CHINHOYI MUNICIPALITY
versus
MANGWANA & PARTNERS LEGAL PRACTITIONERS
and
HONOURABLE RETIRED JUSTICE M. CHINHENGO

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 24 June 2016 and 6 July 2016

Urgent Chamber Application

T Mpofu with *M Hashiti* and *K Kachambwa*, for the applicant
R Chingwena with *M P Mangwana* , for the 1st respondent
No appearance for the 2nd respondent

CHITAPI J: The applicant filed an urgent chamber application on 17 June, 2016 seeking an order that arbitration proceedings between the first respondent and applicant which are pending or in progress before the second respondent be arrested or stayed pending the determination on the return date of the final order in which the applicant prays that the said proceedings be set aside. For completeness of record, the provisional order was crafted in the following terms.

> "TERMS OF FINAL ORDER SOUGHT.
>
> That you show cause to this Honourable Court why a Final Order should not be made in the following terms:
>
> 1. That the arbitral proceedings between the parties held on the 16th of June 2016, which are before 2nd respondent in so far as they were conducted without a determination on the point of jurisdiction be and are hereby set aside.
> 2. 1st respondent to pay costs of suit.
>
> INTERIM RELIEF GRANTED
>
> Applicant is granted the following relief:-

1. The arbitration proceedings which are being presided upon by the 2nd respondent, be and are hereby stayed pending the determination of the question of jurisdiction before 2nd respondent.

SERVICE OF THIS ORDER
Applicant's legal practitioners be and are hereby granted leave to effect service of this order on the relevant parties."

The issue of urgency was not put into issue and I was satisfied upon a reading of the papers that the application merits urgent determination. An application which seeks to interdict a judicial or quasi-judicial officer as in this case, an arbitrator from continuing the hearing of a matter already commenced before him is *prima facie* an urgent one unless it is made on frivolous grounds or where the application is non-suited for the court's determination.

I do not propose to waste time in summarizing each of the documents which have been filed by the parties. I have meticulously gone through them. I propose therefore to summarise the facts as they would appear to be common cause. I perceived the facts to be as I will sat them out hereunder taking into account not only the papers filed but submissions made by counsel in filling up gaps which appeared to require extrapolation. I allowed both parties to address me on facts which I considered necessary to be appraised of to help me to come up with an informed decision. I did grant the parties the leeway to address me on missing facts whilst mindful of the general rule that in application proceedings parties are bound by and to their papers filed of record. This rule of practice is not cast in stone. Section 246 (1) (a) of the High Court Rules, allows a judge to permit or require either of the parties to an urgent chamber application or a deponent to any affidavit filed with or in the chamber application or any other person to provide such further information as the judge may require or consider necessary in the resolution of a matter before him. Where a judge requires such information, the information can be given on oath or by statements from the counsels or the parties. The court therefore has a discretion inn urgent applications to allow further evidence to be outside the filed papers. The rule does not exist to be invoked by the parties but by the judge.

Summary of facts and/or background

1. The first respondent, a legal firm and the applicant, a local authority, both juristic entities executed a mutual agreement between them in the nature of a service agreement in terms

of which the applicant engaged the first respondent to collect debts owed to the applicant by its subjects or residents falling within its polity.

2. The agreement was reduced to writing and was signed on behalf of the applicant and the first respondent on 29 July 2015. A copy of the agreement is attached to the first respondent's opposing papers as annexure 'A'. I will not bother to set out the contents or provisions of the agreement. Suffice however that the agreement was to enure for 12 months from the date of its being signed where after the parties would agree to either terminate or extend the agreement for such period as determined by the parties.
3. The agreement provided for dispute resolution through conciliation as between the parties. If conciliation or amicable resolution failed, the agreement provided that the dispute would be referred for arbitration. Clause 10.1 to 10.7 of the agreement sets out the terms of the dispute resolution machinery. I shall not repeat or quote the terms *ex tenso*. 1 incorporate them by reference.
4. On September, 2015 the applicant held an ordinary council meeting Ref 012/07/2015 at which the first respondent represented by its senior partner Munyaradzi Paul Mangwana attended by invitation. Mr Mangwana gave a presentation or update on the debt collection services which the first respondent was undertaking on behalf of the applicant pursuant to Annexure A to the opposing affidavit.
5. On 13 November, 2015, the first respondent wrote a letter to the applicant noting that it was its understanding that the applicant had cancelled the debt collection agreement Annexure A. The first respondent in the same letter, a copy of which it attached to its opposing papers as annexure C also declared a dispute. The letter further stated that the first respondent had become aware of the applicant's resolution to terminate the debt collection agreement through a well-wisher. The well-wisher was not named. The first respondent in the same letter gave the applicant 14 days to rescind the resolution failing which the first respondent threatened to refer the matter to arbitration as provided under clause 10 of the debt collection agreement.
6. By letter dated 16 November, 2015, the applicant advised the first respondent that it had terminated the debt collection agreement following a resolution passed by the applicant to terminate the agreement with immediate effect. The letter further advised that the

applicant's Finance Director would liase with the first respondent's office to wind up any pending issues. A copy of the aforesaid letter is attached to the first respondents apposing affidavit as annexure 'D'.

7. By letter dated 1 December, 2015, the first respondent wrote a letter to the applicant pointing out that since the applicant had neither rescinded its resolution to terminate the debt collection agreement nor contacted the first respondent, the matter should be referred for arbitration. The first respondent also proposed the second respondent as arbitrator and requested the applicant to indicate whether it was agreeable to the choice of the proposed arbitrator. The first respondent gave the applicant 7 days within which to communicate its acceptance or otherwise of the proposed arbitrator failing which the first respondent would refer the matter to the Commercial Arbitration Centre to select an arbitrator. A copy of the letter is attached to the first respondents' affidavit and marked annexure 'E'.

8. By letter dated 8 December, 2015, the applicant acknowledged receipt of annexure 'E' and advised that its Finance and Human Resources Committee had referred the same to a Special Meeting of the applicant for deliberations after which a substantive response to the issues raised by the first respondent would be addressed. The letter also referred to the first respondents' urgent application, said to have failed and that in view of that, the debt collection agreement remained cancelled. I have not been made privy to details of the failed application referred to but I do not consider it relevant or assistive in the determination of the issue or issues before due.

9. By letter dated 14 December, 2015, the first respondent wrote to the Commercial Arbitration Centre attaching a copy of the debt collection agreement, advising the centre of the existence of a dispute over the termination of the agreement, advising further of its proposal to the applicant to consider the choice of second respondent as arbitrator and the none response to the proposal and requesting the centre to select a suitable arbitrator to determine the dispute as per the agreement. A copy of the aforesaid letter is attached to the first respondent's opposing affidavit as annexure G.

10. On 5 January, 2016, the applicant wrote a letter to the first respondent following a meeting of the parties on the previous day. It committed itself to have the parties amicably resolve their differences without escalating the matter to arbitration. The applicant undertook that its mayor would contact the first respondent following which a meeting would be convened to resolve the matter. A copy of the letter is attached to the first respondents' opposing affidavit as annexure H.
11. On 11 January, 2016, the first respondent responded by letter to annexure H and committed to meeting with the applicant. It however gave a condition that it would only suspend arbitration proceedings if the applicant initiated the proposed meeting within 7 days. A copy of the letter is attached to the first respondent's opposing affidavit as annexure '1'.
12. By letter dated 15 March, 2016, the Commercial Arbitration Centre advised the first respondent that it had appointed the second respondent as arbitrator to adjudicate on the dispute reported by the first respondent. A copy of the letter is attached to the first respondent's opposing affidavit and marked annexure 'J'.
13. There followed correspondence in the form of e-mails between the Commercial Arbitration Centre and the applicant on the appointment of the second respondent as arbitrator. Apparently the Commercial Arbitration had not received responses to its e-mail to the applicant dated 12 February, 2016 regarding the appointment of the second respondent. The applicants' town clerk indicated that his e-mail had been down. The Commercial Arbitration Centre by e-mail dated 17 March, 2016 suggested to the town clerk that he should seek the ratification by full council or convene a special meeting to deliberate on the appointment of the second respondent as arbitrator as soon as possible and thereafter respond to the proposed appointment of the second respondent. Copies of the e-mail correspondence are attached to the first respondents' opposing affidavit as Annexures K, L and M.
14. The last document placed before me in the paper trail again by the first respondent is a minute of the preliminary hearing held by the second respondent at 3 Elsworth Avenue, Belgravia on 30 March, 2016 at 10.00 a.m. The first respondent as claimant was represented by Mr *M.P Mangwana* and Mr *M Mugwambi*. There was no appearance for

the applicant, then as the respondent. Among other issues covered in the minute were the disclosure of no known reasons by the second respondent as would disqualify him to adjudicate on the matter, the time lines for filing statements of claim, defence, reply and costs. The minute of the preliminary hearing is annexure 'N' to the respondent's opposing affidavit.

So far as the background facts leading to the appointment of the second respondent are concerned, the above summarises what was placed before me. As evident from the paper trail, I do not have any written communication from the applicant either agreeing to or objecting to the appointment of the second respondent as the arbitrator in the parties dispute. From this point onwards my problems with filling up gaps began to reveal themselves. From the papers, the parties appeared before the second respondent on 30 May, 2016. It was on this date that, the applicant represented by Advocate *Hashiti* raised the preliminary issue of jurisdiction of the second respondent. According to the applicant, the applicant had prior to 30 May, 2016 filed written submissions in support of its objection. The first respondent admits in its opposing affidavit that the preliminary issue of jurisdiction was raised but averred that it was agreed that the parties would file their argument in regard to the preliminary issues and then file submissions on the merits thereafter. The parties were then ordered to appear before the arbitrator on 16 June, 2016 for oral argument and to take further steps to conclude the matter.

The first respondent avers that it e-mailed to all the parties its heads of argument as directed on 8 June, 2016, albeit after the agreed date. It attributed the delay to the fact that its legal counsel was indisposed. The first respondent averred that on 14 June, 2016 its counsel received communication from the applicant's counsel that the applicant had engaged Advocate *Thabani Mpofu* as lead counsel but that however counsel was not going to be available on 16 June, 2016. On 16 June, the parties appeared before the second respondent. The applicant sought a postponement because of the absence of its newly instructed lead counsel. The first respondent opposed the postponement. According to the first respondent Mr *Mangwana* states in his affidavit paragraphs cc –dd

> "The tribunal made a ruling that the proceedings continue, as intended for the day with reasons being given in due course.

At that point counsel for the applicant herein indicated that he was not briefed to lead in the proceedings, whereupon counsel for the applicant and the applicants' officials departed from the proceedings which continued in their absence."

As to how the matter then progressed. Mr *Mangwana* for the first respondent stated in his affidavit as follows:

"(gg) (ii) Applicant's application lacks merit because the tribunal is empowered to determine the stage at which it will determine any matters, even matters of jurisdiction.

3. the matter giving rise to this application has been concluded. What is only left is the handing down of judgment.

4. ……..

5. …….
6. There is nothing wrong in terms of our civil procedure for a tribunal to deliver judgment dealing with both points raised *in limine* and the merits of the matter. There is no law which requires that once a point *in limine* is raised it must be concluded before the matter is heard on merits."

The first respondent remained in attendance with the arbitrator and progressed its case after the applicant's counsel had asked to be excused. There would be nothing wrong with the arbitrator proceeding to determine the merits of a matter in the absence of a party which has chosen to deliberately not take part in a properly constituted tribunal. The position is unfortunately not what obtains in this matter. From the facts alluded to in the papers and through confirmation by the first respondent's counsel when I asked him to fill up the gap, the second respondent proceeded to hear the matter on the merits despite the challenge to his jurisdiction. It was confirmed to me by the first respondent's counsel that the second respondent did not give a pronouncement or ruling on his challenged jurisdiction before hearing the merits of the matter. Even in the absence of the applicant whose representatives had excused themselves, the second respondent was required to rule that he had dismissed the challenge to his jurisdiction before proceeding further with the matter. He could however have reserved the reasons for his order of dismissal of the challenge and delivered the reasons as part of the main judgment.

The preliminary point raised by the applicant on jurisdiction was not just a technical issue. It was a plea whose determination would decide whether the proceedings should continue or be terminated or aborted for want of jurisdiction on the part of the second respondent. In

Heywood *Investments (Pvt) Ltd* v *Zakeyo* 2013 (2) ZLR (S) at p 20 E-G the Supreme Court per Gowora JA stated

> "…..it seems to me that the court a quo failed to appreciate the legal issue raised by the point *in limine*. It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to determine a matter on the merits without first determining the interlocutory application.
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> In *Grain Marketing Board* v *Muchero* 2008 (1) ZLR 216 (S) Garwe JA stated as follows at 221 D-E
>
> "Once the application to uplift the bar has been made, the court became seized with the matter. The court was enjoined to make a determination on that application. It did not do so. Instead it proceeded on the basis that there was no such application before the court. In this regard, the court erred.
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> I am satisfied that the trial judge erred in disregarding the oral application and proceeding as if none had been made."

In casu, the first respondent admitted that a point *in limine* as to jurisdiction was raised by the applicant by way of written submissions. The first respondent also responded in writing to the submissions. The first respondent confirms that no ruling was made on the point. The first respondent in fact erroneously asserts that there is no law which obliges a presiding officer, as in here the second respondent to deliver judgment on a point raised *in limine* before hearing the merits of the matter. The second respondent with respect erred in not pronouncing on his jurisdiction before proceeding to hear the merits of the matter. The absence of the applicant whose representatives had excused themselves did not matter. The applicant did not withdraw the *point in limine* and the second respondent remained seized with it. He should have made a ruling on the point.

Before I conclude, I need to deal briefly with an issue which was raised by the first respondent. The first respondent put in issue the competence of this application and averred that there was no basis in law upon which the application could be made. This court has inherent jurisdiction in terms of s 171 of the Constitution as read with s 26 of the High Court Act to supervise and/or review proceedings of any inferior court or tribunal or administrative authority within Zimbabwe. In terms of section 27 of the High Court Act, amongst the grounds listed for which the High Court can exercise review powers include lack of jurisdiction on the part of the tribunal concerned and gross irregularity in the proceedings sought to be reviewed. I am

persuaded that in this matter there exists an arguable case which the applicant can ventilate on the return date and that the point or issue which it seeks to ventilate and argue is neither frivolous nor vexatious.

As a general rule, a court should be slow to intervene in uncompleted proceedings pending before an inferior court. The inherent jurisdiction of this court to interfere with or stay proceedings will only be sparingly invoked and in exceptional circumstances. In this case, the applicant has proved a *prima facie* case that the proceedings before the second respondent have been conducted without due observance of the due process of the law and there is a *prima facie* well-grounded fear that justice will be a casualty if the proceedings are not interfered with. See *S* v *Steyn* 2001 (1) SA 1146; *Eliovson* v *Magid & Anor* 1908 TS at 561; *Grinsberg* v *Additional Magistrate of Cape Town* 1933 CPD 357 at 360.

Article 16 of the Arbitration Act [*Chapter 7:15*] gives the second respondent the power to rule on questions of his jurisdiction. Where the point is taken as a preliminary question the arbitrator should make a ruling. Such ruling may be taken up on review to the High Court within 30 days of the ruling provided that the arbitrator is not estopped from continuing and finalising his award by the making of the High Court application. In this case, the second respondent did not make a ruling before proceeding with the case. Therein lies the irregularity.

Disposition

In the circumstances I am satisfied that the applicant has made out a *prima facie* case. That being, I am obliged by r 246 (2) of the High Court rules to grant the provisional order. I accordingly grant the interim relief as prayed for.

Dube Manikai & Hwacha, applicant's legal practitioners
Mangwana & partners, 1st respondent's legal practitioners