CHRIS BESTER
versus
TIAN ZE TOBACCO COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 28 June 2017 and 19 July 2017

Opposed Matter

M T Chagudumba, for the applicant
R Kwenda, for the respondent

MATANDA-MOYO J: This is an application for the setting aside of an arbitral award, granted by P Kwenda on 22 February 2016 on the following grounds;

i. That the arbitrator had no jurisdiction to make decisions on the matter placed before him.
ii. That the arbitral award offends against the public policy of Zimbabwe and
iii. That the arbitrator was conflicted and biased.

The brief facts are that respondent is in the business of financing contract tobacco production which it purchases at its auction floor. The applicant is a farmer who was contracted to grow tobacco for the 2013/14 season. The applicant was supplied with inputs and thereafter delivered the tobacco to the respondent auction floors. After selling the tobacco to the respondent, the applicant remained owing $82 089.33. The respondent referred the matter for arbitration in order to recover the outstanding amount. The arbitrator found in favour of the respondent and ordered the applicant to pay the sum of $82 089.33 plus interest at the rate of 5% calculated from 30 September 2014 to date of full payment. The applicant was also ordered to pay costs on an attorney/client scale.

Firstly the applicant challenged the jurisdiction of the arbitrator to hear the matter when the parties' contract had no arbitration clause. Applicant argued that he only submitted to the

jurisdiction of the arbitrator upon misrepresentation by the respondent that the parties' contract had an arbitration clause. Applicant could not explain why he could not interpret the contract on his own.

It is applicant's argument that having realised he had no jurisdiction to hear the matter, the arbitrator should have refused to hear the matter. The applicant referred the court to s 4 of the Arbitration Act [*Chapter 7:15*] and several decided cases. Applicant prayed that this court finds the award null and void.

The respondent opposed the fact that the arbitrator had no jurisdiction to hear the matter. The respondent insisted the agreement between the parties did have an option to take the matter to arbitration. Respondent also submitted that there was no objection to arbitration proceedings. Both parties voluntarily submitted themselves to the process. It is also respondent's argument that the agreement gave the respondent powers to choose the medium within which to recover any outstanding balance and it chose arbitration.

Section 4 of the Arbitration Act [*Chapter 7:15*] provides;

> "(1) subject to this section any dispute which the parties have agreed to submit to arbitration maybe determined by arbitration." Article 7 thereof provides;
> "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement maybe in the form of an arbitration clause in a contract or in the form of a separate agreement.
> (2) The arbitration agreement shall be in writing. An agreement is writing if it is contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference is a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the agreement."

From the above it is not in doubt that arbitration proceedings can only be resorted to where there is an agreement. Usually within a contract there is an arbitration clause. There must be binding arbitration agreement between the parties. Where jurisdiction of an arbitrator is challenged, the court looks no further than the arbitration clause.

The respondent relied upon para 12 of the agreement which it termed the arbitration agreement.

Paragraph 12 (v) provides

> "should the grower fail to repay the loan the grower gives the Contractor the right to recover the outstanding loan amount through company lawyers or a Debt Collector."

The respondent submitted that the above clause constitutes an arbitration clause. It argued that it gave the contractor's lawyers the right to opt for any process to recover the amount owing, and that option included arbitration. In my view what the above subparagraph does is to give the Contractor an option to engage lawyers or Debt Collectors to recover any outstanding amount. That clause cannot be termed an arbitration clause. An arbitration clause is a clause in a contract that requires parties to resolve their disputes though an arbitration process. A reading of clause 12 (v) does not give the parties any requirement to resolve disputes through arbitration. Paragraph 12 (v) provides for collection of any outstanding amounts through debt collection by either lawyers or debt collectors. Lawyers and debt collectors are not arbitrators. Besides the agreement does not state the manner of choosing an arbitrator.

An arbitrator's authority is derived from a valid and enforceable arbitration agreement. See *Stocks Construction (OFS) (Pvt) Ltd* v *Metter-Pingon (Pty) Ltd* 1980 (1) SA 507 A, *Harlin properties (Pty) Ltd* v *Rush and Tomkins (SA) (Pty) Ltd* 1963 (1) SA 187 (D).

From a reading of a letter by the respondent to the applicant of 17 August 2015, the respondents stated that the matter was referred for arbitration in terms of an agreement between the parties. Obviously this was a misrepresentation as there was never a binding arbitration agreement between the parties. The arbitrator could have easily ascertained that parties had no agreement pertaining to arbitration. This brings me to the issue of waiver. Having submitted to arbitration, and not having raised the issue of jurisdiction before the arbitrator, can applicant raise that issue for the first time in the High Court? The respondent argued that a plea that the arbitral tribunal has no jurisdiction cannot be raised not later than the submission of the statement of defence. The applicant having failed to raise the issue then should be estopped from raising it now.

Jurisdiction is a threshold matter and a question of law. The general position with regard to raising issues of law is that an issue of law can be raised at any time be it during the initial proceedings or on appeal.

In *NNPC* v *Clifio Nig Ltd* (2011) CLR 4 (SC) the court concurred with the lead judgment delivered by RHODES – VIVOUR JSC that,

> "the interpretation of the above and the position of the issue of jurisdiction to hear and determine a dispute raised before the arbitral panel within the time stipulated in the arbitral Act. It can only be raised after the stipulated period if the arbitral panel finds reasons for the delay justified. An appeal on the issue of jurisdiction can be entertained by the High Court provided there was no submission to jurisdiction. A party who did not raise the issue of jurisdiction before the arbitral panel is foreclosed from raising it for the first time in the High Court. The reason being that the foundation of jurisdiction in an arbitration is submission."

However the distinction with the present case is that herein the agreement between the parties had no arbitration agreement. Any submission to arbitration by the applicant was as a result of misrepresentation by the respondent that the parties had agreed to arbitration. Since it is a pre-requisite that an arbitral agreement should be in writing and should be as a result of mutual agreement by parties, it is clear that herein the parties had no such agreement. Applicant can therefore not be said to have lost the right to challenge jurisdiction later.

I am satisfied therefore that the submission to arbitration by the applicant was irregular and as a result of misrepresentation by the respondent. In the result the arbitral award is a nullity and cannot stand. See *Vidavsky* v *Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA). It is apparent that arbitration in this instance was imposed by the respondent.

There is no need for this court to deal with the other issues raised once it is found that the arbitrator should not have heard the matter.

Accordingly it is ordered that:

1. The arbitral award by Honourable P Kwenda dated 25th October 2016 be and is hereby set aside.
2. The respondent shall pay costs of arbitration.

Atherstone & Cook, applicant's legal practitioners
Muvirimi Law Chambers, respondent's legal practitioners