



IN THE HIGH COURT OF BOTSWANA HELD AT FRANCISTOWN

MAHFT-000225-11

In the matter between:

NORTH WEST DISTRICT COUNCIL

APPLICANT

AND

**GERRIT HERMAN VLUG
STAR WARS ENTERPRISES (PTY) LTD**

**1ST RESPONDENT
2ND RESPONDENT**

In re:

the arbitration between

STAR WARS ENTERPRISES (PTY) LTD

Claimant

And

NORTH WEST DISTRICT COUNCIL

Defendant

Mr M Otukile for the Applicant
Ms P Mphetolang for the 2nd Respondent

JUDGMENT

PHUMAPHI J:

1. This is an application to review and set aside or correct an arbitral award made by the 1st Respondent on 27 September 2011 pursuant to clause 23 of the contract entered into between the Applicant and 1st Respondent in terms of which Applicant was to re-gravel 15 kilometres of internal roads in Gumare and 20 kilometres of the road between Qurube and Nxaunxau.
2. Clause 23 provides as follows:

"23. In case any dispute or difference shall arise between the Council and the Contractor, the Council Secretary shall determine such dispute or difference by a written decision given to the Contractor. The decision shall be final and binding on the parties unless the Contractor within 14 days of the receipt of the determination, by a written and registered notice to the Council Secretary disputes this.

If the Council Secretary within 14 days of the receipt of this notice fails to give a decision acceptable to both parties, such dispute or difference shall be referred to Arbitration in

accordance with the Arbitration Proclamation, 1959 (No. 75 of 1959) of the Republic of Botswana, or otherwise to be referred to a mutually agreeable third party, whose decision shall be final and binding.”

3. In terms of that clause the parties bound themselves to abide by the decision of the arbitrator which would be final and binding on them. Notwithstanding that Applicant agreed to be bound by the award made by the arbitrator, it has approached this Court for a review on the grounds stated at paragraphs 16(a) and (b) of its founding affidavit as follows:

“16.I must state at this stage that after going through the award and being advised by the Applicant’s Attorneys of record and which advise I verily believe, the Applicant has now resolved to concede the point that in deed it was a responsibility of the Applicant to provide the 2nd Respondent with borrow pits, which in fact the Applicant did. However the Applicant wishes to take issue with the whole award and thus calling

for same to be reviewed per the Notice of Motion and draft order based on the following grounds:

- (a) I am advised by the Applicant's Attorneys of record and verily believe that whilst the rules for the conduct of arbitrations aforesaid which were adopted by the parties require of the arbitrators to state reasons behind his award, in the present case the 1st Respondent failed to thoroughly assess the evidence involved and state reasons for the award made and in some instances the award was riddled with contradictions and some conclusions made without the support of any evidence.**

- (b) The 1st Respondent in some instances made awards that did not form part of the 2nd Respondent's statement of claim at all nor part of the prayers and thus generally biased towards the 2nd Respondent. This I am advised by the Applicant's Attorneys of record and verily believe that constitutes breach of the principle of Natural Justice in that it steals away the Applicant's right to**

respond to a claim that has not been put to him. In other words it amounts to an ambush and in the overall did not amount to a fair adjudication of the matter."

4. The main thrust of the Applicant's challenge of the award is that the Arbitrator was biased in favour of the 2nd Respondent. He readily accepted the submission by the 2nd Respondent and even awarded claims that were not contained in the 2nd Respondent's claim.
5. The law governing the review of arbitral awards in this jurisdiction is the Arbitration Act (Cap. 06:01) of the Laws of Botswana.
6. Section 13(2) thereof provides as follows:

"13.(2) Where an arbitrator or umpire has misconducted the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside,

and may award costs against any such arbitrator or umpire personally.”

The section delimits the limited circumstances under which the court will review arbitral awards.

7. The next question to consider is what is meant by misconducting the proceedings. Perhaps, the starting point is to define the word misconduct. According to “*The New Shorter Oxford English Dictionary*” by Lesley Brown, to misconduct is to mismanage. In my view, to be able to say the arbitration was mismanaged as to warrant a review, one has to look at how the proceedings were conducted. In other words, can it be said that the proceedings were conducted in accordance with the rules of natural justice, which enjoin upon a tribunal to exercise fairness and justice to the parties? The court is not concerned with the result of the arbitration *per se*, but with whether in arriving at the result, the court was fair to both parties, i.e, were they each given a fair opportunity to be heard? If the arbitrator affords the parties equal chance of motivating their case and then arrives at a

particular conclusion because he is mistaken as to what the true facts are or what the correct law is, his award does not fall to be reviewed on account of those errors only, unless it can be shown that the Arbitrator was dishonest or deliberately biased.

8. I am fortified in this view by what my Brother Letsididi J., said in *China Jiangsu International Botswana (Pty) Ltd v Gerrit Herman Vlug and Knowman Enterprises (Pty) Ltd* in re *Knowman Enterprises (Pty) Ltd v China Jiangsu International Botswana (Pty) Ltd* MAHFT-000050-10 in the cyclo-styled judgment at page 8 paragraph 23 where he said,

"The *ratio decidendi* arrived at in these judgments is that "misconduct" alluded to in our Act is with respect to the arbitrator having acted in a way that, objectively viewed, shows "wrongful, dishonest or improper conduct" in his person or in the manner he conducted the proceedings. A *bona fide* mistake however gross can never amount to misconduct."

9. See also *Champion Construction (Pty) Ltd v AMD Allen and Central District Council* MISCA No. F216/01 at page 14 where the Court dealing with section 13(2) cited *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 at 462E-G where Gubbay CJ said the following:

“Under the repealed Arbitration Act [Chapter 7:02], the High Court could set aside an arbitral award in terms of s 12(2), wherein it was provided that:

‘Where an arbitrator or umpire has misconducted the proceedings or an arbitration or award has been improperly procured, the court may set the award aside and may award costs against any such arbitrator or umpire personally.’

Thus a party seeking to set aside an arbitral award could succeed only if able to establish either misconduct on the part of the arbitrator or the fact that the award was improperly procured. The word ‘misconduct’ was to be understood in the sense of some wrongful, dishonest or improper conduct; a *bona fide* mistake whether of law or of

fact on the part of the arbitrator could not be relied upon as a ground for setting aside the award."

10. Turning now to the case at hand, the Applicant's attack on the award is directed at the merits which the foregoing authorities indicate are not a province of this Court unless they come within the ambit of section 13(2). The bias that is alleged therein relates to conclusions reached by the Arbitrator, but the Arbitrator in his reasoning pointed to a number of flaws in the presentation of the case by either party which left a number of grey areas, leaving him at large to resort to Rule 34 of the Rules of Conduct of Arbitration, which provides that an arbitrator may rely on his own expert knowledge and experience. This Court is therefore in no position to say the findings adverse to Applicant were motivated by bias, thus bringing it within the wrongful conduct contemplated by section 13(2) of the Arbitration Act.

11. In the circumstances I come to the conclusion that the Applicant has failed to persuade this Court that the 1st Respondent

misconducted the proceedings or that the award he gave was improperly procured.

12. The application is therefore dismissed with costs.

**DELIVERED IN OPEN COURT AT FRANCISTOWN THIS 22nd
DAY OF FEBRUARY 2013.**

**M P PHUMAPHI
JUDGE**

Otukile & Associates Attorneys for the Applicant
Langwana Mmekwa Attorneys for the 2nd Respondent