HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

NDLOVU J

HARARE 20 February & 29 June 2023

FIDELITY LIFE ASSURANCE OF ZIMBABWE LIMITED APPLICANT

And

CIF HOLDINGS LIMITED 1st RESPONDENT

JUSTICE NOVEMBER T. MTSHIYA (RETIRED) N.O 2nd RESPONDENT

Adv. Mafukidze, for the Applicant**.**

Adv. T. Mpofu, for the 1st Respondent**.**

No Appearance, for the 2nd Respondent.

NDLOVU J: This is an application for the setting aside of the 2nd Respondent's award in terms of *Article 34(2) (b) (ii)* of *Schedule 1* of the ***Arbitration Act [Chapter 7:15]*** on the basis that the award conflicts with the public policy of Zimbabwe.

Both the Applicant and the 1st Respondent are companies incorporated in Zimbabwe. The second Respondent is a retired Judge of the High Court and Arbitrator over the dispute between the Applicant and the 1st Respondent.

BACKGROUND FACTS

The 1st Respondent issued a claim against the Applicant in May of 2018 in arbitration proceedings before the 2nd Respondent. At the pre-arbitration meeting, the parties agreed that

they would lead evidence if it became necessary. As shall more fully appear hereunder it is this agreement that has birthed the current controversy between the parties. When the statement of defence was filed, the 1st Respondent took the position that it had become necessary for it to lead evidence. The necessities to leading evidence were duly complied with by the 1st Respondent thereafter.

At the commencement of the hearing on 15 September 2020 Counsel for the Applicant indicated that the now Applicant was not going to be lead any evidence. The 1st Respondent's witness then testified. No case of the Applicant was put to the 1st Respondent's witness. At the close of the 1st Respondent's case, counsel for Applicant is recorded as having said the following:-

> *"Ordinarily I would have proceeded to open and close but there has been a comment on the listing rules by the witness. I would want to, in terms of the listing requirements to lead evidence from the Zimbabwe Stock Exchange"*

There was no objection to this indication, and understandably so, as this indication and the manner it was phrased was clear and consistent with the Applicant's indicated position at the commencement of the hearing.

The ZSE witness could not be secured for undisclosed reasons. The Applicant then advised in writing that it was going to find an alternative witness and furnish its statement of evidence and bundle of documents. The 1st Respondent objected to that intended course of action. The basis for that objection was that the Applicant was now changing course and wanted to lead evidence in rebuttal on the substantive issues and thought it could do so as of right and refused to apply to lead evidence. According to the 1st, Respondent the proper approach was for the Applicant to apply to the Arbitrator to lead evidence because of its earlier stance that it will not lead evidence.

In his ruling of 10 December 2020 the 2nd Respondent found in favour of the 1st Respondent and found *inter alia* that the new substantive evidence sought to be led by the Applicant herein would be prejudicial to the 1st Respondent as its witness had testified and left and the prejudice could not be sanitized and that by refusing to apply to lead evidence the Applicant had declined an opportunity to demonstrate how such prejudice could be ameliorated. The approach was insensitive and unfair to the 1st Respondent. The following is the critical excerpt of the 2nd Respondent's ruling:

"I accept [CFI's] position that there is no formal and proper application before me for [Fidelity] to lead evidence. In the circumstances of this case, [Fidelity] ought to have made a proper application to lead evidence".

Aggrieved by this Ruling, the Applicant filed a Court application in this Court to set aside the award by the 2nd Respondent, ***HC 7666/20*** refers. The Applicant later withdrew its Court application. The Applicant decided to file an application to lead evidence to the 2nd Respondent on 21 June 2021. The 1st Respondent opposed the application.

The objection was thrust *inter alia* on 3 points *in limine* and those were:

(1) The matter was res judicata
(2) The arbitrator was estopped from reviewing his own decision
(3) The Founding Affidavit was based on inadmissible hearsay evidence

The application failed and was dismissed on the basis of the rejection of the founding affidavit.

It suffices herein to quote the 2nd Respondent in the 6 October 2021 Ruling Paragraphs 4 & 5 making reference to his 10 December 2020 Ruling.

"4. Notwithstanding the format of the application that was before me, the passages of my ruling quoted above, clearly confirm that I dealt with the merits of the dispute that was placed before me. That explains the reasons for the submission by the respondent that I am estopped from revisiting my own decision….

5 [T]he applicant made this current application on the same dispute that I had dealt with on 10 December 2020".

According to the Applicant, because the 2nd Respondent ruled that there was no proper application before him because the application was on nullity, there was therefore no application before him at all to talk about.

Undeterred the Applicant filed another application on 1 November 2021 seeking similar relief. The 1st Respondent opposed that application. The 2nd Respondent dismissed the application finding it highly improper that he be forced to review his own rulings, According to the 2nd Respondent, the issue was now *res judicata* and the principle of *res judicata* stopped him from entertaining that application. He went on to find the application to be amounting to an abuse of process. This decision is dated 10 May 2022.

It is that award according to the applicant that is subject to this application for setting aside.

POINTS IN LIMINE

The 1st Respondent took several points in limine, and they are:

1. **Application filed out of time.**

   Article 34(3) of the *Model Law* requires that a challenge to an award be brought within 3 months of such an award, otherwise, the right is irrevocably lost.

   Courtesy Connection (Pvt) Ltd & Anor V. Mupamhadzi 2006 (1) ZLR 479

   The 1st Respondent has argued that this application is an abuse of process and is filed out of time because it was filed on 23/06/22 yet the 2nd Respondent found on the 10th of December 2020 that the leading of evidence under the circumstances of this matter by the Applicant would be prejudicial to the 1st Respondent. That determination stands and creates an issue of estoppel.

   Zimasco (Private) Limited V. Portnex International (Proprietary) Limited HH 205/21.

   The Applicant takes the position that the 10 December 2020 award by the 2nd Respondent was not final and definitive on the merits of the application to call an oral witness and compel the creation of the joint bundle. As a result therefore the requirements for *res judicata* had not been satisfied. Even if it were to be held that *res judicata* applied, it should not be applied rigidly.

   With respect, the Applicant is wrong on this point. The arbitrator made findings and pronounced himself clearly in that decision. The arbitrator made a determination that the Applicant should have made a formal application. He went further and stated that to allow the Applicant to lead evidence and file a new bundle of documents would be prejudicial to the 1st Respondent who had already closed its case. He made a determination that arbitration proceedings should be governed and run by the terms

as agreed on by the parties and he could not go beyond the arbitration agreement clause. He made a finding of fact that the Applicant indicated that it would not lead evidence.

Clearly after the 10 December 2020 award, the 2nd Respondent became *functus* on the subject matter of the application to lead evidence by the Applicant. In fact, the Applicant sought to challenge that award in this Court but withdrew the application.

Assuming, the 10 December 2020 ruling was confusing or suffered a defect, the 6 October 2021 award erased all that and cleared the way for the Applicant. The 6 October 2021 award was clearer. It ought to have been challenged there and then and Applicant chose not to. Nothing material separates the 6 October 2021 award from the 10 May 2022 award other than the dates and that on 10 May 2022, the 1st Respondent stated that a dissatisfied party was free to approach this court.

The point *in limine* taken that this application is filed out of time is therefore upheld.

2. <u>Preemption</u>

The Applicant challenged the 10 December 2020 ruling in this court it later withdrew the same. In so doing, the 1st Respondent argues, the Applicant accepted the correctness of the 10 December 2020 award and thus preempted its right to subsequently challenge the award.

Minister of Mines V. Finer Diamonds (Private) Limited SC 28/22

The applicant contra-argues that it did not acquiesce itself to the award.

In my view, the Applicant is clutching at the proverbial straws. What they fought then they are fighting now. From 2020 to date, the issue has always been about the applicant wanting to lead evidence, the 1st Respondent opposing, the 2nd Respondent declining the application on the basis of prejudice to the 1st Respondent and *res judicata*. From 10 December 2020 to date the situation has not changed. When the Applicant launched its first written application it knew beforehand that the 2nd

Respondent's position was that, to allow the Applicant to lead evidence after the 1st Respondent had closed its case was prejudicial to the 1st Respondent. Even when it made its last attempt at that, nothing had moved. I, therefore, uphold this point *in limine*.

3. <u>Forum Shopping</u>

This application came with an application for recusal which was refused and the refusal was appealed. The Applicant argued that those are different applications in which it is exercising its rights and this application should not be taken as an abuse of process but as an application to lead evidence and no more.

I dismiss this point *in limine* on the basis that I do not see it being capable of disposing of this matter.

4. <u>Cause of Action</u>

The 1st Respondent has argued that the Applicant lacks a cause of action to bring this application because it is the Applicant who took the decision that it was not going to lead evidence. As a result of that, its case was not put to the 1st Respondent's only witness and neither were its new documents canvassed with the witness. The applicant was happy to adopt that course, it cannot therefore purport to enforce a right because it has none to enforce.

Where one has no right to enforce, that person has to apply for indulgence, and the sought relief will be granted only if in the exercise of discretion the Court finds in favour of granting the relief sought. One must seek leave when he is at fault. The Applicant ought to have asked and gave an explanation and dealt with the question of prejudice in that application for leave. Because Applicant has continuously refused to seek leave it therefore has no cause of action.

In response to that, the Applicant has denied that it said it will not lead evidence. All it is doing in this case is to exercise its right to call a witness so that it is heard however it has been denied that right by the 2nd Respondent.

With respect I find the Applicant to be splitting hairs when it denies that it said it will not lead evidence. Its own summation of the background facts confirms that that is what it said or at least made everyone concerned believe. The conduct of its lawyer or what he is recorded to have said together with its erstwhile lawyer's affidavit establish beyond doubt that that is the position the Applicant took.

That the parties couched their stated positions with the words "if necessary" was not an open cheque to disorder and chaos. If it became necessary for a party to lead evidence, it could do so procedurally and without causing prejudice to the other party. I find that the Applicant has, on the basis of the facts of this matter no cause of action. I uphold the point *in limine* taken.

5. <u>Positive Relief</u>

In terms of *Article 34(1),* of the Act, this court has no power to grant positive relief. It cannot direct, it can only set aside. This point is conceded by the Applicant and is therefore upheld.

6. <u>Interlocutory Ruling</u>

The 1st Respondent has also argued that the Applicant has no right to challenge an interlocutory ruling. If it is dissatisfied with the ruling it should be patient enough and challenge it right at the end of the arbitration hearing.

***Zimasco (Private) Limited V. Portnex International (Proprietary) Limited & Anor HH 34/21*.** The Applicant has not challenged this point.

I uphold the point *in limine* taken.

DISPOSITION

Having upheld 5 of the 6 points *in limine* taken by the 1st Respondent it is inescapable that this application accordingly must fail and it fails.

ORDER

The application be and is hereby dismissed with costs.

Mawere Sibanda Commercial Lawyers, Applicant's Legal Practitioners.

Nyawo Ruzive Attorneys, 1st Respondent's Legal Practitioners

NDLOVU J

29/06/2023