THE REPUBLIC OF BOTSWANA, MINISTRY OF WORKS TRANSPORT AND COMMUNICATIONS, RINCEAU DESIGN CONSULTANTS (sued as a firm previously T/A KZ ARCHITECTS) v MITRE LIMITED (1995) S.J.

SUPREME COURT
SAKALA, CHIRWA AND MUZYAMBER, JJ.S.
15TH OCTOBER 1995 AND 20TH NOVEMBER 1995
S.C.Z. JUDGMENT NO. 20 OF 1995
S.C.Z. APPEAL NO. 53 OF 1995

Flynote

Contract - Reference of dispute to arbitration - Continuation of injunction after arbitration award

Headnote

The first appellant and the respondent entered into a building contract for the construction of buildings to specifications on plot 2647 Haile Selassie Road Lusaka. Such construction work was to be supervised by the second appellant. Clause 35 of the Contract provided for reference of any dispute or disputes between the parties to arbitration. In the course of construction work a dispute arose between the parties which made it necessary to refer the dispute to arbitration in terms of Clause 35 of the Contract. Prior to the appointment of the arbitrrator, t he respondent had obatined an interim injunction against the appellants. The matter then went to arbitration and an award made on 31st March 1995. Subsequent to the arbitrator's award the respondent filed an application to set aside the award and upon amending the originating notice of motion obtained an extension of time within which to apply to set aside the award.

Held:

(i) The court ought not to have entertained the respondent's application let alone order continuation the exparte order.

Cases referred to:

1. Order 2, R.S.C 1995 Volume 1
2. Leopold Walford (Z) Ltd v Unifreight 1985 Z.R. 203

For the Appellants: A M Wood, D H Kemp & Company
For the Respondents: N Kawanambulu, Nosiku Kawanambulu & Co.

Judgement

MUZYAMBA,J.S.: delivered the judgment of the court.

This is a consolidated appeal against two separate orders of the High Court granting the respondent an injunction and extension of time within which to apply to set aside an arbitration award.

The first appellant is the sovereign Republic of Botswana and the second appellant is an Architectural and/or Consultancy firm in Zambia and also an agent of the first appellant. The

respondent is a limited liability company incorporated in Zambia. The first appellant and the respondent entered into a building contract for the construction of buildings to specifications on plot 2647 Haile Selassie Road Lusaka. Such construction work was to be supervised by the second appellant. Clause 35 of the Contract provided for reference of any dispute or disputes between the parties to arbitration. In the course of construction work a dispute arose between the parties regarding payments of moneys reflected on the second appellant's payment certificates numbers 12 and 13 and also whether or not certain amounts were deductable from these moneys as liquidated and ascertained damages for delays in construction work on the part of the respondent. It then became necessary to refer the dispute to arbitration in terms of Clause 35 of the Contract. At the request of the respondent the Architects and Quantity Surveyors Registration Board then appointed Mr Chris Westlake of J.W. Robertson - quantity Surveyors of Ndola as arbitrator.

The respondent accepted the appointment. As for the appellants, we do not find any evidence on record that they objected to the appointment of Mr West lake as an arbitrator. In any event they submitted to arbitration. I would appeal from the affidavit in support of the application for an interim injunction that on 28th October, 1994 the first appellant terminated the contract and on 2nd November 1994 forceably moved onto the site. By then the arbitrator had not been appointed. This prompted the respondent to issue a writ of summons against the appellants claiming, inter alia, for an injunction in the following terms:

> "Secondly for an order of injunction to restrain both Defendants, their servants or agents from occupying, trespassing, passing, repassing and interfering in whatever manner with the Plaintiff's possession of the construction site, building materials thereon and the premises still under construction on Plot 2647 Haile Selassie Avenue Lusaka pending the final determination by the arbitrator of all disputes between the parties arising under the said building contract."

On 27th December 1994 the respondent obtained an exparte order of interim injunction. the matter then went to arbitration and am award made on 31st March 1995. Subsequent to the arbitrator's award the respondent filed an application to set aside the award and upon amending the originating notice of motion obtained an extension of time within which to apply to set aside the award. Briefly, that is the history of the matter.

We will first deal with the portion of the appeal relating to the injunction. The memorandum of appeal lists 5 grounds and several authorities were cited in support of arguments on each side. One such ground reads:

> "That the learned trial Judge ought to have found that the purpose for which the injunction had been obtained had been overtaken by events because an arbitration award had been made in favour of the appellants".

The success or otherwise of this part of the appeal depends upon this ground. In the writ, the respondent sought for an injunction in the terms already set out above pending final determination of the dispute by the arbitrator. The respondent obtained an exparte order on 27th December, 1994. The order set 2nd February 1995 for inter parte hearing. It is not clear what happened on that day but on 31st May 1995 the court heard both parties. Before then, on 20th April 1995 the arbitrator's award was still filed in court and at the hearing of the inter party application Mr Kawanambulu informed the court that he had filed a separate application to set aside the award. The record shows that that application was filed on that same day of the interparty hearing. The court reserved its ruling and on 16th July, 1995 ordered the interim

injunction to subsist.

Mr Kawanambulu argued that the learned trial Judge was in order to grant the interlocutory injunction and that the injunction should continue until the award is set aside. That if the injunction is discharged the respondent would suffer irreparable damages that cannot be atoned for by damages.

We have considered the ground of appeal and the submission by Mr Kawanambulu. It common cause that the interlocutory injunction was granted long after the arbitrator's award. An interim or interlocutory injunction is by its nature and name a temporary order granted pending the determination of a matter or an issue and terminates upon such determination. In this case the respondent obtained an interim injunction pending arbitration proceedings. The proceedings concluded and an award made before the interparty hearing for an interlocutory injunction. That being the case the court ought not to have entertained the application let alone order continuation the exparte order. For this reason alone we would allow this part of the appeal and dissolve the injunction.

We will not deal with that part of the appeal relating to extension of time. Order 45 rule 13 of the High Court rules, Cap 50 provides as follows:

> "No award shall be liable to be set aside except on the ground of perverseness or misconduct of the arbitrator or umpire. Any application to set aside the award shall be made within fifteen days after the publication thereon."

It is argued by Mr Wood that this rule does not give the court a discretion to extend the time within which to bring an application to set aside an award. That the learned trial judge was therefore wrong to extend the time in this matter. On the other hand Mr Kawanambulu argued that this rule was not mandatory but directory or regulatory and therefore that the court had jurisdiction or discretion to extend the time. He referred the court to Order II Rule 2 of the High Court Rules Cap 50 which provides as follows:

> "Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in any suit. Where such consent cannot be obtained, either party may apply to the court or a judge for an order to effect the object sought to have been obtained with the consent of the other party, and such order may be made although the application for the order is not made until after the expiration of the time allowed or appointed."

We have considered both arguments on this issue. The key words in the rule are 'in any suit.' These words mean pending action or litigation. We are therefore satisfied that this rule applies only to actions that are already pending in court and not to bringing or contemplated actions.

As regards whether or not the rule is mandatory or directory and therefore discretionary we wish to refer to Order 2 rule 1 (1) of the white book, 1995 edition, volume 1 and to our decision in Leopold Walford case (2) cited by Mr Kawanambulu.

0.2 r 1(1) provides as follows

> "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done

> or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect the failure shall be treated as an irregularity and shall not nullify the proceedings any step taken in the proceedings or any document, judgement or order herein."

And in Leopold Walford case (2) at page 205 we said:

> "As a general rule, breach of a regulatory rule is curable and not fatal."

The high Court rules, like the English rules, are rules of procedure and therefore regulatory and any breach of these rules should be treated as mere, irregularity which is curable. Rule 13 of Order 45 is therefore directory or regulatory and not mandatory. the court has therefore a discretion or power, on sufficient reasons shown, to enlarge the time within which to bring an application to set aside an award.

Was sufficient reason for the delay shown in this case? We have examined the affidavit evidence and the attached exhibits. Paragraphs 4-8 of the affidavit in support of the application for an extension of time read as follows:

> "4. That although the award by the arbitrator was signed on the 31st March 1995 it was not made available to me until early in April after I had paid the arbitrator's fees.
>
> 5.That following the award I instructed my Advocates to request the Arbitrator to state a special case for the opinion of the Court but the Arbitrator declined to do so. The documents now produced and shown to be marked "RPH1-3" are copies of the letters from my advocates and the Arbitrator dated 24th April, and 8th May 1995 respectively.
>
> 6.That on receipt of the Arbitrator's reply I then instructed my advocates to make this application on the 31st May 1995.
>
> 7.That the delay in making this application arose from the fact that I did not expect the Arbitrator to refuse to state a special case for the opinion of the court so that by the time I made the application to this court I was already out of time and that the said delay was not deliberate.
>
> 8.That also the amount of work involved as is evidenced by the bulky nature of the affidavit was such that my advocates were not able to lodge the application within a period of twenty one days after the publication of the award."

It is quite clear from paragraph 4 of the affidavit that the respondent became aware of the award early in April 1995. The respondent's first reaction to the award was on 24th April 1995 after the award was filed in court on 20th April 1995. Then the respondent was already out of time. At that stage, instead of applying for an extension of time the respondent entered into some correspondence with the arbitrator.

On 2nd May 1995 the arbitrator wrote to the respondent's advocates saying that he would not state a special case for the opinion of the court. Whether or not an arbitrator can state a case for the opinion of the court after an award is not an issue before us. Again, at that stage instead of applying for an extension of time the respondent wrote another letter to the arbitrator insisting that he should state a special case o the court. The arbitrator replied on 8th May, 1995 maintaining his position. Again the respondent did not apply for an extension. then on 31st May 1995 the respondent filed an application to set aside the award without first

obtaining an extension. The application was listed for hearing on 20th July 1995. Before then, 0n 11th July 1995 the appellants filed a notice of intention to raise preliminary issues at the hearing. One such issue was whether the application should be heard having been filed out of time. It was then that the respondent filed an amended originating notice of motion on 13th August 1995 to include a prayer for an extension of time within which to apply to set aside the award.

From the foregoing, there can be no doubt that the respondent adopted completely wrong approach. This was perhaps due to the fact, as can be seen from the steps taken in the matter, that it was not aware of the provisions of Order 45 rule 13. In law that not an excuse. We therefore not satisfied that sufficient reasons were given for the delay. We would, for this reason also allow this part of the appeal. We set aside the order granting extension of time.

The net result is that the whole appeal succeeds with costs to the appellants to be taxed in default of agreement.

Appeal allowed.
