HH 189-2004
HC 12050/04

WEBSTER MANDIKONZA
and
JACK MANDIKONZA
versus
CUTNAL TRADING (PVT)LTD
and
DAVID E.G. LONG
and
DEPUTY SHERIFF (NYANGA)

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 19 November and 15 December 2004

Urgent Chamber Application

Mr *J. Colgrave*, for applicants
Mr *Ranchod*, for the respondants

UCHENA J: The first and second applicants are farmers in Nyanga. In August 2003 they entered into a contract with the first respondent who financed their potato crop for the 2003 to 2004 season. The contract had as part of its terms provisions requiring the applicants to grow a certain hectarage of potatoes and to sale the table and seed potatoes they were to grow to the first respondent.

It is common cause that the hectarage the applicants were to grow is more than the sizes of the farms allocated to them. The sale of seed potato to the first respondent is prohibited by law. The agreed sale price for the table potatoes was too low compared to the market price.

The first respondent alleges they entered into another agreement in terms of which the applicants were to sale their crop to the open market and the respondent would get 50% of the proceeds.

The applicants deny that there was a subsequent agreement. A term of the agreement provided for the referral of disputes between the parties to arbitration. In terms of that clause the

parties disputes were referred to the 2nd respondent who I will hereinafter refer to as the arbitrator.

The arbitrator made his determination and awarded the first respondent certain sums payable by the first and second applicants.

The applicants did not pay. The first respondent registered the award with this court and a warrant of execution was issued.

The third respondent attached the applicant's farm equipment. The applicants have now made this urgent application to stop the third respondent from selling their equipment in execution pending their application to set aside the arbitral award.

Mr *Colgrave* for the applicants submitted that there is no order by a Judge of this court recognizing the award granted after the first respondent 's application for recognition and enforcement.

Mr *Colgrave* also submitted that the registration of the award was irregular as no notice was given to the applicants. He further submitted that the application for registration of the award should be on notice to the other party and be in the form of a court application made in terms of the rules of this court.

He submitted that the basis for setting aside the arbitral award is that the agreement is contrary to public policy and that the applicants have prospects of success in that application as the agreement of the sale of seed potato to the 1st respondent is prohibited by law.

Mr *Ranchhod* for the respondents submitted that the arbitral award was properly registered as there is no need to make a formal application. He said the application is made to the Registrar of the High Court who registers it and can then enforce it. He submitted that there is no need to give notice of such an application to the other party.

The issues to be decided are:-

1. Is the application for recognition and enforcement of an

arbitral award to the Judge or to the Registrar?

2. Is notice to the other party a requirement when such an application is made?
3. Is the award likely to be set aside for being contrary to public policy?

In my view the determination of the first two issues is capable of resolving the dispute between the parties. If the award was irregularly recognised then there is nothing to enforce as there is no High Court Order authorising enforcement. The irregularity could be due to the incorrect procedure having been used or due to failure to give the applicants notice of the application to recognise the award.

The first two issues can be resolved by interpreting Articles 35 and 36 of the Arbitration Act No. 6 of 1996.

"Article 35 provides as follows:-

1. An arbitral award irrespective of the country in which it was made, shall be recognized as binding and upon application in writing to the High Court, shall be enforced subject to the provisions of this article and Article 36.
2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in Article 7 or a duly certified copy thereof. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language." (emphasis added)

My understanding of article 35 is that :-

1. An arbitral award can only be recognized and be enforced if the party seeking to enforce it makes an application to the High Court.
2. The application shall be subject to articles 35 and 36.
3. The requirements under article 35 are that the application shall be in writing and be accompanied by the following documents:-

(a) A duly authenticated original award or certified copy thereof and

(b) The original arbitration agreement or a certified copy thereof and

(c) If the award or agreement is not in English a duly certified translation thereof into the English language.

It seems to me whoever has to recognize and order the enforcement of the award must be someone qualified to understand the application, the arbitral award, and arbitration agreement.

A combination of what has to be considered and the need for an application to the High Court suggests that the application should be to a Judge and not the Registrar. If the application is to a judge then it should be in terms of the High Court rules and notice to the other part would be a requirement.

This issue cannot be resolved without considering the meaning of article 36 as the application for enforcement has to be in terms of articles 35 and 36.

"Article 36 provides as follows:-

(1) Recognition or enforcement of an arbitral award , irrespective of the country in which it was made, may be refused only –

(a) at the request of the party against whom it is envoked, if that party furnishes to the court where recognition or enforcement is sought 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 the country where the award was made; or

ii) the party against whom the award is invoked was not given proper notice of appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case; or

iii) the award deals with disputes not contemplated by or not falling within the terms of the submission to arbitration, or it 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 submitted that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced or

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 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 the 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 Zimbabwe; or

(ii) The recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph 1(a)(v) of this article, the court where recognition or enforcement is sought may; if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security." (Emphasis added)

A reading of article 36 (1) and (2) clearly indicates that in considering the application referred to in article 35 the application of a judicial mind is called for. In Article 36(1)(a)(i) the capacity of the party against whom the award is to be invoked and the validity

of the law under which the award was made has to be considered. The legislature could not have intended that issues such as these be dealt with by a person who is not a judge as was urged upon me by the respondent's counsel. The court also has to consider the validity of the agreement under the law of a foreign country. That obviously requires the attention of a Judge and certainly not that of the Registrar.

In terms of Article 36(1)(a)(iii), the court has to consider whether the award is within the terms of the referral to arbitration. This in my view calls for a proper application which should be considered by a Judge.

In terms of Article 36(1)(a)(iv) the court has to consider the composition of the arbitral tribunal and the propriety of the arbitral procedure. This in my view is not a task for administrative officers in the Registrar's office. It is clearly a task for a Judge of this court.

In terms of Article 36(1)(b)(i) the court has to determine whether or not the subject matter of the dispute is capable of settlement by arbitration under Zimbabwean law. In terms of Article 36(1)(b)(ii) the court has to consider whether or not the arbitration award is contrary to the public policy of Zimbabwe.

These again point to the hearing having to be before the court and not the Registrar.

Article 36(2) refer to the court hearing the recognition or enforcement application adjourning its decision if the other party has applied for the setting aside of the award. The adjourning of the court's decision suggests a proper court application before a Judge. In fact both Articles 35 and 36 make reference to the application being made to the High Court or the court.

In Order 1 Rule 3 of the High Court Rules the word "court" is defined as meaning "the High Court".

The words "court application" means an application to the

court in terms of paragraph (a) of subrule (1) of rule 226."

The word "registrar" means

(a) the registrar of court;

(b) the deputy registrar who and an assistant registrar who has been designated as a registrar of the court but does not include a deputy registrar or assistant registrar who has been designated as a registrar of the Supreme Court while acting in his capacity as registrar of the Supreme Court."

In view of these clear definitions of the words "court" and "registrar" I do not see how the words "High Court" and "court" used in Articles 35 and 36 can ever be taken to mean the registrar. The High Court is presided over by judges therefore the applications referred to in Article 35 and 36 should be applications before a judge and not the registrar. I would therefore accept Mr *Colgrave's* submissions and reject Mr *Ranchhod's*.

Article 36(1)(a) of the Act provides for the party against whom an award is to be invoked requesting the court to refuse to recognize and enforce the award. This suggests the party against whom the award is made must be notified of the application to recognize and enforce the award. When this is considered together with the provisions of Article 35(1) which provides that the award "shall be recognized as binding upon application in writing to the High Court" there can be no doubt that a proper application in terms of rule 226(1) of the High Court Rules 1971 has to be made by the party seeking to register the award. Failure to comply with that procedure is fatal to the recognition and enforcement of the award. It simply means the award has not yet been recognized. It therefore is not yet enforceable.

In the present case it is common cause that the purported recognition was by the registrar. That there is no court order

authorising the recognition and enforcement of the award. The warrants of execution which were used to attach the applicant's equipment were therefore invalidly granted.

In view of the conclusion I have arrived at as regards the recognition and enforcement of the award I need not consider whether or not the applicant's application for the setting aside of the award has prospects of success to warrant the stay of execution applied for by the applicant.

At the end of the hearing counsel for both parties agreed that I grant or dismiss the application in terms of the final order sought as they had exhaustively argued the matter before me and there was no need for the application to be confined to the granting or dismissing of the provisional order.

I will therefore grant the applicant a final order as follows:-

(1) That the warrant of execution of property issued by this court on the 3rd of November 2004 under case no. HC 11698/04 be and is hereby set aside.

(2) That the 3rd respondent be and is hereby ordered to return to the applicants all the property that was attached and removed by him from the custody and possession of the applicants pursuant to the writ of execution that was issued by the court on the 3rd November 2004.

(3) That the respondent be and is hereby ordered to pay the applicant's costs.

Toto & Makoni, the applicant's legal practitioners

Hussein Ranchhod & Company, the respondent's legal practitioners