

IN THE HIGH COURT FOR ZAMBIA

2008/HP/ARB/NO.001

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER: AN APPLICATION FOR REGISTRATION AND ENFORCEMENT OF AN ARBITRAL AWARD PURSUANT TO SECTION 18 OF THE ARBITRATION ACT NO.19 OF 2000 AND SECTION 16 OF SI NO.75 OF 2001

AND

IN THE MATTER OF: AN ARBITRAL AWARD DATED 14 DECEMBER 2007 AND MADE AT CAPE TOWN IN THE REPUBLIC OF SOUTH AFRICA

CASH CRUSADERS FRANCHISING (PTY) LIMITED APPLICANT

AND

SHAKERS AND MOVERS ZAMBIA LIMITED RESPONDENT

BEFORE HON. MR. JUSTICE NIGEL K. MUTUNA THIS 9TH DAY OF JULY, 2012

For the Appellant: Mrs. S. Shamwana- Chinganya of Messrs Corpus Legal Practitioners

For the Respondent: N/A

J U D G M E N T

Cases referred to:

- 1) United Engineering Group Limited -Vs-Markson Mungalu & Others (2007) ZR page 30**
- 2) Meah-Vs-Sector Properties (1974) 1 ALL ER page 1074**
- 3) Hodgson -Vs-Armstrong & Another (1976) 1ALL ER page 307**
- 4) R-Vs-Weir (2001) ALL ER page 216**

Other authorities referred to:

- 1) Arbitration Act, No.19 of 2000**
- 2) Arbitration (Court Proceedings) Rule 2001, Statutory Instrument No.75 of 2001**
- 3) Landlord & Tenant (Business Premises) Act, Cap 193**

This is an appeal by the Appellant, Cash Crusaders Franchising (PTY) Limited against the ruling of the Learned Deputy Registrar dated 31st December, 2010. The ruling granted the Respondent an extension of time within which to make an application to set aside an award and confirmed an ex-parte order staying execution of the arbitral award.

The grounds upon which the appeal is presented are as follows:

- 1) "That the Learned Deputy Registrar erred in law when she wrongfully construed the meaning of section 17(3) of the Arbitration Act No.19 of 2000 ("Arbitration Act") by ordering an extension of 3 months in which the Respondent would make an application to set aside the Arbitral Award notwithstanding the fact that time had expired and Arbitration Act did not at all confer such authority on the High Court; and*
- 2) That the Learned Deputy Registrar erred in law when she failed to follow binding precedent that was cited and referred to at the hearing of the application to stay execution of Arbitral Award but instead proceeded to confirm the stay of execution."*

The brief facts of this case are that the parties had a dispute which was adjudicated upon by an arbitrator. Following the hearing of the dispute, the arbitrator delivered the award on 14th December 2007. The said award was registered in the High Court registry on 31st March, 2008.

Subsequent to the registration of the award, the Respondent applied to the Learned Deputy Registrar to stay execution of the award and for extension of time within which to apply to set aside the award. The Learned Deputy Registrar initially granted an ex parte order staying execution and later confirmed it inter partes. In doing so she also granted the Respondent an extension of time of three months within which to make an application before a Judge to set aside the award pursuant to section 17(3) of the **Arbitration Act**. The Learned Deputy Registrar's decision aforestated was made via the ruling dated 31st December, 2010, which is the subject of this appeal.

The appeal came up for hearing on 8th June, 2012. Although there was no attendance by the Respondent or its counsel I proceeded to hear the appeal because I was satisfied that the Respondent had been notified of the hearing as was evidenced by the affidavit of service filed on 5th June, 2012.

In arguing the appeal, counsel for the appellant Mrs. S. Shamwana-Chinganya relied upon the heads of argument and skeleton arguments filed on 8th July, 2011.

In the skeleton arguments and heads of arguments counsel for the Appellant focused her arguments on ground 1 which relates to the extension of time granted by the Learned Deputy Registrar for applying to set aside an award. She argued as follows. Firstly that the Learned Deputy Registrar misdirected herself when she arrived at the conclusion that section 17(3) of the **Arbitration Act** is couched in such a way that it gives discretion to the Court to hear the application for setting aside an award after expiry of three months of the receipt of the award. In articulating the said argument

counsel drew my attention to the cases of **United Engineering Group Limited -vs-Mackson Mungalu & Others(1)** and **Meah-Vs-Sector Properties(2)**. It was argued that the said authorities demonstrate that where statute has provide a time limit within which to do an act, a party is obliged to comply notwithstanding the use of the word “may” in the relevant section.

Secondly, that where statute prescribes a time limit within which to perform an act, rules of court can not extend that time limit. My attention in this respect was drawn to **Hodson-Vs-Armstrong (3)**. It was argued therefore that, since section 17 of the **Arbitration Act** sets a time limit of three months within which to apply to set aside an award there can be no extension of time.

I have considered the arguments and grounds advanced by counsel for the Appellant and the ruling of the Learned Deputy Registrar which is the subject of this appeal.

In determining this appeal I shall consider the two grounds in the order that they have been presented. Before I do so however, I feel compelled to demonstrate the role of the Court in the arbitral process because when adjudicating upon this matter the Court below and indeed this Court were exercising their complimentary role in the arbitral process.

The starting point is to recognize that once the parties decide to have their dispute adjudicated upon by way of arbitration, they are in fact saying that they do not wish to avail themselves of the Courts save in the limited circumstances provided by the law. Further, once an award is rendered, it is binding and enforceable upon the parties pursuant to section 20 of the **Arbitration Act** which states as follows:

“Subject to subsection (2) and (3), an ward made by an arbitral tribunal pursuant to an arbitration agreement is final and

binding both on the parties and on any person claiming through or under them.”

By virtue of the said section an award once rendered is enforceable except that an aggrieved party can only apply to have it set aside.

The complimentary role the Courts play in the arbitral process means that the Courts merely assist the arbitral process to be effective because, since it is manned by private citizens and not the State, there are no systems put in place to make it effective such as those available to the Courts. It is inter alia in the form of providing a forum for registering awards and setting aside of awards.

The registration of an award by the court is for purposes of giving it an official seal for enforcement purposes and not for purposes of bringing it into the realms of a judgment and therefore subject to the dictates of a Court.

Having stated the role that the Courts play I now turn to determine the grounds as they have been presented. Ground 1 relates to the decision by the Learned Deputy Registrar to extend the time limit set by section 17(3) for making an application to set aside an award. The said section in its entirety states as follows:

“(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsection(2) and (3).

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that

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(i) a party to the arbitration agreement 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 laws of Zambia;

- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;***
- (iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;***
- (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 this Act or 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 Zambia; or**
- (ii) the award is in conflict with public policy; or**
- (iii) the making of the award was induced or effected by fraud, corruption or misrepresentation.**

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request has been made under articles 33 of the First Schedule, from the date on which that request had been disposed of by the arbitral tribunal ...”

The first thing to note from the foregoing section is that such an application is made to **“the court”**, which is defined in section 2 of the **Arbitration Act** as **“High Court or any other court as may be designated by the Statutory Instrument by the Chief Justice”**. Rule 23(1) of the **arbitration (Court proceedings) rules** clarifies the position further when it states as follows:

“An application, under section seventeen of the Act, to set aside an award shall be made by originating summons to a Judge of the High Court.”

(The underlining is the Court’s for emphasis only)

Such an application must therefore be made to a Judge.

Secondly the section in subsection (3) prescribes a time limit within which to make the application. It states in this respect that such an application may

not be made on expiry of three months after receipt of the award or disposal of application under article 33 of the First schedule.

The Learned Deputy Registrar's interpretation of section 17(3) of the Arbitration Act is at page 6 of the ruling. She states as follows at the said page:

“The question however is whether the court can extend time of 3 months and hear an application for setting aside. Section 17(3) is phrased in such a way that it gives discretion to the court to hear the application for setting aside the award even after the elapse of 3 months. The word “may” connotes discretion whilst “shall connotes mandatory on the part of the court.”

I find the foregoing to be a misdirection on the part of the Learned Deputy Registrar, because although there is the use of the word “may” in the subsection, the wording is such that it makes it explicitly clear that no application to set aside may be made after three months. The wording in my considered view, prescribes a mandatory period of three months within which to apply to set aside an award and in doing so bars any application to be made subsequent to the expiry of three months.

In arriving at the finding I have made in the preceding paragraph, I have considered the case referred to me by counsel for the Appellant of ***United Engineering Group Limited-Vs-Mungalu & Others (1)***. In the said case the Supreme Court's decision lingered on the interpretation of section 28 of the ***Landlord and Tenant (Business Premises) Act*** as to whether or not a tenant could apply for determination of rent after the expiry of a period of three months. The said section states as follows:

“Notwithstanding anything to the contrary contained in this Act or any other written law or in any lease, a tenant whose

tenancy commences on or after 1st January 1972 and to which this Act applies, may, within three months from the commencement, thereof (if he is aggrieved by the rent payable there under) apply to the court for determination of rent; and, - subject to the provisions of subsection (2), the court shall determine the rent which shall be substituted for the rent agreed to be paid under the tenancy.”

The Supreme Court in interpreting the said section stated that the tenant's action for determination of rent which was commenced after three months was statute barred. This holding was notwithstanding the use of the word “may” in the section. Therefore the fact that in section 17(3) there is use of the word “may” does not clothe the court with, discretion to enlarge time. In making this finding I endorse the argument by counsel for the Appellant that rules of court can not be used to enlarge a time limit set by statute.

Despite my findings as regards the interpretation of section 17(3) I am compelled to comment on the Learned Deputy Registrar's purported exercise of discretion to extend time. Even assuming that the word “may” in section 17(3) grants discretion to the Court to extend time, which I have found it does not, I am of the considered view that such discretion can not be exercisable by the Learned Deputy Registrar but rather the Judge before whom the application to set aside the award is pending. A Court which is not seized with determining the substantive matter cannot exercise a discretion arising out the substantive matter. The substantive matter in this case is setting aside which I have found is only dealt with by a Judge.

In view of my findings in the preceding paragraphs I find that ground 1 of the appeal succeeds.

I now turn to determine ground 2. This ground relates to the stay of execution of the award granted by the Learned Deputy Registrar pending the application to set aside award. Having found that she misdirected herself in

extending time within which to apply to set aside the award, any such application to set aside award is rendered misconceived. Consequently the stay of execution upon which it is predicated is also misconceived and cannot stand.

The fact of the stay being misconceived is not only in relation to the failure of the application to set aside but also the fact that it should not have been entertained in the first place for want of jurisdiction by the Learned Deputy Registrar. The award pursuant to which the stay related was handed down by an arbitrator appointed by the parties. It was not handed, down by the Learned Deputy Registrar and as such it was not her decision. She could not therefore stay it. Further, stays of execution of awards are not part of the complimentary role that Courts play in the arbitral process quite apart from the fact that there can be no stay of an arbitral award in the manner it was granted except as provided for by rule 20(2) of the **Arbitration (Court Proceedings) Rules** which states as follows:

“If an application is made to set aside the registration of the award, execution shall not issue until the application has been disposed of.”

It is clear from the foregoing rule that the stay is an automatic stay derived from the rules and not issued by either the arbitrator or the Court. It was therefore a misdirection on the part of the Learned Deputy Registrar to grant the stay of execution.

By way of conclusion, the appeal succeeds on the two grounds and I accordingly uphold it. In doing so I quash the order of the Learned Deputy Registrar granting extension of time in which to apply to set aside an award and set aside the stay of execution.

I also award costs to the appellant, the same are to be agreed in default taxed.

Leave to appeal is granted.

Delivered this 9th day of July 2012

NIGEL K. MUTUNA
HIGH COURT JUDGE