IN THE HIGH COURT OF MALAWI

COMMERCIAL DIVISION

BLANTYRE REGISTRY

Commercial Cause No. 34 of 2023

In the Matter of the Arbitration Act CAP 6:03 of the Laws of Malawi

And

In the Matter of the Arbitration before a Single Arbitrator

BETWEEN

PENGUINS CONSTRUCTION COMPANY.....CLAIMANT

AND

VALE LOGISTICS LIMITED.....DEFENDANT

Coram:**Manda, J**

Mapemba for the Claimant

Hara for the Defendant

Kachimanga Court Clerk/Interpreter

RULING

This was the defendant's application to set aside an Arbitral Award of Mr. Joseph Skinner Chimangafisi (the Arbitrator) dated the 1st day of February, 2023 and for the Award to be remitted back to the Arbitrator for reconsideration. The claimant opposed the application.

Background

The brief facts of this case are that in January, 2021, the claimant and the defendant entered inti a contract for the installation of guardrails by the claimant on specified bridges in 9 district railway sites within Malawi. The contract was for 12 months and was for the sum of USD1, 280, 800.00.

By a notification letter dated, 30th of August, 2021, which was apparently 7 months into the performance of the contract, the defendant terminated the contract for what it termed "its sole convenience and reasons". The reasons were however never specified leading the claimant to conclude that the contract was terminated for the sole convenience of the defendant.

The claimant being dissatisfied with the way the contract was terminated, invoked clause 16 of the contract between the parties which contained an arbitration clause and the matter was referred for arbitration. By agreement, the claimant and the defendant jointly appointed Mr. Chimangafisi as an Arbitrator.

According to the defendant's sworn statement (deponed by Counsel Hara), the parties having filed their statement of claim and defence, the Arbitrator issued "Direction 6", requiring the parties to produce some specified documents. After which the Arbitrator is said to have duly conducted the arbitration proceedings and concluded the hearing in the 12th of May, 2022 and that the proceedings were adjourned pending the Award.

According to Counsel Hara, he was surprised that on the 16th of June, 2022, the Arbitrator issued a "Directive 11", requiring the defendant to arrange with the claimant *"to inspect materials that form part of the claim that were especially for the works and the defendant to submit a signed copy of the list of the materials inspected"*. Counsel Hara then went on to aver that he did email the Arbitrator to enquire as to the purpose of the said direction but that the Arbitrator just responded to the email without affording the parties the right to be heard. For purposes of this Ruling I think its best that I reproduce the Arbitrator's reply. The Arbitrator replied as follows:

> *"Dear Mr. Hara*
>
> *Thank you for your request on my direction regarding inspection of materials in the claimant's custody. The reason for the direction is to confirm the quantity and quality of the materials as claimed. This should have been done in one of my visits to Blantyre*

but to minimize costs that's why I have taken this decision. The law allows me to ask for any relevant information that I deem necessary to make my final award

I hope this is clear enough

Best regards

Jschimangafisi"

The Arbitrator proceeded to deliver his Award on the 1st of February, 2023. According to Counsel Hara, he was informed by the defendant's internal legal counsel, Dalitso Mtambo, that the defendant was of the strong view that the Arbitrator misconducted himself and/or the proceedings as set out in the Notice of Application to set aside the Award.

The Arguments

The defendant proceeded to present 15 grounds which they alleged constituted acts of misconduct on the part of the Arbitrator. These grounds mostly alleged that the Arbitrator misdirected himself as to the evidence that was before and that as such the Arbitrator made findings which were contrary to the evidence. For instance, it was argued that the reason for terminating the contract was not the sole convenience of the defendant but rather the delay. That the Arbitrator disregarded the formula for measuring the value of the services rendered by the claimant in terms of the contract by awarding the claimant the sum of USD596, 332. 80 as value for work done when there was no evidence of the cost of the work done and without applying the principle of law regarding damages for breach of contract.

That the Arbitrator misconducted himself by disregarding the defendant's submission by not holding a hearing for assessment of damages for breach of contract and by treating the sum of USD1, 280, 800 as the total sum of the agreed contract when the same did not constitute a financial obligation but a mere expectation.

The defendant also took issue with direction 11 which was alluded to before and asserted that the Arbitrator misconducted himself by determining that the value of the inspected materials was USD43, 104. 19, basing on the list given to him and not by hearing the parties. The defendant also proceeded to state that the other awards which the Arbitrator made for demobilization and loss of anticipated overheads and profit were not supported any evidence and that in case of the latter. According to the defendant, the award was for more than what

was claimed and that the same was arrived at using a formula adopted by the Arbitrator and not what was in the contract.

Finally, it was also the defendant's submission that the Arbitrator misconducted himself by awarding interest at the prevailing rate of interest for commercial bank when he had no such authority at law. Further that in law interest could not be awarded at such rates in foreign currency.

In response, the claimant denied the fact that the Arbitrator had misconducted himself. First it was the claimant's assertion that the contract was terminated under clause 8.2 of the contract which provided for sole convenience, instead of Clause 8.4.8 which provided for delay. This according to the claimant was conceded in evidence and that the Arbitrator did actually deal with this issue in his Award. In terms of calculations, it was the claimant's submission that they simply provided computations to the Arbitrator as part of their duty to assist the Arbitrator and that if the defendant so desired, they would also have provided their own computations but that they never did that. The claimant thus submitted that the defendant cannot claim misconduct.

It was the claimant's assertion that the Arbitrator was appointed on account of his skill and knowledge and that as such he was not required to solely rely on the evidence. That the Arbitrator could use his knowledge and consult other persons as per the decision in ***In the Matter of an Arbitration Between Sabbatin and J.N. Chaudri and Mrs S.K. Chaudri*** (1923-60) ALR Mal, 296. As for submissions, it was the claimant's contention that both parties did make submissions to the Arbitrator and that the defendant had not power to dictate to the Arbitrator on how the arbitration was to be conducted. That the claimant did actually provide evidence of loss while the defendant did not offer anything.

Finally, it was the claimant's submission that the court should reject any submissions regarding the contract sum of USD1, 280, 800 as being frivolous since that amount was actually the agreed contract sum and that the same was proposed by the defendant. It was the claimant's submission that the Arbitrator analyzed the evidence with skill, experience and diligence and that he ably applied the law, including the application for interest.

Issues

There is only one issue before me which is whether the defendant has made out a sufficient case of misconduct against the Arbitrator requiring this court to set aside the Award?

The Law

It must be stated that section 17 of the Arbitration Act does clearly sate that

> *unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.*

However, while the principle of finality of arbitration awards has now become sacrosanct, the Arbitration Act does provide for instances where the court has power to remit the award back to the arbitrator, remove the arbitrator and set aside the award. This is provided for in sections 23 and 24 of the Act which provide as follows:

> *23. Power to remit award*
>
> *(1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire.*
>
> *(2) Where an award is remitted, the arbitrator or umpire shall, unless the order otherwise directs, make his award within three months after the date of the order.*
>
> *24. Removal of arbitrator and setting aside of award*
>
> *(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him.*
>
> *(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.*
>
> *(3) Where an application is made to set aside an award, the Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application*

Under UNCITRAL an arbitral award may be set aside by the court only if:

> *(a) the party making the application furnishes proof that:*

(i) a party to the arbitration agreement referred to in article 7 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 law of this State; or

(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; or

(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 decisions 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; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State; or

(ii) the award is in conflict with the public policy of the State.

The seven grounds for setting aside arbitral awards can be grouped into (1) those stemming from a defect in the arbitral agreement itself, (2) grounds implying fundamental procedural deficiencies, and (3) grounds including fundamental mistakes concerning the merits of the case. These grounds can further be categorized as capacity of a party, invalidity of arbitration agreement, violation of principles of natural justice and the exceeding of terms of reference by arbitrator. The only residuary ground on which the Court can go into the merits of the award is public policy, which is always subject to circumstances and interpretation.

In terms of misconduct, it should be realised that the same falls in two categories, namely, misconduct of the Arbitrator or the Arbitrator misconducting the proceedings. Though looking at the decisions (some of which have been cited to me) that have been rendered on the subject of misconduct, the issue of personal misconduct of the Arbitrator does not get much emphasis. As noted by Mr. Justice Ryan in ***Fayleigh Ltd -v- Plazaway Ltd t/a Hotel Partners & anor*** [2014] IEHC 52

> *"The law on setting aside awards of arbitrators is very clear. It is an uphill task for the person who wants to overturn the award. There have to be very clear grounds amounting to injustice and the test is described in a variety of ways. The term used for the ground of setting aside the award is misconduct.* ***It does not mean personal misbehaviour or hostility to one of the parties or dishonesty or something of that kind, although something of that kind would obviously amount to misconduct****. But the point is that it does not require some such wrongdoing on the part of the arbitrator".*

A more technical approach is preferred. As per L. J., Jenkins in ***London export Corp Ltd v Jubilee coffee roasting coffee Ltd*** [1958] 1 W. L. R. 661 at 665, *"'Misconduct' is, of course, used in the technical sense in which it is familiar in the law relating to arbitrations as denoting irregularity, and not any moral turpitude or anything of that sort."* In this regard there are four "technical" grounds which have been developed over the years for remittal of an award on grounds of misconduct. In ***McCarthy v Keane*** [2004] 3 I.R. 617, the Irish Supreme Court held that the grounds for remittal are, but not limited to the following:

- Error on the face of the award.
- Mistake.
- New material evidence.
- Misconduct

Even then, it has been observed that an arbitrator is the

> *""master of his own procedure". That this gives him wide discretionary powers to conduct the proceedings in a manner he sees fit, as long as the same is not manifestly unfair or contrary to natural justice. A subjective lack of confidence in the arbitrator by one party was not sufficient ground to remove him. There must be real grounds upon which a reasonable person would think there was a real likelihood that the arbitrator could not or would not fairly determine the issues on hand. In this respect, the court's supervisory role would be exercised with a light hand."*

Not only is the court's supervisory role to be exercised with a light hand, a high threshold is required for the remittal or setting aside of an arbitral award. As it has been noted "the standard or test of misconduct of such a nature would be something substantial, something that smacks of injustice or unfairness." The overall principle being that it is not appropriate to parse and

analyse an arbitrator's award but rather to consider from an overall point of view whether it may be said that the arbitrator has dealt properly with each of the matters referred to him.

Further, it is well settled that unless precluded by the arbitration agreement, arbitrators should be free to adopt procedures as they regard appropriate to resolve the dispute they are seized with. Further that arbitrators are free to determine the admissibility of evidence without being shackled by the formal rules of evidence, therefore they can receive evidence in any form subject only to such restrictions as they may deem appropriate (see ***Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others*** [2014] 1 ALL SA 375 (SCA)). Thus, nearly all the evidence that any party wishes to present will be received "for what it is worth," and it has been stated that fighting over admissibility is a fool's errand. I think I need not say more.

The position in Malawi is that an Arbitrator must be guilty of misconduct or must have misconducted the proceedings. There have not been many cases of Arbitrator misconduct but I would think that anything that amounts to moral turpitude would be considered misconduct. These would include fraud, bribery, and corruption. Suffice it to say that the jurisprudence on setting aside an arbitral award in Malawi is premised on the case of ***Haigh v Haigh*** (1861) 31 I.J. Ch. 430 in which case it was held that an award will be set aside if there is something radically or viciously wrong with it. In this context it has been recognized that an arbitrator in general has discretion in the manner in which proceedings before him or her are to be conducted.

A court cannot review the arbitrator's discretion provided he acts within his or her authority, according to the principles of justice and behaves fairly to each party. This was per ***Apex Operations Limited v World Food Programme*** MSCA Civil Appeal No.15 of 2001. The question to be asked is whether there is an irregularity which may have caused a substantial miscarriage of justice. Further still, where there is no explicit agreement by the parties, the arbitral tribunal has a discretionary power to decide about the procedure, admissibility, materiality and weight of evidence. However, it has to consider the right of the parties to be heard, the opportunity to present the case, the norms of due process, fairness, equal treatment and the expectations of the parties.

Discussion and Findings

From the evidence, it is quite clear that the parties were given the right to be heard by the Arbitrator. They presented and argued their cases and even filed final submissions. The fact

that the Arbitrator directed an inspection of materials, which was actually done with the knowledge of both parties, without hearing them, does not amount to misconduct. After all the law is clear that arbitrators are free to determine the admissibility of evidence without being shackled by the formal rules of evidence, therefore they can receive evidence in any form subject only to such restrictions as they may deem appropriate. It is thus within the discretion of an arbitrator to determine what evidence to consider or ignore.

Speaking of ignoring evidence or not taking the same into account, it should be noted than Arbitration, just like a trial, is an adversarial proceeding. This means that there must be a winner and a loser. For this to happen, the Arbitrator would of course have to disagree with the loser in favour of the winner. Impliedly this would mean that the Arbitrator would have to ignore or disagree with the evidence which was presented by the losing side. This is in fact the what adjudication entails in an adversarial system. This does not in any way amount to misconduct.

As noted above, an Arbitrator is "master of his own procedure". That this gives him wide discretionary powers to conduct the proceedings in a manner he sees fit, as long as the same is not manifestly unfair or contrary to natural justice. A subjective lack of confidence in the arbitrator by one party was not sufficient ground to remove him. There must be real grounds upon which a reasonable person would think there was a real likelihood that the arbitrator could not or would not fairly determine the issues on hand. In this respect, the court's supervisory role would be exercised with a light hand. In this regard, one of the alleged acts of misconduct was that the Arbitrator took the contract sum to be USD1, 280, 800, when this was supposed to be just an "estimate". An examination of the contract clearly shows this to be the contract sum and nowhere in the contract is this an estimate. This was clearly a frivolous and vexatious ground.

Further, in terms of the termination of the contract, the notification letter written by the defendant, it does clearly state that the contract was terminated in accordance with clause 8.2 of the contract which provided for sole convenience and not delay. This the Arbitrator ably dealt with in his determination and I again must find that there is no evidence of misconduct.

In fact, looking at the 15 the grounds which were presented by the defendant as grounds of misconduct by the Arbitrator, what became apparent was the fact that this was purely a case of subjective lack of confidence in the arbitrator by one party. Which is not sufficient ground for removing an Arbitrator or setting aside an Award. The defendant in this instance was clearly not happy that they lost the Arbitration and wanted to argue an appeal against the decision.

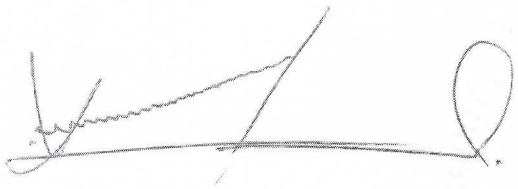
This is evidenced by the assertion for instance that an Arbitrator cannot award interest. In a commercial matter an Arbitrator can surely award interest and determine the rate at which the interest should be assessed. I can go on and on but I think there is no point for me to do so since this was clearly a frivolous attempt by the defendant to argue an appeal against the Award. The defendant cannot argue such an appeal through the backdoor by asserting misconduct on frivolous grounds.

Conclusion

Having considered the facts and the law, it is my finding that there are no good grounds to establish misconduct on the part of Mr. Chimangafisi. When he was appointed by the parties he was touted as being experienced, skilled and knowledgeable. I did not have any reason to doubt that. An Arbitrator is after all a is a master of his own procedure and has wide discretionary powers.

What we have here is simply a matter of the defendant being disgruntled with the Award which is not a ground for setting aside an Award. In fact, it remains a cardinal principle of law that a decision of an Arbitrator is final and binding on the parties. The defendant's application to set aside the Award is thus dismissed for being frivolous and vexatious. The defendant is also condemned in costs of this application

Made in Chambers this……28……day of……February……2024



K.T. MANDA

JUDGE