

2014

P.133

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO.

130/2008

HOLDEN AT LUSAKA

SCZ/8/248/2007

(Civil Jurisdiction)

BETWEEN:

PAOLO MARANDOLA

1ST APPELLANT

CANDY MARANDOLA

2ND APPELLANT

IVAN MARANDOLA

3RD APPELLANT

AND

GIANPIETRO MILANESE

1ST RESPONDENT

GUISEPPE DELLA BIANCA

2ND RESPONDENT

SUSY DELLA BIANCA CRAGNO

3RD RESPONDENT

VINCENZO MILANESE

4TH RESPONDENT

ALBERTO MILANESE

5TH RESPONDENT

CORAM: Mambilima, D.C.J, Chirwa, Mwanamwambwa, J.J.S.

On the 1st of June, 2010 and 30th January, 2014

For the 1st Appellant: Mr. C.K. Banda of Chifumu Banda and Associates

For the 2nd and 3rd Appellants: Mr N. Nchito of Messrs MNB

For the Respondents: Mr P.G. Katupisha of Messrs Malambo and Co.

JUDGMENT

Mwanamwambwa, JS, delivered the Judgment of the Court.

134

Cases referred to:

1. **Stanley Mwambazi V. Morrester Farms Limited (1977) Z.R. 108.**
2. **Leopold Walford (Z) LTD V. Unifreight (1985) Z.R. 203.**
3. **The Republic of Botswana and others V. Mitre Limited, SCZ Judgment No. 20 of 1995.**
4. **D.E Nkhuwa V. Lusaka Tyre Services Limited (1977) Z.R. 43 (SC).**
5. **Attorney General and the MMD V. Lewanika and 4 others (1993-94) Z.R. 164 (SC).**
6. **Petch V. Gurney (Inspector of Taxes) (1994) 3 ALL ER 731.**
7. **Mathias V. Mathias (1972) 3 ALL ER 1.**
8. **Aoot Kalmneft V. Glencore International AG (2002) 1Lloyds Rep 128.**
9. **Secretary of State for the Environment V. Euston Centre Investments Ltd (1994) 2 ALL ER 414.**

Legislation referred to:

1. **The Arbitration Act No. 19 of 2000, section 17.**
2. **The Arbitration (Court Proceedings) Rules, 2001, rule 38.**
3. **The High Court Rules, Cap 27 of the Laws of Zambia, Order 2 rule 2.**
4. **The Rules of the Supreme Court, 1999, Order 3 rules 1,2,3,4 and 5.**

Hon Justice D. K. Chirwa was part of the Court that heard this appeal. He has since retired. This Judgment is therefore by the majority.

135

This is an Appeal against the Ruling of the High Court. By that Ruling the learned trial Judge refused the Appellants' application for special leave to set aside an arbitral award out of time.

The brief facts of the matter are that the Appellants and Respondents approached the Zambia Centre for Dispute Resolution Limited to appoint an arbitrator to arbitrate the dispute between them. On the 6th of August, 2002, an arbitrator was appointed. The matter was heard by the arbitrator and on the 22nd of November, 2004, the arbitrator delivered his award. Later, Counsel for the Respondents made a request that the arbitrator interprets and possibly corrects the award delivered on the 22nd November, 2004. This was pursuant to article 33 of the First Schedule to the Arbitration Act. On the 18th of March, 2005, the arbitrator delivered an Additional Award. However, the Appellants

were not satisfied with the two awards stating that there were numerical mistakes in them. The arbitrator was informed about the numerical mistakes and after meeting the two parties, it was agreed that the two parties

136

enter into a consent award to take care of the numerical mistakes. This was not done.

On the 15th of August, 2007, the 2nd and 3rd Appellants took out summons for Special Leave to apply to set aside the arbitral Award out of time on the grounds which were set out in the Affidavit in Support. The 2nd Appellant swore an Affidavit on behalf of all the Appellants. He deposed that the Appellants were claiming that the 1st and 3rd Respondents agreed to purchase from the 1st Appellant, 350 shares in Wildland Company Limited, at the price of US\$415,250.00. He added that the Respondents had only settled two instalments in the sum of US\$58,499 towards the purchase of the shares. They also claimed that the unpaid shares be treated as forfeited and that they be compensated for losses

and damage arising from failure to purchase the said shares. He stated that on the 22nd of November, 2004, the Arbitrator delivered an Award but that it had a lot of mistakes, illegalities, misapprehensions and misdirections. That as a result, an Additional Award was delivered by the arbitrator on the 18th of March, 2005. He added that the 1st

137

Appellant, Counsel for the Appellants, Counsel for the Respondent and himself met the arbitrator to inform him about some of the errors in the Additional Award. He stated that the arbitrator advised that Counsel from both sides should meet with him to discuss the errors. That before the proposed meeting, the Respondents' Counsel died. He deposed that the Appellants' present advocates advised them that the arbitral Award is contrary to public policy, in so far as it requires the Appellants, in their personal capacities, to repay capital contributions made by the Respondents to a company in which all the parties were shareholders. He added that the delay in resorting to this

application was not deliberate, but was as a result of the problems surrounding the said Award.

There is no Affidavit in opposition on record from the Respondents.

Upon hearing the evidence from the parties, the learned trial Judge held as follows:

“It is quite clear to me from the submissions of Counsel for the Applicant that the Applicant acknowledges that this Application is way out of time. I am in full agreement with the submission of Counsel for

138

the Respondent that Section 17(3) of the Arbitration Act has set a mandatory time limit within which an application may be made. I also agree with the submission of Counsel for the Respondents that the Act specifically prohibits a party from making applications outside the stipulated time and provides for no extension of time. This application is not only out of time but inordinately late. Even if I had any discretion in the matter, this in my view is not the proper case for me to exercise such discretion. For the reasons given, this application fails and I dismiss the same with costs to the Respondents.”

The Appellants appeal against the above Ruling. There are two grounds of Appeal and these are;

Ground one:

The Court below erred in law and in fact when it held that the application was out of time and inordinately late.

Ground two:

The Court below erred in law and in fact when it held that the provisions of Section 17(3) of the Arbitration Act are mandatory and that an application to set aside an Arbitral Award cannot be made outside the period stipulated in Section 17(3) of the Arbitration Act.

For convenience, we shall deal with ground two, followed by ground one.

In ground two, Mr Nchito, on behalf of the Appellants, submitted that section 17 of the Arbitration Act uses the word “may” as opposed to “shall”. That this means that Section 17(3) is merely directive. He added that the requirement to file the

139

application within 3 months of the award is a matter of form and procedure and not a matter of substance. It was submitted that the Arbitration (Court Proceedings) Rules 2001, contain no express provision with respect to extension of time within which a party is obliged to do an act or to take any step in the proceedings under the Arbitration Act or the rules thereunder. That however, rule 38(1) of the Arbitration (Court Proceedings) Rules 2001 enjoins the High Court Rules in the following terms:

“where these rules do not provide for any particular matter or do not make sufficient provision enabling a court to dispose of a matter before

it or to enable a party to prosecute its case, the rules of the High Court or the Subordinate Court, as the case maybe relating to civil proceedings may apply.”

He argued that therefore, the High Court Rules, pertaining to extension of time apply in this case, as the Arbitration (Court Proceedings) Rules 2001 do not provide for extension of time. He also cited Order 3 Rule 5(1)(2) and (4) of the White Book in support of his argument.

He added that this Court has ruled on a number of cases that matters must be tried on their merits. He cited the case of **Stanley**

140

Mwambazi V. Morrester Farms Limited (1) to buttress his position. It was submitted that the application in the court below met the test in the Mwambazi case in that:

1. there was no unreasonable delay as the award was fraught with errors which have never been corrected to date;
2. without delving into the substantive argument, it is the Appellants contention that the Award is in conflict with public policy which allegation is a ground for setting aside an

arbitral award pursuant to section 17(2)(b) of the Arbitration Act. That this presents an issue to be tried; and

3. that there has been neither malafides nor improper conduct on the part of the Appellants.

He argued that this Court, in the case of **Leopold Walford (Z) LTD V. Unifreight (2)**, stated that;

“as a general rule, breach of a regulatory rule is curable and not fatal.”

141

He submitted that the High Court rules, like the English rules, are of procedure and therefore regulatory and any breach of these rules should be treated as mere irregularity which is curable. He cited the case of **The Republic of Botswana and others V. Mitre Limited,(3)** in support of his argument. He stated that without delving into the substance of the decision of the arbitral tribunal, the Appellant will suffer grave injustice if the award is executed against them because the said award is in

conflict with public policy. Mr Nchito added that in the case of **D.E Nkhuwa V. Lusaka Tyre Services Limited(4)**, the Supreme Court stated that:

“The provisions in the rules allowing for extensions of time are there to ensure that if circumstances prevail which make it impossible or even extremely difficult for parties to take procedural steps within prescribed times, relief will be given where the Court is satisfied that circumstances demand it. It must be emphasised that before this Court is able to exercise this discretion to grant such relief, there must be material before it on which it can act.”

He added that in light of the above factors and in the interest of justice, this matter should be determined on merit rather than throwing it out on a technicality.

142

Mr Katupisha submits on this ground that **Order 2 rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia**, does not seem to suggest or seem to oust **Section 17(3) of the Arbitration Act No. 19 of 2000** in its effect and operation. He cited **Order 3/5/3 of the Rules of the Supreme Court, 1999**, in support of his argument.

He argued that section 17(3) is not a procedural rule but a substantive law. He stated that the Respondents were highly prejudiced in the 2 years they waited to enjoy the fruits of their Judgment and to attempt to delay them further by the application to extend time or indeed this appeal is vexatious.

We have looked at the evidence and considered the submissions on this ground. Section 17(3) of the Arbitration Act provides that:

“(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.”

143

The above section is couched in such a way that it gives the intending applicant discretion to make or not to make the application. The use of the word “may” relates to the discretion directed to an applicant to make or not to make the application. The discretion does not relate to the Court having power to allow or not to allow the making of an application.

We are of the view that the purpose of putting a time frame of 3 months was to ensure that matters which are commenced through arbitration are speedily disposed of. In our view, if Parliament intended to grant the court power to extend the period of 3 months, the section could have expressly provided for such an extension. We do not see that intention from this section. Further, it is a well-known fact that parties opt to go for arbitration and not litigation so that they can get their matter disposed of speedily. Therefore, we do not think that with this aim in mind, parliament would decide to allow an extension beyond the 3 months within which to make the application. Therefore, our conclusion is that the

144

application to set aside the award should be made within 3 months of the award. The period cannot be extended.

Further, we wish to state that section 17 of the Arbitration Act is substantive law and not procedural. The section comes from the main Act and not the rules. Counsel for the Appellant,

relied on Order 2 Rule 2 of the High Court Rules and Order 3 rule 5, Rules of the Supreme Court, 1999, stating that the Court has inherent jurisdiction to extend the time within which to take a step. He also cited rule 38(1) of the Arbitration (Court Proceedings) Rules 2001 which provide that:

“where these rules do not provide for any particular matter or do not make sufficient provision enabling a court to dispose of a matter before it or to enable a party to prosecute its case, the rules of the High Court or the Subordinate Court, as the case may be relating to civil proceedings may apply.”

Order 2 Rule 2 of the High Court Act, Cap 27, provides

that:

“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

145

made although the application for the order is not made until after the expiration of the time allowed or appointed.”

Order 3 rule 5(1), Rules of the Supreme Court, 1999,

provides that:

“The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by

these rules, or by any judgment, order or direction, to do any act in any proceedings.”

From the above, it is clear that rule 38(1) of the Arbitration (Court Proceedings) rules, 2001, is limited to the provisions under those rules only and does not extend to the main body of the Act. The provision allows the use of the High Court and Subordinate Court rules in arbitration matters, where the arbitration rules are insufficient, not when the substantive Act is insufficient. In any case, Order 2 rule 2, which the Appellants contend applies to arbitration matters, does not apply in this case. The reading of this rule shows us that it does not apply to a situation where the step to be taken is one which relates to the bringing of an action where there is a limitation in the time within which it should be taken. This rule may apply to a situation where parties agree on the time to be taken within which to take a particular step. An example can

146

be discovery of documents. Parties may agree that discovery should be within 14 days. For whatever reason, the parties may

by consent decide to enlarge or abridge this time they have set. This is not so in this case.

Further, **Order 3/5/3 of the Rules of the Supreme Court, 1999**, provides that:

“However, where mandatory time limits are provided by statute, it is not possible to invoke the inherent jurisdiction of the Court or the provisions of Order 3/5/1 to extend the same.”

The case of **Petch V. Gurney (Inspector of Taxes) (6)** confirms the above statement.

From the above, it is clear that a Court has no discretion to extend a time frame provided by a statute within which to take a particular action. If the statute expressly provides for an extension, then the Court can exercise such discretion. In the case before us, section 17 of the Arbitration Act does not provide for an extension

after the 3 months expires. Therefore, the Judge has no discretion to extend the time beyond the 3 months.

We therefore find no merit in this ground of appeal and dismiss it.

On ground one, Mr Nchito submitted that though the application was made out of time, it was not inordinately late. In advancing his submission, Mr Nchito drew inspiration from the decision of the Court of appeal in **Mathias V Mathias**⁽⁷⁾. When it observed that:

“It is quite true that delay before issue of the writ in an action, or before the action once commenced ceases to be actively and timeously pursued, may have a bearing on whether delay which follows thereafter is to be regarded as inordinate and inexcusable and, if so, whether it gives rise to a risk of the kind mentioned; but delay before the issue of the writ, or before the time when there has been unreasonable delay in prosecuting the action, cannot itself be inordinate or inexcusable delay. The question which the Court must address its mind to is whether that delay which is properly described as inordinate and inexcusable has given rise to circumstances in which it is possible that a fair trial may be impossible or that the defendant may be seriously prejudiced. If the facts are such that no additional prejudice to the defendant has arisen as the result of the delay after the end of that period in which delay can be said to be excusable, it cannot be right, in my judgment, for the court to dismiss the action under this rule.”

He contended that the delay will not result in prejudice to the Respondents and that based on the balance of interests, it is in the interest of justice that the court ought to adjudicate on the matter and determine the same on its merits.

On behalf of the Respondents, Mr Katupisha submitted on this ground that section 17(3) of the Arbitration Act No. 19 of 2001, reflects the draftsman's objectives of achieving finality, restricting the parties to the availability of arbitral resources so that the arbitral process can, if possible, correct itself, and limiting the intervention of the Court. He argued that the length of delay in the instant case is more than 2 years after the Respondent had recourse to Article 33 of the First Schedule to the Arbitration Act No. 19 of 2000. That this is an important consideration and one to which the Court should attach considerable weight, having regard to the emphasis found in the Act itself and the need to avoid delay in arbitration proceedings. He stated that in **Aoot Kalmneft V. Glencore International AG (8)** as quoted in the **International Journal of Arbitration, Mediation and Dispute Management**,

delays of 11 weeks and 14 weeks were described by Colman J. as very considerable delays.

Mr Katupisha added that the factor of public policy cannot be taken into consideration, as this Court is not in a position to evaluate evidence on record before the arbitral tribunal. He submitted that the delay has caused the Respondents irredeemable prejudice, in addition to mere loss of time to enjoy the fruits of their award. He argued that this Honourable Court should consider the effect such a prejudice has caused to the Respondents. He stated that the applications envisaged under Article 33 of the First Schedule to the Arbitration Act are for correction and interpretation of an award and the rendering of an additional award. That this is what was done. He submitted that if aggrieved, the only recourse for the Appellants, after the Additional Award was delivered, was for them to apply to court within 3 months of the award in line with section 17 of the Arbitration Act No. 19 of 2000. That having failed to observe the time limit, the Appellants were out of time.

We have looked at the evidence on record and considered the submissions from both sides. It is clear that an application to set aside an arbitral tribunal award should be made within 3 months. In the case before us, the application to set aside the arbitral award was made 2 years and 5 months after the additional award was delivered. The Appellants argue that the delay was because of the efforts they were making to correct errors in the award. These were numerical errors which were acknowledged by both parties. The arbitrator was agreeable to the proposal that both parties enter into a consent award so as to take care of the numerical errors. This was not done. The Appellants referred this court to a passage in the **Mathias V. Mathias** case.

The passage cited by the Appellants can be distinguished from the case before us. The application that was in issue in the above matter was to do with an application made under the applicable rules in England, to dismiss an action for want of

prosecution. The applicable rules provided a time frame within which an application to dismiss an action for want of prosecution could be made. The

151

matter was dismissed for want of prosecution because the Plaintiffs in the matter failed to make discovery in compliance with the rules. In the case before us, the time frame for making the application is fixed by a substantive Act, that is, section 17 of the Arbitration Act and not the rules of the High Court or the Arbitration Act.

In the case of **Secretary of State for the Environment V. Euston Centre Investments Ltd (9)**, parties to a lease agreement had a dispute over the amount of rent to be paid, so they referred the matter to arbitration. The tenant applied for leave to appeal to Court on 17th June, 1992, within 21 days after publication of the award, pursuant to RSC Order 73, r 5. On 19th March, 1993 the Commercial Court made an order transferring the proceedings to the Chancery Division, the delay of ten months being due to an administrative error by the court. The tenant's

solicitor received notification of the transfer on 29th April, 1993 and wrote to the solicitors for the landlord on 9th June, 1993 to arrange for a date of hearing to be fixed. On 19th August, 1993 the hearing was fixed for 2nd December, 1993. On 24th November 1993 the tenant applied

152

under the inherent jurisdiction of the court to strike out the landlord's application for leave to appeal on the ground of want of prosecution; because the landlord had failed to conduct the proceedings with proper despatch. The landlord contended that the court's jurisdiction to strike out could only be exercised if the court was satisfied either that the default had been intentional and contumelious or that there had been inordinate and inexcusable delay, which gave rise to a substantial risk that it was not possible to have a fair trial of the issues or had caused or was likely to cause serious prejudice to the defendant and that in the circumstances those principles did not apply.

It was held that:

“The principles on which the court would strike out actions for intentional and contumelious default or because of inordinate and inexcusable delay which gave rise to a substantial risk that it would not be possible to have a fair trial or would cause serious prejudice to the defendant only applied to actions that had yet to be tried. Where parties aggrieved by an arbitration award utilised the appeal procedure introduced by s 1(3)(b) of the 1979 Act the court would control the procedure strictly in order to prevent abuse and would be vigilant to prevent frustration of the intention of Parliament to promote speedy finality in arbitral awards, whether or not the defendant had suffered any prejudice from the want of prosecution. In seeking leave to appeal

153

from an award of an arbitrator the applicant was invoking a special statutory jurisdiction which public policy required to be exercised with the utmost expedition and therefore the inherent power to strike out applications for leave was exercisable whenever there was a failure to conduct and prosecute an appeal with proper despatch since . On the facts, the delay in prosecuting the application for leave to appeal had been grossly excessive and accordingly the application would be struck out.”

From the above case, it is clear that arbitration matters are to be dealt with and resolved speedily. We note that the issue that brought about the arbitration in the case before us is a commercial issue. We believe that Arbitration is used in commercial matters to resolve matters speedily. The parties in this case agreed to proceed through arbitration so that the matter can be disposed of quickly. The application to set aside the arbitral award was made 2 years 5 months after the additional award. We believe that allowing the application would seriously

defeat the whole intention of parliament in coming up with the arbitration Act. The time prescribed by the Act for bringing an application to set aside an award is 3 months. The time that had passed is too long. We do not think that a fair trial maybe possible due to the time that has passed. The dispute arose over 11 years ago and we expect a party, who is not satisfied

154

with the arbitral award, to move expeditiously in ensuring that the matter is resolved quickly. Allowing the application to set aside the award would seriously prejudice the Respondents in that the status quo of the witnesses has obviously changed and the memories of those that may still be available may not be as good. The case of **Secretary of State V. Euston** cited above requires that an application to set aside or to appeal to Court against an arbitral award is made quickly, so as to avoid defeating the whole intention of going for arbitration. We are alive to the law that interlocutory matters should not be used to prevent the hearing of a matter on its merits, but the case before us is different. The application relates to the law of arbitration and it is not an

interlocutory matter. A period of over 2 years and 5 months to bring an action to set aside an Award is inordinate and inexcusable. The Appellants sat on their rights for over 2 years. Allowing the application would defeat the aims and aspirations of the law relating to the quick disposal of commercial matters through arbitration. This would not be in the interest of justice which this Court is called upon to uphold.

155

We therefore dismiss this ground of appeal for the reasons we have given above.

All in all, the whole appeal fails. We award costs to the Respondents, to be taxed in default of agreement.

.....

I.C. Mambilima

DEPUTY CHIEF JUSTICE



M.S. Mwanamwambwa

SUPREME COURT JUDGE