TRANSCOM SHARAF MOZAMBIQUE LIMITADA
versus
MANYAME MILLING COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 11 October 2018 & 4 April 2019

Opposed application

R G Zhuwarara, for the applicant
T Magwaliba, for the respondent

CHITAKUNYE J. This is an application for the registration of an arbitral award granted on 11 July 2017 in Mozambique in favour of the applicant and against the respondent in terms of Article 35 of the Arbitration Act [*Chapter 7:15*]

On 28 September 2011 the applicant and the respondent entered into a Cargo Services Agreement, (hereinafter referred to as the Agreement) in terms of which the applicant was to provide the respondent with Road Cargo Haulage Services in Mozambique and Zimbabwe.

The pertinent terms of the agreement included, *inter alia,* that:-

a. The applicant was to provide the respondent with vehicles and trailers suitable for Road Transport to transport Cargo for and on behalf of the respondent.
b. The respondent was obliged to make a minimum payment of US$ 90 000.00 each and every month which would be paid upon presentation of an invoice at the beginning of each month.
c. The said agreement contained an arbitration clause to the effect that in the event of any dispute arising between the parties the dispute must be settled by Arbitration in accordance with the Rules of the Mozambique Arbitration Law 11.99 which Rules were deemed to have been incorporated by reference in this section.

After a passage of time a dispute arose between the parties. The applicant alleged that the respondent had breached the terms and conditions of the agreement. In accordance with Clause 7.2 of the agreement, the dispute was referred to the Arbitration Tribunal in Mozambique. A hearing was conducted before the Honourable arbitrator Fernanda Lopes.

On 11 July 2017 the arbitrator rendered his arbitral award in favour of applicant to the effect that the respondent was to pay the applicant an amount of US$748 011.50.

The respondent was aggrieved by the outcome and launched an appeal against the award.

The arbitrator rejected the appeal and declared the award as final on 13 August 2017.

It is trite that the objective behind arbitration is to arrive at an award that is final and binding on the parties. An arbitral award can thus not be ignored or be set aside at the whims of an aggrieved party. It is in recognition of this that there are very limited grounds upon which an arbitral award maybe refused recognition.

In this matter Clause 7.5 of the Cargo Services Agreement captured the final and binding nature of the arbitral award once granted in these terms:

> "The decision of the sole arbitrator shall be final and binding on the parties after the expiry of the period of 21 days of the arbitrator's ruling if no appeal has been lodged by either party. The decision of the appeal tribunal shall be final and binding. A decision which becomes final and binding in terms of Clause 7.5 may be made an Order of Court at the instance of any party to the arbitration."

It is such final and binding award that applicant obtained on 11 July 2017 and whose finality was confirmed by the rejection of respondent's appeal on 13 August 2017, which the applicant seeks to register with this court.

The respondent opposed the application for the registration of the award. In its opposing affidavit respondent admitted to have entered into the Cargo Services Agreement in question. It, however, alleged that there was a condition precedent that it would secure a bank guarantee which was not fulfilled and so the agreement did not come into force and effect.

Despite this assertion respondent admitted that a dispute arose between the parties which was referred to arbitration in accordance with Article 7.2 of the agreement.

Respondent further confirmed that it appealed against the initial decision by the arbitrator. After the rejection of its appeal respondent stated that it lodged a further appeal against the rejection of its first appeal.

The respondent thus contended that by virtue of the appeal against the rejection of the first appeal, the arbitral award the applicant seeks to register has not yet become final and binding on the parties.

It is apparent from respondent's grounds of opposition that its main concern pertains to the merits of the decision save for the contention that the award is not final due to the further appeal.

In the heads of argument respondent's counsel also averred that the applicant has not complied with the requirements of Article 35 (2) in that it did not supply the original arbitration

agreement or a duly certified copy thereof. Further, that it did not supply the authenticated original arbitral award or a duly certified copy thereof. On the basis of the above counsel argued that the application is fatally defective and must be dismissed.

It is pertinent to note that these latter aspects were not in respondent's opposing affidavit but were only raised in the heads of argument.

Applicant's counsel, on the other hand, argued that the application is proper and that the award must be registered as applicant has complied with the requirements of Article 35.

Article 35 provides that:-

> "(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36.
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in *the English language*, the party shall supply a duly certified translation into *the English language*."

In *casu*, the applicant has made the application in writing as required under article 35

(1) In that application applicant is required under sub-article 2 to supply:

a) a duly authenticated original award or a duly certified copy thereof;

b) the original arbitration agreement as referred to in article 7 or a duly certified copy thereof.; and

c) where the award or agreement is not in English language, to supply a duly certified translation into the English language.

The applicant supplied the above documents but the question raised was on the documents not being authenticated originals or duly certified copies thereof.

An examination of the documents is thus of the essence.

The first document to consider is the agreement between the parties titled 'Cargo Services Agreement'. The document filed of record is in English language and so issues of translation did not arise. It is apparently a copy of the original. The deponent to the respondent's opposing affidavit admitted that this was the agreement as referred to in paras 6 and 7 of the applicant's founding affidavit. This admission and confirmation was despite the fact that it is not a certified copy. The respondent's only issue of contention was that this agreement did not come into force and effect as it was subject to receipt of a bank guarantee which never materialised.

It is this same agreement that contained the arbitration clause in its clause 7. In the event of a dispute arising and the parties failing to reach amicable settlement, clause 7.2 provided as follows:-

> "If they do not reach such solution within a period of 28 (twenty eight) days after one of the parties has requested consultations as *per* Clause 7.1, then the dispute or differences shall on written demand by either party be referred to and finally settled by arbitration in accordance with the rules of the Mozambique Arbitration law 11:99 which rules are deemed to be incorporated by reference into this section."

It was thus in terms of this clause that the dispute was referred to arbitration and an award made.

Thus far there is no dispute that the arbitration clause as incorporated in the Cargo Services Agreement is the one applicable here.

The respondent did not express any disquiet on the agreement tendered as Annexure A, if anything respondent confirmed that this is the agreement between the parties under which the arbitration was conducted and the award granted.

I am of the view that the respondent's admission in this regard was well informed as respondent was represented by legal practitioners. Thus the admission could only have been made after a careful consideration of the document in question and its contents. Clearly therefore no issue of misrepresentation or forgery or lack of genuineness was raised against the copy of the agreement.

The only issue is that the agreement is not an authenticated original or certified copy. The issue is thus on form and not on substance.

In considering whether the defect in the form is fatal or not it is important to consider the Arbitral Award before making a final determination.

The Arbitral Award was in Portuguese language. As *per* requirements of Article 35 (2), the arbitral award was translated into the English language and there is a certificate accompanying such translation. The original award is in fact certified thus meeting the requirement for certification. (See last page and stamps within the pages).

In *casu*, in para 8 of the opposing affidavit, respondent admitted that annexure B to the application is the arbitral award rendered by the arbitrator on 11 July 2017. In para 9 of the opposing affidavit the respondent did not deny but confirmed that Annexure C to the application is the decision by the arbitrator on its appeal. Besides the above admissions it is pertinent to note that the arbitral award rendered on 11 July 2017 Annexure B was in Portuguese and was duly translated into English. The translator duly certified it before a notary

public as clearly reflected on the certificate dated 5 February 2018. In that certificate the translator confirmed translating the twelve page document and appending his signature thereto. Thus as far as the requirement for translation is concerned there should be no issue there.

The arbitral award itself which was translated has at the back of the Portuguese copy a certification stamp and it is duly signed and dated. It is thus incorrect to say that the award itself was not certified.

I am of the view that considering the intention behind article 35 the applicant has indeed complied with its requirements. There is no dispute on the authenticity of the agreement on arbitration and the award itself. Those aspects are, in fact, common cause.

The only issue as alluded to pertain to the failure to certify the copy of the agreement. The effect of such failure must however be taken in light of the fact that the award itself is certified and considering the intention of the legislature in making provision for authentication, such failure may not be fatal.

It is my view that whilst the provision is peremptory I have no doubt that the intention was to ensure that an agreement presented for registration is the true and correct document and not forged or fraudulent documents. The genuineness of the document is common cause.

Thus where both parties are agreed that this is the true document pertaining to the agreement and that the arbitration clause therein is the clause under which the award was made there may not be need to insist on the original or certified copy of the original.

In *Lourens M Botha* v *Gwanda Rural District Council* HB 151/18 at page 3 of the cyclostyled judgement, MATHONSI J, when faced with an objection on the basis that the applicant had not furnished the original award due to failure by respondent to pay its portion of the arbitrator's fees for the original or certified copy of the award to be released by the arbitrator, aptly stated the intention behind Article 35 (2) as follows:-

> "The import of that provision which has some international flavour, as it ought to, being the United Nations Commission on International Trade Law (UNCITRAL) Model Law is to provide the registering court with an authentic document sought to be registered. It is for the benefit of the registering court which must ensure authenticity before registration. The legislative intendment is to prevent fraud or some other like vices as may lead to a false or forged document being registered thereby being turned into a court order unduly. It occurs to me that the provision should not be abused by a litigant bent on frustrating the objectives of arbitration."

Though in the *Botha* case applicant had been forced to apply for registration without first obtaining the original award from the arbitrator due respondent's conduct and had later in his answering affidavit filed the original, the salient aspect is the import of the provision.

In the present case there is no doubt on the authenticity of the agreement between the parties and the arbitration clause. To authenticate maybe defined as to demonstrate the authenticity of; or to make valid; to verify. If therefore respondent in its responses confirmed the agreement, thus giving it authenticity or confirming its genuineness, should this be disregarded simply because the original or a certified copy thereof has not been furnished? I would have agreed with respondent's counsel had respondent not confirmed that what applicant tendered as Annexure A is in fact the agreement. That agreement though not in its original form is accompanied by a certified arbitral award. This, in my view, should be sufficient for purposes of ensuring registration of the award. I am of the view that considering the intendment of Article 35 the applicant has indeed complied with its requirements. There is no dispute on the authenticity of the agreement on arbitration and the award itself.

The next point to consider is whether the award is final or not. The respondent's contention is that the award is not yet final as it has noted another appeal.

The issue is thus whether there is another appeal and if so its effect on the arbitral award. In terms of the determination of the first appeal, the arbitral award rendered became final on 13 August 2017 when the first appeal was rejected. This is in tandem with Clause 7.5 of the agreement which is to the effect that such decision shall be final and binding and maybe made an order of court at the instance of any party to the arbitration.

In its contestation that the award is not final respondent referred to its alleged further appeal it purportedly filed against the rejection of its first appeal. The respondent attached notification letters, one of which is from the arbitration centre acknowledging receipt of the alleged appeal against the rejection of the appeal in the first decision as proof that it had appealed against the rejection. However, the legal point parties had to address was the effect of such further appeal. In this regard counsel could not agree on the party with the onus to prove the position of the Law of Mozambique in situations of such alleged further appeals.

In resolving this issue, it is pertinent to have regard to article 36 of the Act which provides grounds upon which this court may refuse recognition or enforcement of an award.

That article provides, inter alia, that:-

> "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only—
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> (*a*) at the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that—

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(*b*) if the court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Zimbabwe*; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of *Zimbabwe*."

It is apparent that the onus is upon the party against whom the award was made to establish to court's satisfaction that any or some of the above grounds for refusal exist in a particular case. In casu, the respondent' contention was that the award was not yet final and binding due to its further appeal. Such ground falls under Article 36 (1) (a) (v). It was thus incumbent upon respondent to prove that in terms of the law of Mozambique, the launch of the second appeal suspended the finality of the award. This is more so in that the arbitral Clause simply provides for one appeal after which the award becomes final. Unfortunately the respondent did not proffer any proof controverting the finality and binding nature of the award.

Further, it is trite that he who alleges must prove. In *casu*, it is respondent who alleged that its appeal against the refusal of its appeal suspended the finality of the arbitral award and so the onus of proof was on the respondent.

In terms of s 25 of the Civil Evidence Act [*Chapter 8:01*] the respondent ought to have proved that in terms of the Law of Mozambique this further appeal rendered the award not final. That section provides that:

"(1) A court shall not take judicial notice of the law of any foreign country or territory, nor shall it presume that the law of any such country or territory is the same as the law of Zimbabwe.

(2) Any person who, in the opinion of the court, is suitably qualified to do so on account of his knowledge or experience shall be competent to give expert evidence as to the law of any foreign country or territory, whether or not he has acted or is entitled to act as a legal practitioner in that country or territory.

(3) In considering any issue as to the law of any foreign country or territory, a court may have regard to—

(*a*) any finding or decision purportedly made or given in any court of record in that country or territory, where the finding or decision is reported or recorded in citable form; and

(*b*) any written law of that country or territory; and

(*c*) any decision given by the High Court or the Supreme Court as to the law of that country or territory.

(4) The law of any foreign country or territory shall be taken to be in accordance with a finding or decision mentioned in para (*a*) of subsection (3), unless the finding or decision conflicts with another such finding or decision on the same question.

(5) For the purposes of para (*a*) of subsection (3), a finding or decision shall be taken to be reported or recorded in citable form only if it is reported or recorded in writing in a report, transcript or other document which, if the report, transcript or document had been prepared in connection with legal proceedings in Zimbabwe, could be cited as an authority in legal proceedings in Zimbabwe."

It is clear from this section that court is prohibited from taking judicial notice of foreign law. It also does not allow the court to presume that foreign law is the same as Zimbabwean law. Subsection 2 prescribes how foreign law should be proven through the evidence of a witness who is an expert on that foreign law. In considering any issue as to the law of a foreign country or territory the court can in terms of subs 3, 4 and 5 have regard to:-

(a) Authoritative citable reported or recorded decisions of the courts of that country whose decisions do not conflict with another such finding or decision on the same question;

(b) Written law (i.e. statute law) of that country.

(c) Zimbabwean High Court or Supreme Court decisions on what the law of the country in issue is. This refers to, proof through precedents by Zimbabwean Superior Courts on the foreign law in question.

See *Stubbs* v *Stubbs (nee Du Plooy)* HH 101/15 and *Mokbel* v *Mokbel* HH 192/15. Evidently therefore, expert evidence or such evidence as is provided for above ought to have been called to prove the positon of the law of Mozambique as this court cannot presume that the law of Zimbabwe is the same as in Mozambique or assume that the further appeal suspended the finality of the award.

In other words without expert evidence explaining the effect of the respondent's 'appeal against the decision to refuse an appeal' this court cannot conclude that finality of the arbitral award in issue has been suspended.

The circumstances of this case bring to the fore the need to remind parties that the objective behind arbitration is to expedite the resolution of disputes and arrive at an award that is final and binding on the parties. An arbitral award may only be refused recognition to the extent delimited by the Arbitration Act. Once parties decide to submit to arbitration agreeing that the decision of the arbitrator shall be final and binding upon them such parties should not seek to circumvent what they agreed to just because the outcome is not favourable to them; the result of arbitration must be respected. I am of the view that there is more honour in adhering to the award than in seeking to avert the unfavourable outcome at any cost. In *casu*, the respondent's opposing affidavit, especially as depicted in paras 6 to 7, shows that the respondent is simply seeking to reargue the matter on issues the arbitrator had determined.

It is pertinent to bear in mind that an application for the registration of an arbitral award is essentially an administrative process. Consequently, the court does not assume a review or appeal role. In the main, this court only determines whether or not the award is registrable. In doing so it satisfies itself that the award does not contravene the law of the land, is extant and remains enforceable against the other party.

See *Mathews* v *Craster International (Pvt) Ltd* HH 707-15 and *Dzirutwe* v *Dairiboard Zimbabwe (Pvt) Ltd* HH 259-16.

Accordingly, I am of the view that the arbitral award in question is registrable

It is hereby ordered that:

1. The arbitral award by the Honourable arbitrator Fernanda Lopes dated 11 July 2017, a copy of which is annexed hereto Marked 'A' be and is hereby registered as an order of the court.
2. The respondent shall pay the applicant's costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
Atherstone & Cook, respondent's legal practitioners