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Judgment No. SC 35/07
Civil Appeal No. 162/06

(1) STANLEY MTETWA (2) COURTESY CONNECTIONS (PVT) LTD v DAVID MUPAMHADZI

SUPREME COURT OF ZIMBABWE
SANDURA JA, GWAUNZA JA & GARWE JA
HARARE, MAY 8, 2007

L Mawuwa, for the appellants

T G Kasuso, for the respondent

GWAUNZA JA: At the conclusion of the appeal hearing in this matter, we dismissed the appeal with costs and indicated that the reasons would follow. These are the reasons.

Subsequent to the signing by the parties of an agreement for the sale of a certain piece of land and the construction thereon of a house by the appellants, a dispute arose between the parties.

The dispute was referred to Mr C A Banda ("Banda") for arbitration. In his award, Banda upheld the agreement of sale and construction, and ordered the appellants to transfer to the respondent the piece of land in question. The appellants were also ordered to complete the construction of developments on the piece of land, as per the parties' agreement. The award was subsequently registered with and became an order of

the High Court. The appellants were ordered to pay costs on the legal practitioner and client scale.

A notice to tax the costs ordered by the court *a quo* was served on the appellants and set down for 8 November 2005. On 10 November 2005, the appellants filed an application in the court *a quo* entitled **"Application for Review and Leave to Apply Out of Time".** In the application, the appellants sought to have Banda's arbitral award set aside on the basis that it was "grossly unreasonable".

The court *a quo* dismissed the application on three main grounds, that;

(1) the application should have been made in terms of Article 34 of the Model Law as set out in the First Schedule to the Arbitration Act [*Cap* 7*:15*];

(2) the applicants, who filed the application in question more than three months after receipt of the arbitral award contrary to subs 3 of Article 34 of the Model Law, had by reason of such delay, irrevocably lost the right to have the award set aside; and

(3) that in any case, the applicants had proffered no good explanation for the delay in filing the application to set aside the arbitral award.

The learned Judge also made an adverse finding regarding the merits of the application.

I can find no fault with the learned Judge's findings and conclusions in this matter.

In the court *a quo*, the applicant sought an order that "the arbitration order in this matter and the order of the High Court registering it be and are hereby set aside".

It is contended for the appellants that they were perfectly within their rights to file an application for review/setting aside of the decision of the arbitrator, in terms of Order 33 r 256 of the High Court Rules, since there was nothing in that rule which precluded them from bringing such an application.

This contention, I find, has no validity. As discussed below, the Model Law, in its Article 34(1), makes it clear that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) thereof.

Specifically the relevant provision reads as follows:

> "ARTICLE 34
>
> *Application for setting aside as exclusive recourse against arbitral award*
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article." (my emphasis)

The use of the words "exclusive" and "only", in my view, suggest there is to be no compromise when it comes to any attempt to have an arbitral award set aside.

The application must be made in terms of the provision cited. That provision quite simply and effectively precludes the applicants from filing their application for the setting aside of an arbitral award, otherwise than in terms of paras (2) and (3) of Article 34.

Even had the appellants sought to file their application in terms of Article 34 of the Model Law, such application would have fallen short of the requirements set out in that Article. Paragraph (2) of the Article provides that an arbitral award may be set aside by the High Court only if –

(i) a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law;

(ii) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;

(iii) the award deals with a dispute not contemplated by or falling within the terms of the submission to the arbitration;

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

Additionally, Article 34 in its para 2(b) provides that the High Court may set aside an arbitral award if the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe or the award is in conflict with the public policy of Zimbabwe.

One does not need to closely analyse the application filed in the court below to realize that it did not satisfy these requirements.

One other significant hurdle that the appellants would have had to tackle in their application was that posed by subsection (3) of article 34 of the Model Law. As the judge *a quo* found, the clear meaning of this provision is that an application to set aside an award may not be made more than three months after the party seeking to have it set aside, received the award. It is not in dispute that the application in question was filed some fourteen (14) months after the appellants had received the arbitral award in question. The learned judge a quo, I find, correctly noted that Article 34 does not provide for a possible extension of the period for good cause shown or on any other ground. I can also find no fault with her conclusion, based on authorities cited, that the right to have the award set aside was irrevocably lost when the appellants failed to file their application on or before 1 December 2004, the last day of the three months period stipulated in the Arbitration Act.

The appellants' contention that there was nothing in Order 33 r 256 of the High Court Rules that prevented them from making the application in question under that order calls for further comment. Article 34 is part and parcel of a statute, the Arbitration Act, and should therefore hold dominance over Order 33 of the High Court Rules, which is subsidiary legislation. In any case, as correctly found by the court *a quo*, the application in question failed to satisfy even the provisions of Order 33.

Rule 256 of Order 33 makes it imperative (as indicated by the use of the word shall) for an applicant to "direct" his application to the person whose decision is to be reviewed, as well as to all other parties affected. As correctly observed by the court *a quo*, the appellants in their application did not cite the arbitrator as a party. This, in my view, would have been fatal to the application, even were it to be accepted as an application for review.

Further to this, and as again correctly observed by the learned Judge *a quo*, no grounds for review appeared *ex facie* the application, as required by r 256.

Thus, having determined that the application should have been filed in terms of Article 34(2) of the Model Law, and also that it failed to meet the requirements for a review in terms of the High Court Rules, we were satisfied the appeal had no merit.

Hence our decision to dismiss it with costs.

SANDURA JA: I agree

GARWE JA: I agree

Mutezo & Company, appellants' legal practitioners
Mantsebo & Partners, respondent's legal practitioners