HB 284-16
HC 1304-16

ELPHAS MAVUNE MAPHISA
versus
BULAWAYO MUNICIPAL COMMERCIAL
UNDERTAKING (BMCU) t/a Ingwebu Breweries
and
GORDON GEDDES
and
CITY OF BULAWAYO

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 4 OCTOBER 2016 AND 27 OCTOBER 2016

Opposed Application

Applicant in person
L. Nkomo for the 1st and 3rd respondents

MOYO J: This is an application for review in terms of Order 33, as read with section 26-29 of the High Court Act [Chapter 7:06], as read with Article 34 of the Arbitration Act [Chapter 7:15]. This is as per the title given to the application by the applicant himself. The application caption reads:

> "Take notice that the applicant intends to apply to the High Court in Bulawayo for a review of the final award of the tribunal served on the applicant on 11 May 2016."

The face of the application also states that the application for review, set aside and correct the proceedings is brought on several of grounds listed therein.

Clause 1 of the draft order seeks the following:

> "The final award handed down between the parties on 3 December 2015 by the tribunal be and is hereby set aside."

The first and third respondents have raised a point *in limine* that an application to set aside an arbitral award can only be made exclusively in terms of paragraphs (2) and (3) of Article 34 of the Model Law. Respondents argue that applicants' application is a hybrid of sections 26-29 of the High Court Act *(supra),* as read with order 33 of the High Court rules as read further with Article 34 of the Model Law.

Respondents argue that this application is irregular and the relief sought is incompetent as Article 34 of the Model Law stipulates that the only and exclusive recourse to a court against an arbitral award is by way of an application to set it aside in accordance with paragraphs 2 and 3 thereof.

Article 34 of the Model Law is under Chapter VII of the Arbitration Act *(supra)* and its tilted "Recourse against award."

> "Article 34 (1) reads:
> Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs 2 and 3 of this article." (my emphasis)

This in essence means that any recourse to a court against an arbitral award may be made in accordance with paragraphs 2 and 3 thereof. In the case of *Mtetwa and Another* v *Mupamhadzi* 2007 (1) ZLR 253 (ZSC) it was held that:

> "In terms of Article 34 (1) of the Model Law which is the First Schedule to the Arbitration Act [Chapter 7:15], recourse to a court against an arbitral award may be made ONLY by way of an application for setting aside in accordance with paragraphs 2 and 3. It was held further in that case that although there was nothing in Order 33 rule 256 of the High Court Rules 1971 that prevented the applicants from making the application in question under that order, Article 34 is part of a statute and therefore should hold dominance over Order 33 of the High Court Rules which are subsidiary legislation."

In fact, I also hold the view that the High Court rules operate under the umbrella of the High Court Act which is the statute and therefore the provisions of the High Court Act on the powers of review, section 26 of the High Court Act which gives the High Court review powers stipulates that:

> "subject to this Act and any other law, the High court shall have power, jurisdiction and authority to review all proceedings of all inferior courts of justice, tribunals, and administrative authorities within Zimbabwe." (my emphasis).

Clearly section 26, subjects the review powers of the High Court to any other law, any other law which is the Model law in this case, has provided that an arbitral award can only be set aside in terms of that law, the High Court would not therefore have any powers of review conferred to it in terms of section 26.

Also, in the case of *Star Africa Corporation Ltd* v *Sivnet Investments Pvt Ltd and Another* 2011 (2) ZLR 123 (H) the court held that an arbitration award cannot be challenged or set aside by way of review proceedings. Held further that recourse to a court against an arbitral award

may be made only by an application for the setting aside in accordance with paragraphs (2) and (3) of article 34 of the Model Law. That is the law as enunciated by the highest court of the land, the Supreme Court not only is it correct in my view but it is also binding on this court.

I accordingly uphold the point *in limine* as raised by the first and third respondents and as a result the application is dismissed with costs.

Longhurst, Boyce and Company, 2nd respondent's legal practitioners
Calderwood, Bryce, Hendrie & Partners, 1st & 3rd respondent's legal practitioners