CFI HOLDINGS LTD
and
LANGFORD ESTATES (1962) (PVT) LTD
versus
COMMERCIAL ARBITRATION CENTRE
and
FBC BANK LIMITED
and
AGRIBANK OF ZIMBABWE LIMITED
and
CBZ BANK LIMITED
and
INFRASTRUCTURE DEVELOPMENT BANK
OF ZIMBABWE LIMITED
and
NMB BANK LIMITED
and
STANDARD CHARTERED BANK LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 20 and 26 March 2015

Opposed Application

T. Mpofu, for the applicants
S. Moyo, for the respondents

BERE J: The applicants in this matter seek an order from this court to compel the first respondent to appoint an arbitrator in terms of the Memorandum of Understanding (MOU) entered into between the applicants and the respondents in April 2014. The application has been prompted by what the applicants perceive to be a dispute that has arisen between the parties in terms of the MOU over the valuation of the land earmarked for disposal by the applicants in order to effectively deal with their indebtedness to the six respondents who are all commercial banks.

The first, the fifth and the sixth respondents have not opposed the order desired by the

applicants.

It is the second, the third, the fourth and the seventh respondents who have strenuously opposed the granting of the order sought by the applicants on the basis that, among other issues there is no arbitrable dispute between the parties to warrant the roping in of the first respondent.

THE BACKGROUND

The background of this matter can be summarised as follows:

The second, to the seventh respondents are commercial banks who are owed various sums of money by the applicants as a result of certain contractual arrangements entered into. The applicants have failed to discharge their obligations to the mentioned respondents.

It is the applicants' failure to discharge their contractual obligations in terms of the subsisting arrangements that informed the applicants and the respondents to enter into an MOU in April of 2014. In terms of that MOU the applicants proposed a choice of three arrangements by which they would meet their obligations to the respondents namely:

i) A land-debt swap agreement, in which the applicants would swap land they own for amounts they owe respondents.

ii) An outright purchase agreement in which the lenders or any third party would purchase the land from the applicants to enable the applicants to address their indebtedness.

iii) An outright settlement or restructuring of the debt for those lenders not able to or unwilling to participate in the land-debt swap.

The MOU was meant to set the tone for subsequent negotiations between the applicants and the respondents to enter into written Definitive Agreements for disposal of or servicing of the applicants' debts.

In order for the applicants and the respondents to be fully informed in their anticipated negotiations in concluding the Definitive Agreements there was need to ascertain the value of the land owned by the applicants. There was therefore need to have a proper valuation of the land as informed by clause 7.2. of the MOU.

In accordance with clause 4.5 of the MOU, Dawn Properties Limited and Integrated Properties (Private) Limited were mandated to do the valuation of the land to determine its market value. Two valuation reports were given. It is clear from the MOU that the applicants and

the respondents had agreed prior to commissioning of the valuation reports that these reports would serve to assist the parties in determining the current market value of the land so that this would in turn inform the parties in pursuing the conclusion of their Definite Agreements.

It is also clear that the applicant's problems started when the valuations reports were produced. On being presented with the commissioned valuations the applicants rejected the valuations arguing that they were not a true reflection of the current market price of its land.

The applicants expressed the view that the current market price for their land was much higher than the value given by the two valuers. The respondents were satisfied with the valuations given by the valuers commissioned by all the parties in 2014.

It is this dispute between the applicants and the respondents which has spilled into this court. The applicants have crafted the dispute between the parties as whether or not the agreement (MOU) contemplated the disposal of its land on a "flawed valuation as opposed to a proper market price". They also want the precise place to be occupied by the valuations to be subject for arbitration.

In opposing this application the respondents have raised a point *in limine* in their notices of opposition and I intent to deal with that issue first.

All the respondents who opposed this application pointed out that the resolution attached to the deponent for the applicants limited the deponent to the arbitration proceedings and that, this court, not being an arbitration tribunal, the applicants were improperly before this court and sought to have this application dismissed on this technicality. I do not believe the respondents are on balanced feet on this point.

In the first place, this argument misses the point that what is sought in these proceedings at this stage is to do with the appointment of an arbitrator by the first respondent.

Secondly, and more importantly, the concerns raised by the respondents have been adequately dealt with by Advocate *Mpofu* in his heads of Argument when he made reference to r 227(4)[1] which provides as follows:-

> "Affidavit filed with a written application
>
> a) shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out in therein".

In her founding affidavit Rufaro Acquilina Chinamo stated that she has knowledge of the facts to which her deposition pertains, and in the absence of anything said to the contrary, the

court must accept that she was perfectly entitled to make the deposition on behalf of the applicants. See *Mall (Cape) (Pty) Ltd* v *Merino Kooperasie*[1] and *Direct Response Marketing (Pvt) Ltd* v *Shepherd*[2], two authorities properly referred to me by the applicants' counsel.

Perhaps Mr *Moyo* for the respondents appreciated the flaw in his argument on this point and this might explain why he literally abandoned this argument both in his Heads of Argument and oral submissions he made in this court.

I may go further and say that without understating the need for litigants to fully comply with the court rules or court procedure, such adherence is not the end in itself. The court enjoys a wide discretion and if need be non-compliance can be condoned for good cause as long as that condonation does not prejudice the other part. In this regard, I find comfort in restating the views expressed by Van Winsen AJA in the case of *Federated Trust Ltd* v *Botha*[3] when he stated:

> "The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts".

But in this case, it has not even been demonstrated by the respondents that the deponent does not have the knowledge that she claims to have.

For these reasons the point *in limine* is dismissed paving the way for me to deal with the substantive issues involved in this case.

As stated, the applicants have urged this court to make an order compelling the first respondent to appoint an arbitrator to deal with what they perceive to be a dispute concerning the place that must be occupied by the valuations given that there is no agreement with the respondents for the valuations done by the two independent valuers.

The Legal Position

It will be necessary at this stage for me to try and define what this whole concept of arbitration entails. Mr *Moyo* referred this court to one of the leading text books on arbitration which I desire to lean on in defining arbitration. Buttler and Finsen[4] define arbitration in the following manner:

> "Arbitration is a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has impartially received and considered evidence and submissions from the parties. The reference to an arbitrator takes place pursuant to an agreement between the parties".

In this country, arbitration is regulated by the Arbitration Act[1] and s 4 of that Act provides as follows:

> "4. What may arbitrated
> (1) subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration". My emphasis

It will be further noted that it is not every matter which the parties desire to refer to arbitration that qualifies to be so referred. It is the accepted position that despite the existence of an arbitration clause in the parties' agreement, it is not every dispute or disagreement that qualifies to be referred to arbitration. In *PTA Bank* v *Elanne (Pvt) Ltd and Ors*[2] Smith J noted that :

> "The decision as to whether there is a dispute at all can be determined by the court, rather than the arbitrator".

The same position had also been recognized in *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd*[3] and *Croplink (Pvt) Ltd* v *Jessrs & Ors*[4].

Having briefly laid sown the legal position as perceived I will now proceed to deal with the contentious issues as defined by the parties through their respective counsel.

This application has been prompted by what the applicants perceive to be a dispute warranting the appointment of an arbitrator in terms of Article 11 (4) (c) of the Arbitration Act[5]. In a well presented argument, Advocate *Mpofu* for the applicants expressed the view that the parties, having made provision for resolution of possible disputes in terms of clause 10 of their MOU, once the first respondent was presented with Annexure 'B' to which it responded with Annexure 'C' to its founding papers, it was incumbent upon the first respondent to see the process through and not to allow the process to be subverted as it were by any of the respondents.

Mr *Moyo* for the respondents argued to the contrary that there was really no arbitrable dispute warranting the appointment of an arbitrator, and worse still that the parties had yet to have the main "Definitive Agreement", which would contain in it the parties' respective contractual obligations. He further argued these were the obligations contemplated to be dealt with by the arbitration clause in the MOU.

The main contention by Advocate *Mpofu* was that because the applicants and the respondents have not agreed on the valuations done by the independent valuers, then "the precise

place to be occupied by the valuations had become an issue to be resolved through arbitration".

Persuasive as it was, the argument by Advocate *Mpofu* was confronted with numerous challenges some of which I deal with hereunder.

Firstly, it does not seem to me that the MOU contemplated unilateral referral of a perceived dispute to arbitration. As argued by Mr *Moyo* (correctly so in my view), clause 10.3 of the MOU contemplated the issuing of a notice to the other parties registering its intention to refer any dispute to arbitration.

For clarity sake the clause was framed as follows:

> "**10. ARBITRATION**
> **10.3.** A Party wishing to have any dispute referred to arbitration may do so, by issuing notice of at least 14 (fourteen) business days to the other parties of its intention to refer a dispute to arbitration"[1]

There is no indication that this clause was complied with. It was only when the applicants had referred the matter to arbitration that the respondents felt obliged to consider the issue. It would seem that, at that stage, and having benefited from Mr *Moyo's* legal counsel, those who opposed this application formulated the opinion that there was no arbitrable dispute warranting the attention of the first respondent. The first respondent's position must therefore be understood within this context, i.e. at the time it showed eagerness to refer the matter for arbitration it had not got representation from all the parties but had received communication from the applicants only. It naturally had to consider its position when the other parties also made their representations to it.

Secondly Advocate *Mpofu* made the point that the purpose for the desired referral to arbitration was to have "the precise place to be occupied by the valuations determined" as a result of the disagreement between the applicants and the respondents over the valuations presented by the two independent valuers.

This argument was shot down by Mr *Moyo* who passionately and convincingly argued that this disagreement between the parties was not an arbitrable dispute basically for two reasons.

Firstly, the argument was that the MOU itself had already addressed the applicants' concerns through clause 4, 5 of the MOU which stated:

> "Dawn Properties Limited and Integrated Properties (Private) Limited shall be the

> professional independent valuers appointed by the parties to assist in determining the current market value of the property"[1]

The firm view that I take is that the place of the valuations was adequately dealt with by the parties in the MOU and as such, it cannot become an issue for referral to arbitration as contemplated by clause 10 merely because the parties have not agreed on the valuation of the applicants' property.

As argued by the respondents, surely if the applicants are not satisfied with the manner in which the valuations were done by the two valuers, the remedy does not lie in dragging the respondents to arbitration, rather, they must instead complain to the Valuers Council so that the alleged flaws in valuation can be addressed.

Thirdly, I take the point as argued that it is not the function of an arbitrator to define disputes for the parties or to draw up terms of reference for such disputes. The arbitrator's function is restricted to resolving disputes between the parties as informed by s 4 of the Arbitration Act (*supra*).

It would seem to me that the above-referred section presupposes that the parties must have agreed to submit their dispute to arbitration.

The other issue which was canvassed in this case was that truly speaking there is no genuine dispute between the parties requiring referral to arbitration. The argument was that it is not every disagreement that constitutes a dispute for purposes of arbitration. Smith J clarified this position in *Croplink (Pvt) Ltd* v *Jesse and Ors*[2] when he stated:

> "It is attacking the validity of the contract itself. It is not alleging any beach of any term on condition of or undertaking made in terms of or under, the agreement. That being the case, I consider that the dispute does not fall within the terms of the arbitration clause".

The point made is that a dispute is that which if resolved will result in the judgment of the arbitrator being enforceable against one of the parties. In the instant case, even if for argument's sake the arbitrator were to be appointed and fix a value desired by the applicants on its land, this on its own would not force the respondents to enter into debts or loan settlements with the applicants because the Definitive Agreements were never contemplated to be on coercive grounds. There is no way the respondents can be forced to enter into agreements with the applicants irrespective of the value of the applicants' land. I am therefore more than satisfied that

there is no arbitrable dispute between the parties.

Costs:

I have agonised on the issue of costs in light of the position urged upon me by the respondents that the applicants' case is both frivolous and vexatious. I do not agree with this characterisation of the applicants' case.

I do not accept the argument that the applicant's case was hopelessly framed or recklessly pursued to the external of warranting a punitive order of costs.

In the result the applicant's application is dismissed with costs.

Sande and Associates, applicants' legal practitioners
Scalen and Holderness, respondents' legal practitioners