DAVIS TAWODZERA MUHAMBI
versus
D.E.B LONG (ARBITRATOR)
and
BRUNO FUNGAYI TAKAWIRA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 2 October 2014

C. Phiri, for the applicant
B. Mugomeza, for the respondent

ZHOU J: This is an application for the setting aside of an arbitral award which was rendered by the first respondent in a dispute between the applicant and the second respondent. The dispute arises out of an agreement in terms of which the second respondent sold to the applicant a Mercedes Benz S600 motor vehicle. The agreed purchase price was US$65 000-00, of which the applicant paid a sum of US$35 000-00, leaving a balance of US$30 000-00. The dispute was referred to the first respondent for arbitration.

On 16 December 2013 the first respondent rendered an award in terms of which he ordered the applicant to pay the sum of US$30 000-00 together with interest. He also awarded that upon payment of the above amount the second respondent must effect transfer of ownership of the motor vehicle to the applicant.

The applicant seeks the setting aside of the arbitral award on the basis that the first respondent denied him the opportunity to lead oral and/or expert evidence. The contention is that by letter dated 31 October 2013 the second respondent had advised the parties that due to the complexity of the matter "he would not only require more time, but would likely also need to hear oral submissions and possibly call (for) independent expert evidence." The applicant argues, therefore, that the failure to afford the parties the opportunity to lead oral and/or expert evidence contravened the provisions of Art 34(2) of the Arbitration Act [*Cap 7:15*]. That section allows this court to set aside an arbitral award if proof is furnished that:-

> "the arbitral procedure was not in accordance with the agreement of the parties."

The applicant's case is that the procedure adopted by the second respondent was not in accordance with the agreement of the parties.

But the parties never had any agreement that there would be oral evidence or expert evidence to be led before the arbitrator before he could render his award. The statement in the arbitrator's letter relied upon by the applicant did not constitute an agreement to have oral or expert evidence led. In fact, it was an indication by the arbitrator that there was a likelihood that he might call for such evidence. It was not a suggestion of either of the parties to have oral evidence led. In the same letter, in the penultimate paragraph, the arbitrator actually expressed the hope that he would be able to deal with the dispute on the basis of the documents filed with him by the parties. Neither the applicant nor the first respondent objected to that indication. Indeed, the applicant did not respond to that letter by insisting on what he now alleges was an agreement that oral or expert evidence would be led.

I have considered too, that the applicant has not stated in his founding affidavit the nature of the oral or expert evidence he intended to lead or how such evidence would have changed the result.

The authorities show that it is only when there is a contravention of Art 34 of the Act that this court is entitled to set aside an arbitral award. No such contravention has been established *in casu*.

In the result, I find no ground to set aside the arbitral award. Accordingly, the application is dismissed with costs.

Machingura Legal Practitioners, Applicant's Legal Practitioners
Mugomeza & Mazhindu, Respondent's Legal Practitioners