable on the effective date of the agreement and the balance one year later. RTZ gave certain warranties in clause 7 of the agreement which were referred to as essential warranties. FSI claimed that RTZ had breached certain of the express warranties, in that the values of stocks and debtors in the balance sheet of TI as at I January I994 had been overstated and creditors H understated, and claimed compensation for a shortfall in a fixed asset to the

extent, in total, of $7 064 065,15. RTZ accepted $512 000 of the amount claimed as being valid, it being the cost of a new A crane to replace one not handed over to FSI, but did not accept the balance of the claim.

Although the agreement of sale does not contain an arbitration clause, FSI and RTZ agreed that the dispute on whether there was a breach of the express warranties should be referred to arbitration. The lawyer for RTZ suggested that the B dispute be settled by a single arbitrator agreed by both parties, the arbitration be conducted in an informal manner, both parties being represented by their accountants, that there be no formal pleadings but that two letters between the parties be treated as defining the matters in dispute; and that the arbitrator's decision should be final. The lawyer for FSI responded by accepting the proposals subject to certain qualifications, one being that the second respondent (hereinafter referred to as C "Bailey") was to be the arbitrator and another being that the arbitrator would have wide and unfettered discretion in the procedures to be adopted and in regard to the nature and extent of

the evidence that he may require to be led, as well as in relation to any decisions or determinations which he may deem fit. The lawyer for RTZ accepted the qualifications and added the additional qualification that RTZ would be permitted to adduce evidence and to argue that "by reason of the D manner in which the deal was structured, the various points taken by (FSI) are not relevant". The lawyer for FSI responded by saying that FSI would not wish to fetter the broad discretion given to the arbitrator by stipulating the nature and extent of the evidence which the arbitrator would be required to hear. He therefore did not agree to the additional E condition, saying that FSI would prefer to give the arbitrator the broadest possible mandate in regard to the nature and extent of the evidence he may require to be led and as to the procedures which he may choose to follow. He added that RTZ would be free to suggest to the arbitrator that it was entitled to adduce the evidence suggested and the arbitrator F would be able to agree or refuse to allow the evidence to be adduced. The final response from the lawyer for RTZ was to say that RTZ was happy to proceed with arbitration without further ado as long as FSI undertook that it would not oppose RTZ adducing the evidence necessary to establish the manner in which RTZ alleged the "deal was structured". If FSI intended to oppose the introduction of such evidence, then RTZ declined to follow the arbitration path and would proceed G by way of action for the recovery of the amounts allegedly due to it. FSI agreed that RTZ would be "free to show, by evidence, that the transaction was structured in such a way that the individual items which form the basis of (FSI's) case cannot be considered in isolation, but must be looked at in the context of the structuring of the deal as a whole". H

Smith J

A Bailey was duly appointed arbitrator and was sent copies of the correspondence between the parties which set out the contentions of the parties and his mandate. By letter dated 5 September l995 he advised the parties that he would meet representatives from FSI at 9.30 a.m. on Monday ll September and representatives from RTZ at 2.05 p.m. on the same day. He also fixed l0.00 a.m. on Tuesday, 12 September, for a provisional meeting with FSI representatives to hear further B representations and 11.30 a.m. on the same day for a similar meeting with RTZ representatives. He said that, if necessary, a further meeting could be held in the afternoon.

Two meetings with representatives of FSI and two with representatives of RTZ were held by Bailey at which verbal C submissions were made and questions asked concerning the dispute. Bailey also held a brief meeting with Mr Vincent to receive submissions from him because RTZ wanted his views to be made known. Thereafter Bailey, in a letter dated 19 September l995, handed down his decision. After dealing with the background to the dispute, his terms of reference and impartiality, the submissions by the parties and the consideration of the sale agreement, he concluded that the only claim D FSI had against RTZ was for $512 000 (relating to the crane) because both parties agreed that that was the case, but the balance of the claim by FSI, amounting to $6 552 065,15, could not be sustained by the sale agreement as worded.

Bailey filed an affidavit saying that he had no interest in the outcome of the application but wanted to respond to the E allegations made against him. In his affidavit he made the following statements. He had considerable sympathy towards FSI and felt that a number of its claims were persuasive and deserved consideration but, ultimately, he felt that the sale agreement did not give it the protection it sought. He felt that a strict interpretation of the agreement prevented him from F making any award in favour of FSI. He did interview the two parties separately but he had no intention of causing prejudice or favouring one party above the other. He decided to interview the representatives of each party separately so that he could understand exactly what the contentions of each party were and what the claim was. Having made a preliminary inquiry, he would then show each party the contentions of the other and give it an opportunity to reply. The G preliminary inquiry was held with representatives of FSI and RTZ on Monday ll September and the follow-up meetings were held on the morning of

Tuesday 12 September. It was his intention that, if the parties felt that there should be a further hearing, it would be held on the Tuesday afternoon, with both parties present together. However this did not appear H to be necessary. One of the representatives of FSI did say that they had not had the chance to actually hear what the

Smith J

representatives of RTZ had said, they had merely been told by him what they had said. He had replied that he would be A very happy to arrange a session where both sides sat and discussed the question of FSI's claim. The representatives of FSI then said that they did not think it was necessary to hold a further meeting with representatives from both parties present together.

Section 12(2) of the Arbitration Act [*Chapter 7:02*] provides that where an arbitrator has misconducted the proceedings, B the Court may set aside the award. FSI has filed an application seeking an order setting aside the award made by Bailey, alleging technical or legal misconduct on his part. Mr *de Bourbon* submitted that Bailey had erred in two respects. Firstly, the manner in which the proceedings were conducted was contrary to the agreement between the parties and contrary to the rules of natural justice. Secondly, the award did not deal with the matters or issues placed before the arbitrator for C arbitration and Bailey had overlooked or misconceived what he was required to determine.

The attitude to be adopted by the court in an application of this nature was expressed by Fieldsend CJ in *Cone Textiles* D *(Pvt) Ltd v Redgment & Ors* 1983 *(1)* ZLR 88 (S) at 92 as follows:

> "There was little dispute as to the law. The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal, and they have agreed that that award shall be final and binding: *Clark v African* E *Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77. It is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator."

However, the court is required to interfere where the proceedings have been misconducted. The position of the arbitrator F was expressed as follows by Seligson AJ in *Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd* 1994 *(1)* SA 837 (C) at 845:

> "The position of an arbitrator in the true sense is very different. He acts in a quasi-judicial capacity and must conduct himself accordingly. Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner ... as to ensure a fair G administration of justice between the parties'. (*Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77 *per* Gardiner J). This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine parties or witnesses or conduct a hearing in H

Smith J

> A the absence of one or other of the parties. If he does so he commits an irregularity which will result in his award being set aside. This rule has been established in a long line of cases. See *Lazarus v Goldberg & Anor* 1920 CPD 154; *Burns & Co v Burne* 1922 NPD 461; *Gafoor v Mahomed* 1926 WLD 188; *Adamstein v Adamstein* 1930 CPD 165; *Field v Grahamstown Municipality* 1920 EDL 135; *Grant Brothers v Harsant* 1931 NPD 477; B *von und zu Bentheim v von Oppen & Ors* 1938 SWA 54; *Shippel v Morkel & Anor* 1977 *(1)* SA 429 (C). As was said in *Adamstein's* case *supra* at 168:
>
> > Courts of law jealously guard the rights of a person to be present at and heard at proceedings to which he is a party, and will only tolerate C a departure from the rule which recognises this right in very special circumstances'".

In the case of *Wilton v Gatanby & Anor* 1994 (4) SA 160 (W), where one of the parties refused to attend before the D arbitrator, the court refused to make the award of the arbitrator an order of court because the arbitrator had considered that no evidence was necessary for the purpose of enabling him to make an award since one of the

parties to the arbitration refused to submit to arbitration and to attend the hearings. The court held that the arbitrator was entitled to proceed in the absence of a party in wilful default but he could not simply issue an award similar to a default judgment in terms of the E Rules of Court. He was required to hear evidence and to bring his mind to bear on the issues. Likewise in *Landmark Construction (Pvt) Ltd v Tselentis* 1971 *(1)* RLR 56 (G) the court set aside the award of an arbitrator because the requirements of natural justice were not observed. At p 60 Beck J (as he then was) said:

> F "As has already been indicated, the agreement arrived at between the arbitrator and the parties to the arbitration when the meeting of 3 June 1971 was terminated left to the decision of the arbitrator the question whether further evidence should be received before making his award. In deciding whether or not to receive further evidence, the arbitrator was obliged to observe the requirements of natural justice. The manner of G reception was governed by the special agreement that evidence could be taken without the presence of both parties at its taking; but the need to take evidence, and the need to apprise the parties of its content so as to afford to both a suitable opportunity for rebutting it or otherwise dealing with it, remained undisturbed, if this was required in order to arrive at a proper judicial decision, and in order to act in fairness to both parties, as H was contemplated would be the case.

Smith J

> Without burdening this judgment with details of the many disputes which arose out of the execution of the building contract, it is sufficient to say A that a perusal of the contentions advanced by the applicant, and of those advanced in Acavalos's reply thereto, discloses that, in a number of instances, evidence, dehors the documentary material which was before the arbitrator, exists which is relevant to the proper determination of the matters in question, and which, if true, would disturb the situation indicated to the arbitrator by the documentary material taken by itself. To have B concluded that none of this evidence need be received shows a total want of that judicial capacity which is required even of an ordinary fair-minded layman appointed to adjudicate by the parties to the dispute'".

In that case the arbitrator had received written submissions from both parties. He made his award without seeking any C further information, except in respect of one matter, where he obtained an explanation from one of the parties in regard to an item in its submission without advising the other party of that fact or of the explanation given. The court held that, D despite the agreement between the parties as to the manner in which the evidence was to be taken, the arbitrator was still obliged to observe the requirements of natural justice in deciding whether or not to receive further evidence, and must apprise the parties of the contents of such evidence so as to afford to both a suitable opportunity for rebutting it or otherwise dealing with it. E

In *Shippel v Morkel & Anor* 1979*(1)* SA 429 (C) van Winsen J at 434D said:

> "It can thus be said with confidence that it is well established by the cases in our courts that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties. This appears from numerous cases in the South African courts ... ". F

In that case the applicant had applied for an order setting aside an award made in arbitration proceedings, on a number of grounds, the major one being that the arbitration had on one day been conducted in his absence. He had telephonically informed the arbitrator's office that he would not be available on that one day. He had, however, requested and been G furnished with a summary of the evidence given on that day. At the resumed hearing the arbitrator asked him whether he wished to raise any matter arising from such evidence. He replied in the negative. The court held that he had acquiesced in the situation arising from his absence at one of the hearings. At p 436-7 the learned judge said: H

Smith J

> A "Although the principle is clear each case must be decided on its own merits. Applicant's conduct, in my opinion, affords clear evidence that he acquiesced in the situation arising from his absence at one of the hearings. I consider that in this connection it is worthy of note that applicant enjoyed the support and advice of an attorney, a Mr Potash, at least

one of the hearings before the arbitrator. He must also be taken to have been aware that the submission to arbitration signed by him applied the provisions of s 15 of Act 42 of l965 to the arbitration. The arbitrator B informed applicant by letter dated 30 September that the hearing had taken place. Applicant did not protest against this procedure even after he had received a resume of Faulman's evidence, nor did he do so at the meeting of 27 October. On the contrary he replied in the negative to the C enquiry of the arbitrator as to whether he wanted to raise any matter in connection with the evidence led on 30 September. He at no stage asked for the recall of Faulman.

I find it very difficult to avoid the conclusion that his telephonic objection to the arbitrator after the hearing in question was in the nature of D anything other than a tactical move and not a genuine effort to have the prejudice, if any, suffered by him on 30 September repaired.

I do not think it is open to a party to lie by and take no action until he sees which way the award goes. Such conduct is difficult to reconcile with E an intention to enforce his rights. I conclude that on this ground, too, respondents have a good defence to applicant's claim."

In this case Bailey indicated clearly to both parties the procedure he intended to follow. Mr Fraser, one of the representatives of FSI, said in the founding affidavit that when he received the letter from Bailey about the meetings that F were to be held, he always assumed that, in hearing the matter, Bailey would require the representatives of both parties to meet together in his presence so that their respective contentions, representations and arguments could be properly challenged. It was only when he went to the first meeting with Bailey on Monday ll September that it became apparent to G him that Bailey had decided not to hear the parties together but rather to hear them separately. However, he does not go on to say why he did not object at that stage to the procedure that was being adopted. Why? I agree with the statement by Bailey in his affidavit that it must have been obvious from the letter he sent to FSI and RTZ that he intended to hear the evidence and arguments from each party separately. The letter refers to a provisional meeting with FSI representatives at H l0.00 a.m. on 12 September and a later meeting at ll.30 a.m. with RTZ

representatives. It seems clear to me that the FSI representatives must have known what procedure was going to be A adopted by Bailey and raised no objection thereto when informed of the programme. At the second meeting between FSI representatives and Bailey, one of the former did raise the question that they had not been given an opportunity to actually hear the RTZ representatives put forward and argue their case. Bailey then said that he was willing to arrange a meeting at which both parties were represented so that they could sit down together and discuss the matter. The FSI representatives B then decided that such a meeting was not necessary.

Ordinarily, all proceedings before an arbitrator must be conducted in the presence of the parties to the dispute. However, the parties to a dispute submitted to arbitration are free to agree to any procedure which they think is appropriate for the C settlement of their dispute. The courts will not impose any specific procedure on the parties. I am satisfied that in this case FSI and RTZ agreed to the procedure that Bailey proposed to adopt. Neither of them raised any objection or refused to attend any meeting. When the FSI representatives discussed with Bailey the fact that they had not been afforded the chance to hear the arguments raised by RTZ they were offered an opportunity to do so but they decided that that was not D necessary. As van Winsen J said in *Shippel's* case *supra* it is not open to a party to lie by and take no action until he sees which way the award goes.

Accordingly, on the first point raised by FSI, whilst I agree that the rules of natural justice require adherence to the *audi* E *alteram partem* rule, it is also true that the parties may agree to a procedure in which the principles of that rule are not strictly adhered to. The procedure adopted by Bailey, which as I say was accepted by the parties, meant that the submissions and arguments raised by each party were made known to the other party and it was given an opportunity to respond. A similar procedure was accepted by the Court as being acceptable in the *Landmark Construction* case *supra*. F The difference in that case was that the arbitrator did not

apprise the other party of the evidence adduced. Although FSI subsequently raised the point that the evidence from RTZ had not been given in its presence, its representatives felt that a joint meeting of the parties was not necessary. A similar attitude was adopted by the applicant in the *Shippel* case *supra.* G Accordingly I find that there was no misconduct in the proceedings insofar as the *audi alteram partem* rule was not strictly adhered to. Bailey did apprise each party of the evidence led by the other and gave it an opportunity to rebut or otherwise deal with the evidence. H

Smith J

A On the second issue raised by FSI, Mr *de Bourbon* submitted that Bailey overlooked or misconceived what he was required to determine. He was required to determine whether there had been a breach of the express warranties given by RTZ. There can be no doubt that if an arbitrator overlooks or misconceives a submission he would have misconducted the B proceedings within the meaning of a s 12(2) of the Arbitration Act [*Chapter 7:02*], thereby allowing a court to intervene - see *Cone Textiles (Pvt) Ltd v Commercial Union Fire, Marine and General Insurance Co Ltd* 1989 (2) ZLR 152 (S) at 155 D. Did that happen in this case? Admittedly FSI did allege that RTZ had breached the express warranties. However that was not the full allegation. In the letter from FSI to FTZ dated 10 February 1995, which was referred to Bailey as C setting out the issues between the parties, FSI set out the claims it had against RTZ and the amount due in respect of each claim. RTZ responded by letter dated 14 March 1995 refuting each claim and stating that it followed and continued to follow its stated accounting policies in the preparation of its year-end accounts. FSI then sent RTZ a cheque for $20 742 585,74 D representing the amount owing at 31 March 1995 in terms of the agreement of sale less the disputed amount of $5 745 414,26 and the reduction for the crane amounting to $512 000. RTZ responded by stating that it had been short-paid $5 745 414,26 which was then overdue. It disputed the right of FSI to deduct such amount. FSI responded, saying that the deduction was due and that the basis for the deduction was the breach of the express warranties. Perusal of the award E handed down by Bailey shows that he was well aware that the principal issue between the parties was whether there had been a breach of the express warranties set out in clause 7 of the agreement of sale such as would entitle FSI to a reduction of the purchase price, whether by way of damages or otherwise. His mandate was to determine whether the F deductions were permissible. There would be little point in him deciding that there had been a breach of the express warranties if he did not go on to determine the consequences of such a breach. In the award Bailey analysed each of the express warranties in the context of the agreement of sale. Some, he felt, were not relevant to the dispute or to the business taken over. One, he felt, could not give rise to any claim for damages because FSI had not suffered any loss as a G result of any breach thereof. There was only one warrant (clause 7.5 of the agreement) which he felt was relevant. If there was a breach of that warranty he considered that FSI would be entitled to cancel the agreement. But the breach could not, in his opinion, give rise to any claim for damages or a reduction in the purchase price. That being the case, he felt that there was little point in him investigating the question of whether or not there had been a breach. In the circumstances he H performed his mandate. Whether or not he was correct in his determination

Smith J

is not for this court to decide. The court could only interfere if the error was so gross as to in reality amount to A misconduct - see Jacobs *The Law of Arbitration in South Africa* at p 143. Mr *de Bourbon* did not attempt to submit that the award should be set aside on the grounds of gross error on the part of Bailey. There are indeed no grounds on which he could have based such a submission. B

For the reasons set out above, I agree with the submission by Mr *Andersen* that Bailey dealt with the mandate he was given which was to determine whether there had been a breach of the express warranties in clause 7 of the agreement of sale such as would

entitle FSI to a claim for damages or a reduction of the purchase price. He concluded that no breach thereof would give rise to such an entitlement. C

In *Re Hopper* (l867) LR 2 QB 367 Cockburn CJ said:

> "I would observe that we must not be over-ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceedings.' D

The courts of this country and of South Africa have concurred wholeheartedly with the views so ably expressed by the learned Chief Justice. Where parties to a dispute decide that, rather than taking their dispute to a court for decision they E would prefer to have the dispute settled by an arbitrator of their choice, the courts are very reluctant to interfere. The parties are at liberty to determine the procedure they want followed and are free to select any person acceptable to both as being fit and suitable for the purpose of settling their dispute. Once they have made their choices they must abide by the consequences. I would emphasise what Fieldsend CJ said in the *Cone Textile* case *supra*: F

> "a court will always be most reluctant to interfere with an award of an arbitrator".

The application is dismissed with costs. G

Winterton, Holmes & Hill, applicant's legal practitioners

Gill, Godlonton & Gerrans, lst respondent's legal practitioners