HH 143-23
HC 1186/18
HC 1775/18

TOWNSEND ENTERPRISES (PVT) LTD
And
SINOHYDRO ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 27 July 2022 & 22 February 2023

Opposed application

J. Chirambwe for applicant
K. Kachambwa for respondent

CHILIMBE J

INTRODUCTION

[1] Had it not been for the vagaries of climate change, this application may well never have been made. Before the court is a consolidation of two opposing claims between the same parties. One party (the applicant or "Townsend"), seeks an order for the registration of an arbitral award in terms of Article 35 of the Arbitration Act [Chapter 7:15] ("the Act"). The other party (respondent "Sinohydro") opposed Townsend`s claim. It also filed an application, under case number HC 1775/18, wherein it prayed for an order setting aside the same arbitral award in terms of section 34 of the same Act.

[2] The arbitral award at the centre of the dispute was handed down by Mr. David Whatman ("the Arbitrator") on 15 January 2018 and amended on 19 February 2018. Materially, the facts are that Sinohydro was contracted by the Zimbabwe Power Company (ZPC) to carry out engineering works under the Kariba South Extension Project. Sinohydro in turn, engaged, by written contract dated 15 June 2015, Townsend to supply 60,000 cubic metres of "washed sand". The sand was to be excavated and transported to Sinohydro` s site from a location on the Gache-Gache River which feeds into Lake Kariba. The sand was to be transported by road from the borrow pit to a loading point then loaded onto barges which were tugged to the Sinohydro site.

[3] A combination of an El Nino-induced drought and subsequent heavy rains gravely impacted the contract. The drought (and power generation on the North and South Banks) caused water levels on Lake Kariba to drop drastically around April 2016. The subsequent heavy rains in turn rendered the route used by the trucks unusable in addition to raising violent storms over the lake. Townsend stated in its Statement of Claim to the Arbitrator that in fact, one barge had to be abandoned during a heavy storm and it sank to the bottom of the river. Townsend argues that it became impossible for it to extract, load and convey the washed sand from Gache-Gache as previously envisaged.

[4] This change in circumstances forms the source of the parties` dispute. Townsend contended that the changes consitituted force majeure as provided for in terns of clause 5.4 of the parties` written agreement. Invoking its rights under the clause, Townsend called for a variation in both performance and price. For the latter, it claimed an increase from the original rate of $46.96 per cubic metre of washed sand delivered .to $98.08 per cubic metre. Townsend claimed a revised total amount of US$1,938,645.17.

[4] Sinohydro did not accept that the weather changes or drop in the lake levels amounted to force majeure, nor did it agree to payment of the contract price at the increased rate. It took the position that the changes were both foreseeable and predictable. Townsend should have effectively provisioned for this eventuality through proper and scientific planning. There are factual disputes as regards what exactly transpired during the period of disagreement but it is accepted that parties conferred over the issue between April and October of 2016 eventually declaring a dispute in April 2017.

[5] What is also common cause is that Townsend continued to make sand deliveries, to a total of 32,712.82 cubic metres, on the anticipation of an increased price. Similarly, Sinohydro continued to receive the sand deliveries on the expectation that the price stayed locked at $46,96 per cubic metre. Negotiations to resolve the matter failed and Sinohydro terminated the contract in February 2017.The parties submitted to arbitration before Mr. Whatman who issued the arbitral award that is now subject of this application.

PROCEEDINGS BEFORE THE ARBITRATOR

[6] The parties held a pre-arbitration meeting on 29 May 2017. The issues for determination were identified as follows; -

2 Is Claimant entitled, in terms of Clause 5.4 of the Contract, to an adjustment of the contract price based on costs due to force majeure?

3 If Claimant is entitled to an adjustment of the contract price, what is the quantum of that adjustment?

4 What was the quantum of WS delivered? Is Claimant entitled to payment for WS delivered and as yet unpaid for or Respondent entitled to a refund of any sum paid in excess of WS delivered?

5 Was Respondent entitled to cancel the remainder of the contract and did it so cancel the contract?

6 If Respondent was not entitled to cancel or did not do so, then is Claimant entitled to any compensation for losses as a result?

7 Is Respondent entitled to return of diesel -or its equivalent value-used by Claimant in excess of the amount agreed per Contract and if Respondent is so entitled to return of the diesel or its value, what is the quantum of that return?

[8] The parties prosecuted their respective claims based on these positions. The core issue was whether the variation of the contract claimed by Townsend was justified in terms of the contract price variation clause based on force majeure. The parties prosecuted and defended their respective positions with intensity. The Statement of Claim presented before the arbitral tribunal comprised of 56 paragraphs. It was backed up by a bundle of supporting documents ranging from email communication, hydrological reports of Kariba water levels, news reports, email communication, letters, aerial photographs and mileage tables.

[9] The Statement of Defence by Sinohydro was no less formidable and invited an equally tenacious response from Townsend. Both parties were represented by counsel who drew up the papers and arguments presented at the hearing. Witness testimony (Townsend called 3 and Sinohydro called 2) was presented and examined. The parties wound up their positions with closing submissions which again traversed the matters in contention.

[10] Clause 5.4 of the parties` agreement set their arguments in train. It provided thus; -

> 'The contract price defined in this [5.1] clause shall not be subject to adjustment by either party for any reason other than costs due to force majeure".

[11] This clause was read with clause 12 and its two sub-paragraphs 12.1 and 12.3 which read;

12.1 Once signed, this contract shall not be subject to alteration or termination by either Party without the prior agreement in writing of the other Party, otherwise any economic losses caused thereby shall be compensated by the responsible Party at its own expense".

12.3 " …….. The definition of force majeure shall be the same as defined in the contract between the contractor [Sinohydro] and ZPC. (Appendix 5)".

[12] Appendix 5 referenced in 12.3 was attached as part of the contract. It stated that force majeure related to acts of nature which could not be prevented by exercise of due care. Importantly, the contract also provided, by clause 7.5 which placed the responsibility on Townsend to manage "any negative impact incurred as a result of the weather" Heavy reliance was placed on this provision by Sinohydro the response to which was that clause 7.5 merely envisaged a situation of normalcy.

[13] The parties argued their positions around these three provisions. Townsend maintained that the change in weather constituted force majeure. It also defended itself from the attacks of dereliction. In addition, Townsend then submitted calculations constituting what it claimed were its entitlements in terms of clause 5.4 of the contract.

[14] Sinohydro presented the following key arguments. There was no force majeure at all as contemplated in the contract in clause 5.4 as read with 12.3, its appendix 5 and 7.5. There was abundant information, inclusive of data published by the Zambezi River Authority. Townsend could have utilised that information in making appropriate arrangements to manage the declining water levels on Lake Kariba as well heavy rains later experienced. The adverse conditions did not render it legally nor physically impossible for Townsend to perform. The onus was on the Townsend to demonstrate force majeure and it had failed to do, argued Sinohydro. Townsend's managing director and key man, Mr. Ray Townsend, who testified at the arbitral tribunal was taken to task on his preparedness to run the contract. It was alleged that he had applied rule of thumb methods in preparing and managing the contract rather than proper scientific methods.

[14] Aside from that, Sinohydro submitted that Townsend misread the import of clause 5.4 by clamouring as he was, for a price increase. That clause merely provided for an adjustment

of "costs" and not "price" in the event of force majeure. In its closing submissions, Sinohydro presented the following argument[1] ;-

> "In essence the Claimant is submitting that it is entitled to a price increase due to force majeure but such force majeure did not render it unable to perform any segment of the contract".

[15] The Arbitrator dealt with each item raised for his attention on the issues list. On the material aspect of the dispute regarding force majeure, he commenced by recognising that the contract between the parties amounted to a turnkey[2] project rather than a mere contract of sale. Sinohydro suggested this point themselves in the closing submissions to the Arbitrator. The Arbitrator examined the contractual clauses and concluded that indeed force majeure necessitated a variation and that Townsend was entitled to payment of the adjusted price. The Arbitrator handed down an award on 15 January 2018. (Updated by an "Additional Arbitral Award" dated 19 February 2018). The award ordered the following in material terms; -

i. That Sinohydro pays Townsend an amount of $1,192,599.73 as the adjusted contract price.
ii. That Sinohydro pays Townsend an amount of $246,203.33 for undelivered washed sand.
iii. That Townsend pays Sinohydro an amount of $48,900.23 as compensation for 46,571.65 litres pf diesel advanced by Sinohydro to Townsend.

THE ISSUES

[5] This is the award whose registration has since been resisted by Sinohydro on the grounds out below. I took the trouble to traverse the key arguments and findings in the arbitral tribunal because these matters will, in my view, assist in the speedy disposal of the issues that have now been tabulated for determination before this court. Reduced from a much longer list, the issues can be stated as follows; -

[1] Paragraph 46 page 377 of the Amended Consolidated Index Volume II.
[2]" a contract in which a company is given full responsibility to plan and build something that the client must be able to use as soon as it is finished without needing to do any further work on it themselves"-Cambridge Online Dictionary.

1. The determination of the main dispute between the parties reflects a reasoning and conclusion so faulty and incorrect by the Arbitrator that it must be set aside as it offends the public policy of Zimbabwe.

2. The award was obtained by fraud.

THE LAW

[6] Before turning to the issues, a quick examination of the law governing the registration or refusal of registration of arbitral awards. The value and relevance of arbitration as an alternative dispute resolution mechanism is now well-entrenched in the jurisdiction. As such, courts will permit, and indeed encourage arbitral processes to run autonomously as long as no violations offending natural justice or public policy are committed. In that regard, it is a well-established position at law that courts will only set aside an arbitral award if the proceedings were discredited by failure to observe the rules and processes of natural justice, or where the arbitral tribunal`s reasoning and conclusions reflect incompetence exceeding mere "faultiness" or "incorrectness".

[7] Public policy and fraud have been raised as defences to the present application for registration of the arbitral award. An unfailingly useful starting point in testing these defences is the well-travelled dictum of GUBBAY CJ in *ZESA v Maphosa* 1999 (2) ZLR 452 (S) at 464 D. The Supreme Court in that decision (a) defined the approach to be adopted in dealing with challenges to arbitral proceedings and (b) the proper considerations to guide the court when confronted with the defence of public policy and stated thus; -

> "Under article 34 or 36, the court does not exercise an **appeal power** and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

[8] A number of decisions have since refined this approach over the years. I wish to refer to two or three out of the many authorities on the point. Firstly, GARWE JA (as he then was) stated as follows in *Provincial Superior, Jesuit Province of Zimbabwe v Kamoto & Ors* 2007 (2) ZLR 8 (S) at 13 C-D; -

> *"ZESA* v *Maposa supra* is authority for the proposition that an award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation, a court would not be justified in setting aside the award. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far-reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above."

[9] Secondly, MALABA DCJ (as he then was) further articulated the concept of a "restricted appeal" in *Alliance Insurance v Imperial Plastics (Pvt) Limited & Anor* SC 30/17 [at page 5]; -

> "The salient feature of the provision is that it prohibits any recourse against an arbitral award other than in terms of its requirements and limits the grounds on which the award can be assailed. The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are followed. The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34(2). An application brought before the Court under this provision is, in essence, a restricted appeal and the applicant should prove the grounds set out in order to succeed in its application." [Emphasis added]

[11] Thirdly, MATHONSI J (as he then was) in *Harare Sports Club v Zimbabwe Cricket* HH 398-19 admonished those litigants given to legal churlishness. The ones who use Article 34

in order to sidestep the restrictions of *res judicata* or issue estoppel by resuscitating non-reviewable-non-appealable disputes properly concluded by competent arbitral tribunals. The learned judge stated as follows [at page 8]; -

> "In a line of cases, the courts have been very careful to interpret that provision narrowly cognisant of the need to protest the principle of sanctity of contract. After all, it is the parties who voluntarily submit to arbitration as an instrument for the speedy and cost-effective means of resolving their dispute. The courts are therefore more inclined to deprecate conduct of a party intent on disrespecting the agreement by undermining the process of arbitration agreed upon by the parties. Fanciful defences against registration of arbitral awards and frivolous applications seeking to set aside an award by inviting the court to plough through the same dispute which has been resolved by an arbitrator in the forlorn hope of obtaining a different outcome will not be entertained."

PUBLIC POLICY

[12] Sinohydro attacked the reasoning and conclusions of the Arbitrator as offending the public policy of Zimbabwe. It alleged that the Arbitrator`s findings and conclusions went beyond mere faultiness and incorrectness in their violation of fundamental principles of the law of contract being; -

1. Violation of the fundamental principle that a contract is formed and subsists because of its essentials.
2. A failure to interpret the contractual clauses and the facts as against the principle of force majeure.
3. Failure to uphold the sanctity of contract in that the Arbitrator effectively made an agreement for the parties.
4. Failure to observe that a remedy for breach of contract was only claimable from the date of breach.
5. Failure to recognise the doctrine of quasi mutual assent.

[16] I will deal with each of these averments in turn. *Violation of the fundamental principle that a contract is formed and subsists because of its essentials*. This argument is misplaced because it overlooks that despite the non-variation clause, the terms were subjected to a series of mutilations from Day 1. The parties themselves accommodated all manner of variations. It

thus becomes difficult to embark on an inquiry to establish the propriety of the contract on the basis of its essential elements. This point was neither raised pointedly nor argued before the Arbitrator. In any event, one of the issues agreed on by the parties was to establish whether termination of the contract was effected correctly. This issue did not seem, in my mind, central to the matter of the force majeure and price adjustment. Further, this point flies in the face of Sinohydro' s own proposal that this contract carried more than the mere characteristics of an exchange of a *merx* for a *pretium.*

[17] *Failure to interpret the contractual clauses and the facts as against the principle of force majeure*. Sinohydro quarrels with the Arbitrator because he found against it in declaring that the contract was subject to force majeure. Neither facts nor cogent legal argument have been placed before the court to demonstrate how disparate was the Arbitrator`s reasoning from a proper understanding of the concept of force majeure. The Arbitrator was driven by the issues presented before him to adjudicate over as amplified by evidence and argument. The positions submitted before and after the proceedings directed him toward the destination, which as his decision reflects, he reached. He recognised the peculiarities of this agreement as a turnkey contract, as well as the specific clauses 5.4,12.3 and 7.5. It may be noted that Sinohydro` s argument in clause 14 above appears misplaced. Clause 5.4 clearly permitted a party affected by proven force majeure to trigger an increase to the price in the form of costs. The Arbitrator also took into account the ordinary incidence of inclement weather as provided for in clause 7.5 and distinguished them from those provided for in clause 5.4,12 and Appendix 5 which he held amounted to force majeure.

[18] *Failure to uphold the sanctity of contract in that the Arbitrator effectively made an agreement for the parties*. The argument raised on behalf of Sinohydro is that the Arbitrator erred by ruling that force majeure entitled Townsend to a price increase. It was argued that the Arbitrator ought to have, upon making that finding, referred the matter back to the parties to negotiate the applicable new price. With respect, I found this argument disingenuous. The issues presented before the Arbitrator were clear. Parties surrendered their autonomy over the contract to the Arbitrator for him to make a ruling. They specifically required him to do so under issue 2 and 3 captured in paragraph [6] above. There is also nothing on the copious papers filed before the Arbitrator nor the argument presented before him that suggest this issue [referral for price negotiation having been specifically raised. Computations were made

and tested during the arbitral proceedings and the only protest from Sinohydro remained that there was no justifiable force majeure.

[20] *Failure to observe that a remedy for breach of contract was only claimable from the date of breach.* This ground assumes the posture of a party who was absent from the proceedings. The respondent Sinohydro has not argued that the Arbitrator was presented with a proposition that in the event that an award of compensation is made, then it ought to commence from or subject to specific conditionalities. In any event, if the Arbitrator misdirected himself on the point, then it was "within his province to err" as further shown below.

[21] *Failure to recognise the doctrine of quasi mutual assent.* This ground has been effectively disposed of in the preceding paragraphs. This court has persistently reiterated the need for parties who submit to the resolution of their disputes through arbitral processes not to renege on the outcomes of such. The guiding principles regarding when courts may interfere to set aside arbitral proceedings on the basis of public policy are well known. The fact that the arbitral tribunal may have been wrong in his interpretation of the law is insufficient basis to seek the setting aside of his or her award. Sinohydro have not shown that the degree of the alleged misdirection was being unconscionably significant to the depth described in *ZESA v Maphosa*. . MATHONSI J (as he then was) held as follows in *Harare Sports Club v Zimbabwe Cricket* (supra) [at page 9]; -

> "The views expressed in the foregoing authorities were endorsed by the South African Supreme Court of Appeal in *Telcordia Technologies Inc* v *Telkom SA Ltd* 2007 (3) SA 266 HARMS JA stated at 302 A: "*An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry-they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry*." Pursing the same line of reasoning that it does not matter that the arbitrator may have misinterpreted the agreement, failed to apply the law correctly or had regard to inadmissible evidence, the learned judge of appeal stated at 302 D-E: "*Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the*

> *limits of his power. The power given to the arbitrator was to interpret the agreement rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly------. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it*." That position is settled, a party to arbitration cannot come to court because the arbitrator was wrong." [Underlined for emphasis].

THAT THE AWARD WAS INDUCED BY FRAUD

[22] Paragraph 69 of the heads of argument filed on behalf of Sinohydro summarise the respondent`s compliant that the award was induced by fraud ;-

> "The Applicant concealed its response to the ultimatum at page 49 of its Statement of Claim by deleting or covering the email with answers to the ultimatum."

[23] The question then is why did the respondent not earlier unmask this charlatanry? The parties interrogated each other`s positions intensely. Clearly, had this point been significant in the proceedings and issues before the Arbitrator it would have been noted and dealt with. There is also no explanation as to why Townsend's witness were not challenged on the point. In any event, even if the email which was apparently concealed is considered, it would not, in the light of the positions taken, be material.Further,fraud is a legal principle whose elements must be proven if a party is to successfully invoke it.The respondent Sinohydro has not done that. This concealment could at most amount to perfidy but clearly not fraud.

DISPOSITION.

[24] Respondent Sinohydro have not made a case for resisting the application for registration of the arbitral award nor have they satisfied the court that there is any legal basis to vacate the award.

It is therefore ordered that;

1. The application for the registration of the Arbitral Award issued by the Arbitrator Mr.D.A. Whatman dated 15 January 2018, as read with an Additional Arbitral Award dated 19 February 2018, be and is hereby awarded with costs.

2. The Arbitral Award issued by the Arbitrator Mr.D.A. Whatman dated 15 January 2018, as read with an Additional Arbitral Award dated 19 February 2018, be of and is hereby registered as an order of this Court in the following terms, it being noted that "Claimant" refers to the applicant and "Respondent" to the respondent in this matter; -

    a) The respondent pay the claimant the amount of $1,192,599.73 in respect of the adjusted Contract Price (VAT included) in respect of washed sand delivered by Claimant to Respondent.

    b) The Respondent pay the Claimant the amount of $246,403.23 in respect of damages on undelivered washed sand. This figure excludes VAT as it is damages claim.

    c) The Claimant pays the Respondent the amount of $48,900.23 in respect of the cost of 46,571.65 litres of diesel.

    d) The Respondent shall pay the Claimants costs on a party and party scale, other than in respect of costs directly associated with the postponed hearing, which costs shall be paid on the legal practitioner and client scale.

    e) The Respondent shall pay the costs of the Arbitrator in full. Respondent shall refund the Claimant for its half of the arbitrator`s costs paid.

Machekano Law Practice-applicant`s legal practitioners.
Manokore Attorneys-Respondent`s legal practitioners.

CHILIMBE J _____ [22/02/23]