MINING ENGINEERING CONSULTING SERVICES [PTY] LTD
versus
BLANKET MINE [1983] [PVT] LTD
and
MR GEORGE GAPU N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 30 January 2024

Date of written judgment: 9 February 2024

Opposed application

T. Mpofu, with him, *T.S. Manjengwah*, for the applicant
D. Tivadar, for the first respondent
No appearance for the second respondent

MAFUSIRE J

[1] Article 16 of the United Nations Commission on International Trade Law [UNCITRAL] Model Law, an annexure to our Arbitration Act [*Chapter 7:15*] ["***the Model Law***"], paraphrased, and for the moment only picking the bare essentials relevant to this case, empowers an arbitral tribunal to rule on the question of its own jurisdiction. The Article also empowers a party to an arbitration to raise a plea that the arbitral tribunal is exceeding the scope of its authority. The arbitral tribunal may rule on the question of its exceeding the scope of its authority either as a preliminary point or in its award on the merits. If it rules on such a question as a preliminary point, any party may, within 30 days of receipt of the ruling, request this court to decide the matter.

[2] At all relevant times the applicant and the respondent were in a contractual relationship. A dispute arose between them. It was referred to arbitration. The referral was in accordance with an arbitration agreement in the contract. They settled on the second respondent as the arbitrator. At the arbitration, the applicant herein ["***Mining***

Engineering"] was the claimant and the respondent herein ["***Blanket Mine***"], also the respondent therein.

[3] Mining Engineering is a private company registered in Australia. Blanket Mine is a private company registered and operating in Zimbabwe. The second respondent, the arbitrator, is a duly registered and practising legal practitioner in Zimbabwe with more than 10 years' experience. Mining Engineering's line of business includes the provision of specialised shaft sinking and equipping services at mining locations. Blanket Mine operates a mining location.

[4] In terms of the contract between the parties, Mining Engineering would provide specialised shaft sinking and equipping services at a mining location run by Blanket Mine. At some point Blanket Mine terminated that legal relationship. Mining Engineering did not accept the reasons for the termination. However, it reserved its rights in regards thereto. It went on to demand payment in the sum of $279 425-21 Australian dollars for the final invoice said to be outstanding. Blanket Mine did not pay. It withheld payment on the basis of its on concerns against Mining Engineering regarding some previous invoices which it considered had been overstated. The dispute was referred to arbitration. Again the finer details are being spared for the moment.

[5] At arbitration, specifically in its statement of claim, Mining Engineering made three claims: the first relating to the outstanding invoice aforesaid, in the sum of $279 425-21; the second being damages in the sum of AUD$5 235 316-32 for unlawful termination of the agreement, and the third and final one being a claim in the sum of AUD$5 765-02 for the value of the equipment retained by Blanket Mine. Relying on *Art* 16 of the Model Law, Blanket Mine raised a plea that the question of the unlawful termination of the agreement and that for compensation for the undelivered equipment fell outside the scope of the arbitrator's authority and that therefore the arbitrator had no jurisdiction to determine them on the current referral.

[6] The arbitrator decided to deal with the question of the plea as a preliminary point. He upheld it. Thus, he declined to deal with the two claims relating to damages for

unlawful termination of the contract and the value for the undelivered equipment. His determination, in a nutshell, was that his authority to determine the dispute had been circumscribed by the letter written by Mining Engineering to Blanket Mine, among other things, declaring a dispute and inviting Blanket Mine to arbitration. The letter also nominated three potential arbitrators, including himself, whom the parties eventual appointed by mutual consent. In his ruling, the arbitrator also considered the appointment letter written to him as one also limiting the scope of his authority.

[7] Aggrieved, Mining Engineering has approached this court in terms of *Art* 16[3] of the Model Law to set aside the arbitrator's decision. It wants an order directing the arbitrator to exercise his jurisdiction over its claim for damages. Its argument is basically that the arbitrator misconstrued the position of the law in believing that arbitration should always be preceded by a declaration of claims; that he conflated the issue of jurisdiction and that of scope of authority; that the issue that was before him was that of jurisdiction rather than scope of authority; that manifestly he has the jurisdiction to determine the contractual dispute that was referred to him and that his approach violates the 'once and for all rule' which dictates that one must include in a single process all one's claims arising from the same cause of action.

[8] Mining Engineering further argues that parties to an arbitration are not required to agree on the identity or number of claims before the arbitrator can exercise jurisdiction. What activates his or her jurisdiction is the receipt of the request to refer a matter to arbitration. When a dispute has been referred to arbitration, the parties are then required to set out the nature and extent of their claims in the statement of claim or defence. Otherwise if it were not so, a party would never be able to amend his or her claim once the dispute has been referred to arbitration in terms of an invitation letter. A party is allowed to amend his or her claim which right entails the expansion or addition of further claims for as long as they fall within the purview of the nature of the dispute referred to arbitration.

[9] In reply, Blanket Mine argues that the sole dispute raised by Mining Engineering upon which it agreed not only to go to arbitration but also as to the choice of the arbitrator was that in relation to the outstanding invoice. It says the claim for damages

for unlawful termination of the contract and for the return of equipment were not referred to arbitration.

[10] Blanket Mine further argues that the approach by Mining Engineering violates both the Model Law and the actual agreement between the parties in that in terms of *Art* 21 of the Model Law, arbitration commences on the date upon which the request by the one party to refer a particular dispute to arbitration is received by the other party, and that in terms of the agreement, only when the nature of the claim was identified would it be possible to choose an arbitrator given that he or she has to be professionally qualified in the fields specified by the contract, namely accounting, law or technical.

[11] It is also argued on behalf of Blanket Mine that the 'once and for all rule' has been misconstrued. This rule relates to the requirement to bring in one claim all species of claims for damages arising out of a single cause of action. The claim by Mining Engineering bunches together different species of claims. Regarding the right to amend, it is argued that a party cannot amend its claim once referred to arbitration in a manner that requires the arbitrator to exceed the scope of his authority. Finally, it is argued that Mining Engineering is free to declare a separate dispute in relation to the damages claim and refer it to arbitration and that therefore there can be no conceivable prejudice to it if the decision of the arbitrator is upheld.

[12] At the hearing it was clarified and confirmed by both parties that the relief sought in the present application excludes the issue of the unreturned equipment. The application was now concerned only with the damages claim for $5 million odd.

[13] I consider that this matter turns on a proper construction of the intention of the parties when they referred the dispute to arbitration. Such intention is discernible from, *inter alia*, the relevant letters written at the time. It is from that intention as ascertained from such correspondence that the jurisdiction of the arbitrator was defined and the scope of his authority circumscribed. From there the law as set out in the Model Law will then be applied.

[14] Mining Engineering, through a letter by its legal practitioners, Wintertons, dated 27 September 2022, to Blanket Mine, initiated the arbitration. The letter set out the

nature of the dispute. It also proceeded to circumscribe the particular dispute that it sought arbitration to sort out. The letter made it clear that the dispute it wanted resolved by arbitration was emanating from the contractual relationship between the parties, in particular the unlawful cancellation of the contract by Blanket Mine. Relevant parts of that letter are now reproduced below. The underlined portions, highlight what this court considers to be the intrinsic segments formulating the exact nature of the dispute and the exact claim for submission to arbitration, thereby defining the scope of the arbitrator's authority:

> "We have been instructed by our client that on the 14th September 2016, they entered into a written contract … with Blanket Mine … for the provision of *inter alia*, highly specialised professional shaft sinking and shaft equipping services. The contractual relationship commenced on 1 October 2016 and was unlawfully terminated by Blanket on 30 September 2019. Our client's rights are reserved in relation to the unlawful termination of the Contract.
>
> Our client raised an invoice in the sum of AUD279 425-21 …, being the final invoice for services rendered during the month of September 2019 in accordance with the terms of the Contract.
>
> Our client instructs that Blanket failed, and/or neglected and/or refused to make payment of the invoice within the stipulated time, or at all. Blanket proceeded to set out in writing several reasons, which are denied by our client, for non-payment of our client's final invoice. … …
>
> Our client does not accept the reasons Blanket provided for withholding payment and insists that same is entitled to full payment of its final invoice. As mentioned above, our client denies the reasons for which payment of its final invoice is withheld and is claiming full payment thereof.
>
> In light of the above, it is clear that the dispute in question is a legal dispute, and we accordingly propose that ***it*** be submitted to arbitration before an arbitrator envisaged in clause 18.2.2.2 of the Contract for resolution. Set out below are the nominees for appointment as arbitrator.
>
> … … …
>
> Please revert as to which one of the aforesaid potential arbitrators Blanket agrees to be so appointed. Blanket's reply is required within fourteen [14] days from date herein as envisaged in clause 18.2.3 of the Contract.
>
> All our clients' rights remain reserved."

[15] Deconstructed, the above letter set out what the dispute was. It was two-fold: the unlawful termination of the contact by Blanket, and the unlawful withholding of payment for the final invoice by it. The letter makes it plain that consequences would flow from the

unlawful termination of the contract. Such consequences would manifest in rights accruing to Mining Engineering. But the letter further makes it plain, in two portions of the letter that, for the moment, Mining Engineering would not be pursuing such of the rights as had accrued to it from the unlawful termination of the contract by Blanket Mine. They were being reserved.

[16] Wintertons' letter aforesaid specified that it was the second dispute, the one in relation to the outstanding final invoice, that it wanted referred to arbitration. It was quite specific in this regard. The dispute was explicit. Mining Engineering was insisting the money was due. Blanket Mine was insisting the money was not due. Therefore, arbitration had to resolve it. It was a dispute primarily of a legal nature. In accordance with cl 18.2.2 of the contract, the arbitrator had to be a practising senior counsel or a commercial attorney of not less than 10 years' experience. That was the essence of the invitation to arbitration that Blanket Mine received.

[17] Blanket Mine replied to Wintertons' letter on 13 October 2022. The relevant portions of that reply were as follows, again crucial segments being highlighted by this court:

> "Please note that we have no intention to litigate by correspondence; accordingly should your client wish to persist with its claim and progress this matter to arbitration, which arbitration we believe is baseless and ill-advised by your client for the reasons given in the letter dated 5 October 2022 from our parent company to you, our election of Arbitrator for this matter from the names you have provided is George Gapu."

[18] It is clear that the particular dispute about which the parties were *ad idem* was that of the outstanding final invoice. It was the matter about which they had had an exchange of correspondence before. In Wintertons' letter above, Blanket Mine's own position regarding the non-payment of that invoice was set out. Thus, Blanket Mine agreed to the choice of the second respondent as the arbitrator only in relation to "*this matter*".

[19] Mr *Mpofu*, for the applicant, argues that there is no requirement in law for parties to identify and declare the number of the disputes that they may want referred to arbitration. He argues further that the scope of the second respondent's authority on the claim for damages should not be taken to have been proscribed by Wintertons' letter aforesaid but that once it is accepted that the dispute sought to be referred to arbitration emanated from the contract document which contained an arbitration agreement, the jurisdiction of the arbitrator would

have set in. It would then be up to the parties to set out the nature and extent of their claims or defence in the statement of claim or defence respectively.

[20] Mr *Mpofu's* arguments above are not consonant with the facts or the law. In this matter, the whole enquiry is basically this: what is it that the parties agreed to refer to arbitration? Which particular claim? Plainly, it was that of the outstanding invoice. Apart from the letter above, the further letter by Wintertons', on 14 October 2022, inviting the second respondent to accept appointment as the arbitrator, which letter was copied to Blanket Mine, also specified the exact claim to be adjudicated upon in quite unequivocal terms. Relevant portions of that letter read as follows, again underlining intrinsic segments for emphasis:

> "Mining Engineering Consulting Services [Pty] Ltd and Blanket Mine [9183] Private Limited entered into contract no. H113 on the 14th September 2016. The contract which was in writing, for the provision to Blanket Mine by MECS of among things specialized professional shaft sinking and shaft equipping services [*sic*]. The contractual relationship persisted until the 30th of September 2019, wherein Blanket Mine terminated the contract.
>
> A dispute has arisen regarding the payment of MECS' invoice in the sum of AUD279,425.21 … …, being the fee for services during the month of September 2019. The parties have agreed to appoint you as an arbitrator to resolve ***the*** dispute in terms of clause 18.2.2.2 of their contract."

[21] The court cannot possibly ignore such exactitude in the way the dispute for arbitration was formulated. The stance by Blanket Mine accords with *Art* 21 of the Model Law. This provision governs the commencement of arbitral proceedings in respect of a particular dispute. Arbitral proceedings are said to commence when a request by the claimant to have that dispute referred to arbitration is received by the respondent. Verbatim, *Art* 21 reads, the critical provisions highlighted for emphasis:

> "Unless otherwise agreed by the parties, the arbitral proceedings in respect of ***a particular*** dispute commence on the date on which a request for ***that*** dispute to be referred to arbitration is received by the respondent."

[22] The meaning of that provision is plain. No canons of construction are necessary. It means that when the parties would go for arbitration, the claim to be interrogated was that of the outstanding invoices. That is what commenced the arbitration. *Art* 23 of the Model Law that Mining Engineering placed reliance on cannot not possibly assist it. It is at variance with its own position. This provision governs the filing of the statements of claim and defence by

the parties before the arbitrator. These statements should contain facts supporting the claim or the defence, the points at issue and the relief or remedy sought. In my view, the statements cannot be construed as some kind of processes founding a party's claim or defence before the arbitrator. They are not processes commencing any proceedings or defence. They are merely supportive of what has already been commenced.

[23] In *Art* 23[2] either party can amend or supplement his claim or defence during the course of the arbitral proceedings. The word "add" is conspicuous by its absence from the text. You can only 'amend' or 'supplement' that which is there already, not to bring in something completely new. At any rate, amending or supplementing cannot be done in such a way as to overstep the scope of the arbitrator's authority as agreed to and prescribed by the parties originally. If it has to happen, then the parties must agree first, as *Art* 23[1] provides, "… *unless the parties have otherwise agreed as to the required elements of such statements*." Or the arbitrator has to allow such amendments or supplements if he or she considers them appropriate. It is not a unilateral decision or exercise by one party. The whole article reads, again highlighting being for emphasis:

> "ARTICLE 23
>
> *Statement of claim and defence*
>
> "(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.
>
> (2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

[24] In his ruling, the arbitrator identified the nature of the challenge before him, namely between jurisdiction and the scope of authority. Mr *Mpofu* submits that the arbitrator misdirected himself in that having correctly identified the nature of the challenge before him as being one of jurisdiction he strayed from there and gave a ruling on scope of authority. Mr *Mpofu* argues that clearly the arbitrator had jurisdiction on the matter because the dispute that

had been referred to him had been one arising in contract and in respect of which the parties, in terms of the arbitration clause in that contract, had agreed to refer to arbitration.

[25] *Art* 16 of the Model Law reads:

> "ARTICLE 16
>
> *Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the *High Court* to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award."

[26] Evidently, *Art* 16 above is dealing with two subject matters, related but different. The one is the question of the arbitrator's jurisdiction and the other is the question of the scope of his or her authority. The law gives the arbitrator the competence to rule on both where there has been a challenge on his or her capacity to deal with a particular dispute. A challenge on jurisdiction has to be raised not later than the statement of defence. A challenge on the scope of authority has to be raised as soon as the issue manifests during the arbitration proceedings.

[27] Both parties have referred me to the case of *Cone Textiles [Pvt] Ltd v Ayres & Anor* 1980 ZLR 347 which succinctly brings out the distinction between jurisdiction and scope of authority. Although the case was dealing with the old Arbitration Act, nonetheless it is still quite relevant in appreciating *Art* 16[3]. In that case, the appellate court said, at p 355 – 356:

> "An arbitrator can only act within the jurisdiction or the authority conferred upon him. Usually only particular defined disputes are submitted to the arbitrator and he is only authorized to determine the dispute referred to him for determination."

[28] Demonstrably, the *Cone Textiles* case above is consistent with the provisions of *Art* 21 considered before. Among other things, arbitral proceedings are commenced in respect of a particular dispute or disputes. In the present matter, the particular dispute referred to arbitration by agreement between the parties was specifically that of the outstanding final invoice. That that dispute arose from a written contract containing, among other things, an 'arbitration agreement' within the meaning of *Art* 7 of the Model Law does not mean that the arbitrator was empowered to deal with any dispute arising out of that contract even if it had not been referred to him.

[29] With *Art* 7 of the Model Law, for example, even where there is an arbitration agreement the parties may still refer all or certain of their disputes to arbitration. That is exactly what the parties did in this matter. From their contract had arisen three separate disputes as aforesaid. Mining Engineering reserved its rights in respect of two. It invited Blanket Mine to arbitration in respect of one. Blanket Mine obliged. Mr *Mpofu* argues that they were not separate disputes but merely separate claims under the same dispute. I do not agree. Call it whatever you may, it was the claim in respect of the outstanding invoice that was referred to arbitration, not the rest. I agree with Mr *Tivadar's* submission on the point on behalf of Blanket Mine. Nothing stops Mining Engineering from initiating separate arbitration proceedings in regards to the rest of its claims. The 'once and for all rule' of damages claims under the law of delict does not apply. The position of the Model Law on the referral of disputes to arbitration is specific, plain and straightforward.

[30] The arbitration clause in the parties' agreement provided for a single arbitrator to determine a dispute. His or her appointment would depend on his qualifications taking into account the nature of the dispute. An accounting issue would require an arbitrator who was a chartered accountant of not less than 10 years' experience; a legal matter would require an arbitrator who was a practising senior counsel or a commercial attorney of not less than 10 years' experience, and so on. Mr *Tivadar's* argument on this point is that quite apart from the provisions of *Art* 21 of the Model Law, by this provision in the arbitration clause, the parties themselves required that, among other things, the nature of the claim to be submitted to

arbitration be identified right at the outset in order that a suitably qualified arbitrator be selected. I agree.

[31] The application cannot succeed. The arbitrator's decision cannot be faulted. The dispute before the arbitrator was on the whole question of jurisdiction, in both the narrower and wider senses. Scope of authority is a species of jurisdiction. In any given case it is up to the parties to identify the species of jurisdiction relied upon in any challenge as to the arbitrator's capacity. *In casu*, the challenge was on the scope of authority given what had been placed before the arbitrator.

[32] Cots shall follow the result. But there is no justification to award them on the higher scale as Blanket Mine prays. The applicant has raised pertinent points that have required closer scrutiny. There is no reason to mulct it in costs. In the circumstances, the application is hereby dismissed with costs.

9 February 2024

Wintertons, legal practitioners for the applicant
Gill, Godlonton & Gerrans, legal practitioners for the first respondent