PAMIRE & ORS v DUMBUTSHENA NO & ANOR 2001 (1) ZLR 123 (H)

Citation	2001 (1) ZLR 123 (H)
Case No	Judgment No. HH-36-01
Court	High Court, Harare
Judge	Makarau J
Heard	1 February 2001
Judgment	12 February 2001
Counsel	*O Ziweni,* for the applicants *P Nherere,* for the second respondent
Case Type	Civil application
Annotations	Link to case annotations

Flynote

Arbitration *—award — setting aside of—allegation that award contrary to public policy —damages being granted for breach of contract to party* C *which had not itself fulfilled its contractual obligations —such award contrary to elementary notions of justice and therefore to public policy*

Headnote

An arbitral award by the first respondent, arising out of a contractual dispute between the applicants and the second respondent, was attacked on the grounds that recognition of it would be contrary to public policy. It was alleged that the arbitrator was grossly D unreasonable in the treatment of the evidence and there was thus a breach of the rules of natural justice; and that the damages the arbitrator awarded to the second respondent took no cognisance of the fact that the second respondent had itself breached the contract, in that it had failed to pay the full amount of the investment agreed upon.

Held, that natural justice relates to the procedures by which a decision is reached, rather than the content of that decision, and in this respect there was no breach of natural justice.

Held, further, that an award of damages for breach of contract is intended to put the parties in E the position they would have been had the contract been properly performed. To grant full damages to the second respondent in spite of its own failure to meet all its obligations under the contract would violate elementary notions of justice and would thus be contrary to public policy.

Cases cited

Catering Employers' Assn of Zimbabwe v Deputy Chrmn, Labour Relations Tribuna F HH-206-00

Silver's Trucks (Pvt) Ltd & Anor v Dir of C&E 1999 (1) ZLR 490 (H)

Zimbabwe Electricity Supply Authority v Maposa 1999 (2) ZLR 452 (S)

Case information

O Ziweni, for the applicants

P Nherere, for the second respondent G

Judgment

Makarau J: On 29 October 1998, the applicants in case No. HC 13490/98 filed a court application in which they sought to have a certain arbitration award, made by first respondent in favour of second respondent, set aside. This application was filed under the provisions of ss 26 and 27 of the High Court Act as a review application. The application was duly and H

Makarau J

A timeously opposed. On 17 November 1998, the second respondent filed an application seeking an order to have the same arbitration award enforced under the provisions of Article 35(1) of the Model Law contained in the first schedule to the Arbitration Act [*Chapter 7:15*]. The application by the second respondent was opposed on the main ground that to recognise or enforce the award would be contrary to the public policy of Zimbabwe. B The two applications were consolidated through an order granted in case No. HC 15716/99. The consolidated applications were argued before me. For the sake of convenience, I shall refer to the parties as they are cited in the first application, case No. HC 13490/98.

Prior to the set down date, I requested counsel to note the sad passing away C of the first respondent. Both counsel were agreed that there was no need to consider substitution of parties for the first respondent. This was based on the fact that he had been served with all the papers and had not at any time indicated an intention to participate in the proceedings.

At the commencement of the hearing, Mr *Ziweni,* for the applicants, applied for leave to have admitted a supplementary affidavit, deposed to by D the first applicant and filed with the court on 22 January 1999.

Mr *Nherere* objected. He argued that no acceptable basis had been laid for the admission of the affidavit as no new facts had come to light after the filing of the founding affidavit. He further argued that the supplementary affidavit sought to shift the basis of the application to introduce the ground of public policy as a ground upon which to attack the award.

E I am in total agreement with Mr *Nherere* that the supplementary affidavit is in no way a supplement to the founding affidavits, but is an attempt to have the proverbial second bite at the cherry. It clearly was filed as a result of a belated realisation that the application as currently filed did not allege the correct basis upon which to challenge the award.

F I am mindful of the fact that the discretion vested in the court to allow supplementary affidavits is one that should be exercised only in exceptional circumstances. See the judgment of Smith J in *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* 1999 (1) ZLR 490 (H). Ordinarily, I would not have allowed the affidavit to be admitted. I have, however, allowed the affidavit to be admitted because, as indicated above, the G applicants opposed the application under case No. HC 1437/98 on the grounds that to recognise and enforce the award would be contrary to public policy. Disallowing the supplementary affidavit in case No. HC 13490/98 would have not taken the issue of public policy out of my consideration. I would still have had to consider the issue under case No. HC 1437/98. This is based on my understanding that the effect of consolidation of cases H necessarily implies a consolidation of issues. On the basis of the foregoing,

Makarau J

I allowed the affidavit to be admitted. In any event, the respondents will not A suffer any prejudice as a result of the admission of the supplementary affidavit as the issue of public policy raised in the affidavit is already an issue for determination between the parties.

Regarding the answering affidavit, Mr *Ziweni* conceded the arguments raised by Mr *Nherere* and, by consent, it was struck out.

As indicated above, the applicants filed a review application under the B provisions of ss 26 and 27 of the High Court Act. In this application, the applicants seek an order setting aside the arbitration award on the grounds of gross unreasonableness. Mr *Nherere* has challenged the procedure adopted by the applicants. Despite attempts by Mr *Ziweni* for the applicants, I am not persuaded that an arbitration award made under the provisions of the C Arbitration Act [*Chapter 7:15*] can be set attacked other than in terms of s 34 of the Model Law contained in the Schedule to the Arbitration Act. Counsel for the applicants brought to my attention the decision in *Catering Employers Association of Zimbabwe v Deputy Chairman, Labour Relations Tribunal & Anor* HH-206-00 as authority for using review proceedings to attack an arbitration award. In that matter, CHINHENGO J was dealing with a review of D an arbitration award made by the Labour Relations Tribunal under the provisions of the Labour Relations Act [*Chapter 28:01*]. On that basis, I cannot say that he was wrong in holding that, in the circumstances of the facts before him, review proceedings under the provisions of s 27 of the High Court Act were permissible. I however have no doubt that arbitration awards E made under the Arbitration Act can only be attacked on the basis of the restricted grounds provided for under the provisions of the Model Law. The point was clearly made by the Supreme Court in *ZESA v Maphosa* 1999 (2) ZLR 452 (S). The limited grounds of attack are meant to ensure international uniformity in the application of the law, which is of international origin and which is intended to govern both domestic and international arbitrations. F

The matter is not, however, disposed of, as I still have to determine whether or not the award can be enforced as prayed for by second respondent.

It is trite that, in terms of the Model Law, an award will not be recognised or enforced if to do so would be contrary to the public policy of Zimbabwe. Public policy as a concept for the purposes of the Arbitration Act has been G discussed in *ZESA v Maphosa supra* where it was held that the circumstances connected with the making of the award or the substantive matter of the award itself may be contrary to public policy.

The applicants' attack upon the award is to be found in its opposing affidavit. The two grounds raised are, firstly, that the reasoning process adopted in arriving at the award was not in accordance with the principles of H

A natural justice and, secondly, that the recognition of the award in its present form would be contrary to public policy.

The applicants allege that the first respondent was grossly unreasonable in his findings on the evidence before him and in arriving at the amount of damages forming the award. The applicants further contend that if the first respondent was grossly unreasonable in his treatment of the evidence before B him, then there certainly was a breach of the rules of natural justice in the process leading to the making of the award. I am unable to follow the logic in this submission for, in my opinion, the rules of natural justice relate more to the procedures by which a decision is arrived at and less to the content of that decision. As was stated in *ZESA v Maphosa supra:*

> C "Natural justice embraces the requirement that there be fairness in the procedure. Therefore, both parties must be treated equally. Each must be given a full opportunity to present his case ... and be afforded an opportunity of answering the case against him by meeting his opponent's evidence and contentions."

It is not the applicants' case that they were not treated fairly during the arbitration proceedings. It is, further, not their case that they were not D afforded a chance to fully present their case to the first respondent and to meet all of the second respondent's contentions against them. To that extent, I cannot hold that there was a breach of the rules of natural justice during the arbitration process. I further cannot hold that a grossly unreasonable decision is necessarily the result of a breach of the rules of natural justice.

E Rather, the applicants' case is that the first respondent erred in awarding damages in light of the provisions of clause 14 of the shareholders' agreement, which stipulates that:

> "If this agreement is terminated in terms of paras 11 and 13 when disbursements have already been made the money so disbursed and all incidental expenses become due and payable immediately on termination ..."

F Alternatively, so the applicants' case goes, if he had to award damages, the first respondent erred in awarding the sum of $15 312 000 as damages on the basis of the evidence before him. I will deal with each point in turn.

The arbitration agreement that was submitted to the first respondent did not make reference to clause 14 of the shareholders' agreement and all parties to G the dispute proceeded to argue their cases before the first respondent as if there was no clause 14. The point relating to clause 14 first appears in the supplementary affidavit that was filed by the applicants after all other affidavits had been filed, thereby giving the impression that it was a belated discovery. The issue that then arises is whether or not the failure by the first respondent in such circumstances to refer to clause 14 renders enforcement H of the award contrary to public policy. I think not. The parties submitted their

dispute to the first respondent in the form of an arbitration agreement and, in A so doing, prescribed the mandate within which he had to make a finding. Had the first respondent gone out of this mandate and *mero motu* inquired into whether or not damages were payable in the first instance, that would have been a proper and competent ground for the setting aside the award. The applicants omitted to invoke in their favour the provisions of the clause B when drafting the arbitration agreement and during the arbitration proceedings and hearing. The result of their omission cannot be the fault of the first respondent and cannot be held to violate public policy.

Finally, I have to deal with award itself.

The first respondent awarded damages to the second respondent in the sum C of $15 312 000 broken down as follows:

SHARES	
(a) Dividend from shares	1 266 000
(b) Sale of shares	8 924 000
Sub-total	10 190 000
DEBENTURES D	
(a) Interest on debentures at 15%	300 000
(b) Redemption of debentures	500 000
(c) Capital appreciation on debentures	3 963 000

Sub-total	4 763 000
SUPPORT FEES	359 000
TOTAL	15 312 000 E

In arriving at this award, the first respondent made a finding that the applicants had breached the agreement between the parties and consequently, the second respondent had to be put in the position he would have been had the agreement been properly performed for the full period agreed upon by the parties. The applicants contend that, in coming up with an amount as F damages, the first respondent ought to have taken into account the fact that the second respondent had not fully performed its side of the bargain, in that it had not paid the full amount of the investment agreed upon. It is apparent that in coming up with the amount of the award, the first respondent did not take into account the fact that the second respondent still had to pay the outstanding sum of $217 729.54. He makes no reference to this in his G consideration of the damages payable. I now have to determine whether this omission on his part is one that would make "justice turn on its head".

Under the law of contract, damages for breach are meant to put the injured party in the position they would have been had the contract been properly performed. It is trite that the proper performance of the contract necessarily involves the satisfactory discharge of all obligations by all parties and not by H

Makarau J

A the one. Applying this principle to the facts before me, it is clear that for second respondent to have received the sum of $15 312 000 at the end of the agreed period, it would have had to invest the sum of $1 500 000. In the absence of such an investment, the full reward would not have been forthcoming. To therefore grant the full reward in the absence of complete performance by the second respondent does make justice turn on its head, B in my opinion. It is a violation of Zimbabwe's notions of elementary justice and constitutes a palpable inequity that would hurt the conceptions of justice in Zimbabwe. Justice in Zimbabwe ought to be conceived as fair, even-handed and non-discriminatory between the rich and the poor. To recognise the award would have the effect of dispelling this conception.

On the basis of the aforegoing, I think it is contrary to public policy to C recognise or enforce the award. Accordingly, I make the following order:

1. The applicant's application in case No. HC 13490/98 is dismissed with costs.
2. The second respondent's application in case No. HC 14371/98 is dismissed with costs. The award of the arbitrator dated 22 October 1998 D is set aside in terms of Article 34(2)(b)(ii) of the Model Law.

Ziweni & Co, applicants' legal practitioners

E *Ziumbe & Mtambanegwe,* second respondent's legal practitioners