TOWNSEND ENTERPRISES (PRIVATE) LIMITED
versus
SINOHYDRO ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 11 July 2018 & 19 December 2018

Opposed Matter

F. Girach, for the applicant
K Kachabwa, for the respondent

PHIRI J: This was an application for registration of an Arbitral Award handed down by the Arbitrator Mr D.A Whatman on 15 January, 2018. This was in respect of case No. HC 1186/18

The parties also agreed that this court should concurrently deal with and the application made by the respondent in case number 1775/18, for the setting aside of the same arbitral award.

After perusing the applications and hearing counsel this court holds that:

(1) The arbitral award handed down by Arbitrator Mr D.A. Whatman on the 25th of January, 2018 be and is hereby registered as an order of this court.

(2) The application in case number 1775/18, for the setting aside of the aforesaid arbitral award be and is hereby dismissed.

(3) The respondent in case number HC 1186/18 b and is hereby ordered to pay legal costs on a legal practitioner and client scale.

(4) The applicant in case No. 1175/18 be and is hereby ordered to pay costs of suit on a legal practitioner and client scale.

REASONS FOR THE JUDGMENT

The following shall be the reasons for the judgment:

BRIEF FACTS

The brief facts in these matters are that the applicant and the respondents entered into A Memorandum of Agreement on the 18th June, 2015.

In terms of this agreement Townsend Enterprises (Private) Limited was to supply 60 000 cubic metres of sand to Sinohydro Zimbabwe (Private) Limited.

In broad terms the claimant was to extract and wash sand (the washed sand referred to as WS) from the Gache Gache river feeding into lake Kariba, at a site called 'Area 1,' and deliver the WS meeting a specification agreed in the contract, from a loading site near area 1 to a stock file sight in Kariba by large-crossing a portion of Lake Kariba (the lake) to do so. The delivered price per cubic metre of WS was agreed at $46-96 before Vat.

Various longstanding disputes were raised, between the parties, culminating in the declaration of a dispute by Townsend Enterprises (Private) Limited in April, 2017 and a disputed cancellation of the balance of the contract by Sinohydro Zimbabwe (Private) Limited in May, 2017.

In the Arbitrator's word:

> "The precise nature of the dispute, the interpretation of the contract and the obligations of either party as they relate to the performance of the contract as well as the costing and price of the WS are the significant, and interwoven issues brought before the tribunal. More specifically, the main dispute is that … the claim for an adjustment of the contract price was rejected by Sinohydro (Zimbabwe)."

A more extensive analysis of the dispute and the resolution thereof is contained in the Arbitral Award itself.

The applicants filed an application for Registration of the Arbitral Award, with this court and the respondents opposed the registration of the award in case number HC 1186/18.

The respondents contended that the arbitral award should not be registered on the basis that:

'(a) it is contrary to public policy and

(b) it was secured by fraud.

APPLICATION FOR SETTING ASIDE THE ARBITRAL AWARD IN CASE NO. 1775/18

In case No HC 1775/18 Sinohydro Zimbabwe Private Limited filed an application for the setting aside of the Arbitral Award in terms of Article 34 of the Model Law set out in the Arbitration Act.

It was alleged that the Arbitral Award violated basic principles of contract law and was therefore contrary to public policy.

Secondly it was contended that the making of the Arbitral Award was induced by fraud.

POINTS *IN LIMINE*

At the hearing of these matters counsel for the applicant in case number 1186/18 (and for the respondent in case number HC 1775/18) raised the preliminary point that in the opposing affidavit filed in case No. HC 1186/18 the respondent was not in compliance with r 227 of the rules of this Honourable Court. (High Court Rules, 1971).

The same point was raised as a preliminary issue in case number HC 1775/18 that there was non-compliance with the same rules in the founding affidavit deposed for and on behalf of the applicant in that case.

In both instances the founding and opposing affidavit were deposed by one Wu Yi Feng.

It was argued that Wu Yi Feng was not a witness at the arbitral hearing itself.

It was also argued that he also was not party to the negotiations in dispute and neither did he have any personal knowledge of the facts relating to these matters.

Rule 227 of the High Court Rules 1971 provides;

> "An affidavit filed with a written application:
> (a) shall be made by the applicant and respondent, as the case may be; or by a person who can swear to the facts or aver what's there in and
> (b) may be accompanied by documents verifying the facts or averments set out in the affidavit, and any reference to this order to an official shall be construed as including such documents."

It was argued that "where the provisions of the rules are not complied with it has, the effect of rendering the process a nullity." (See paragraph 7 p 87 of applicants heads of argument in case No. HC 1186/18).

The same point was similarly taken in respect of the founding papers in case No. HC 1775/18 that the deponent to the founding papers is not qualified to swear to the founding papers.

In support of this contention this court was referred to the case of *Air Duct Fabricators (Pvt) Ltd* v *M Machado & Sons (Pvt) Ltd* case number HH 54/16; p 4 of the cyclostyled judgment.

The court was also referred tom the case *Newman Chiadzwa* v *Herbert Paulkner* 1991 (2) ZLR 33 at p 37 C-38A where GUBBAY CJ (as he then was) stated:

> "What a deponent must do in order to effectively counter any such doubt, is to set out facts which will justify the Court in coming to the conclusion that thee averments in the summons are within the knowledge – some facts which show an opportunity on his part to have acquired such knowledge"…..
> "A useful test is to ask whether the deponent would be a competent viva voce witness to the facts where he to be called."

(See heads of argument on both case No. 1186/18 and 1775/18).

Attention was also drawn to the comments contained in Herbstein and van Winsen, *The Civil Practice of the Superior Courts in South Africa* (3rd ed), where at p 82 the learned authors set out that a deponent is;

> "required to set out in full the facts upon which he bases his grounds for belief and how he obtained the information. The failure of the applicant to do so constitutes an irregularity, which in accordance with the general rule against the matter in reply is not cured by the filing of a replying affidavit setting out the required information."

It was argued that the peremptory provisions of the r (227) require that, at very least, a Notice of Opposition (in case 1186/18) must be sworn by "a person who can swear to the facts or averments therein."

Wu Yi Feng was not such a person.

Similarly was argued, in case number 1775/18 and in the founding papers Wu Yi Feng contended that he had "personal knowledge" of the papers he deposed to. "In the answering papers he resides from that position.

It was contended that the applicant was obliged to set out his case in the founding papers the "basis of his knowledge" and omitting to do so constitutes a gross irregularity which renders the founding papers defective and that such conduct or defeat cannot be condoned.

See *Austerlands (Pvt) Ltd* v *Trade Investment Bank Ltd & Ors* SC 92/05; *Muchini Vadamis* SC 47/13; also *Karimatsnega* v *Tsvangirai* HH 362/12 and also *Antonio* v *Ashanti Goldfields Zimbabwe Ltd* 2009 (ZLR) 372 (HC*).*

This honourable court is accordingly persuaded that the opposing papers, such as they are, in case number 1186/18 ought to be struck out and the application must cussed.

Similarly this honourable court also finds that the founding papers in case number 1775/18 ought to be struck out and the application must fail.

Wherefore this court makes the following order:

CASE NO 1186/18

a) That the arbitral award handed down by arbitrator Mr A.A Whatman on 15 January 2018 be and is hereby registered as an order of this court.
b) Each party is to pay its own costs.

CASE NO 11775/18

c) The application for the setting aside of the arbitral award be and is hereby dismissed with costs.

Machekano Law Practice, applicants/respondents' legal practitioners
Manokore Attorneys, respondents/applicants' legal practitioners