

**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2008/HPC/550

IN THE MATTER OF THE ARBITRATION ACT, 2000

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN:

JOHN KUNDA

(Suing as Country Director of and on behalf
of the Adventist Development and Relief Agency (ADRA))

PLAINTIFF

AND

KEREN MOTORS (Z) LIMITED

DEFENDANT

BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 3RD DAY OF MAY, 2011.

FOR THE PLAINTIFF:

Mr. K. Hang'andu, Messrs Kelvin Han'gandu & Co.

FOR THE DEFENDANT:

N/A

J U D G M E N T

Case referred to:

Greer v Kettle [1938] A. C. 156

Legislation referred to:

Arbitration Act No. 19 of 2000, Section 17(2)(b) (iii)

Authorities referred to:

1. Cheshire, Fifoot and Furmston's Law of Contract 12th edition, p 274
2. G. H. Trietel, The Law of Contract, 12th edition, p 89
3. Redfern, Alan/Hunter, Martin, Law and Practice of International Commercial Arbitration, Third Edition, London 1999

The Plaintiff issued an originating summons seeking an order to set aside the arbitral award of the sole arbitrator, Dr. Ngosa Simbyakula in the arbitral proceedings involving Keren Motors (Z) Limited as Claimant and Adventist Development and Relief Agency (ADRA) as Respondent rendered on 6th August, 2008 on the ground that the said award is affected by fraud and/or misrepresentation within the terms contemplated by Section 17(2)(b)(iii) of the Arbitration Act No. 19 of 2000 (hereafter referred to as "the Act"). The originating summons is supported by an affidavit sworn by John Kunda, the Plaintiff's country director. The affidavit discloses that according to the deponent's personal knowledge of the case, the Plaintiff received the award through Mr. George Kanja of Palan & George Advocates, who at the time were the Plaintiff's counsel in the arbitration proceedings. Mr. Kanja did not minute in the diary or elsewhere the exact date when he received the award (exhibit "JK1") but he reckons he might probably have received the Plaintiff's copy of the award either in the fourth week of August 2008 or the first week of September 2008. However, Mr. Kanja has no actual recollection of the date for the purpose of satisfying Rule 23(2)(d) of the Arbitration (Court Proceedings) Rules, 2001.

The affidavit in support further discloses that the award is tainted with fraud and/or misrepresentation because the Defendant based its original fees or charges against the Plaintiff upon the carriage contract by falsifying the tonnage of the potato

vines or the goods transported on the Plaintiff's behalf on the various routes as a result of which it fraudulently charged the Plaintiff the sum of K2,625,085,059.20. When the Plaintiff objected against the said price and accused the Defendant with fraud or misrepresentation, the bill was waived and reduced by over K1,300,000,000.00; so that after discovering the fraud when the Plaintiff had already paid K834,649,714.40 on the contract a balance of K1,737,061,939.16 remained owing to the Defendant.

The affidavit in support also discloses that the fraud having been detected the Plaintiff refused to pay any more of the bill as a result of which the Defendant slashed the said balance to the sum of K360,471,260.80. The Plaintiff initially began to off-set the balance by paying K50,000,000.00 at once, but having confirmed the said fraud the Plaintiff refused to be bound by the contract any longer, prompting arbitration proceedings. At the arbitration proceedings the Plaintiff's evidence as to the said fraud was rejected and the Plaintiff was ordered bound by estoppel notwithstanding the fraud to pay the balance of K310,471,260.80 and the Plaintiff now appeals to have the award entirely set aside.

The Defendant's affidavit in opposition sworn by Jane Mukumba Kibrom, Defendant company's deputy managing director discloses that the date and time when the Plaintiff's former advocates in the arbitral hearing received the award is no longer relevant to the present proceedings. The parties to this action agreed in principle to proceed to arbitration and narrowed agreed issues for determination. Following this, a document was executed by both parties and the arbitrator equally appended his signature to the agreed issues (see exhibit "BK1").

The affidavit in opposition further discloses that the arbitral award is not in any way tainted by fraud and/or misrepresentation in the sense contemplated by the Act and should not therefore be set aside. The award must be read in the context of the issues to be determined. This application is misconceived, baseless and frivolous and should be dismissed with costs.

The Plaintiff's affidavit in reply jointly sworn by John Kunda and Mwewa Chibende, the Plaintiff's director of finance discloses that the Defendant rendered an invoice worth K2,621,089,959.20 against the Plaintiff. According to the Defendant the Plaintiff had incurred the said bill upon contracting the Defendant to transport agro inputs namely, cassava cuttings, sweet potato vines, fertilizer and maize seed during the 2003/2004 Emergency Drought Recovery Programme undertaken in the Northern and Eastern Provinces of Zambia by the Plaintiff. Of the said bill, K884,649,714.40 had been paid by or on behalf of the Plaintiff as of 9th February, 2006. The Defendant was the sole transporter of the said agro inputs contracted for freight from various sources to the different delivery points by both suppliers and the Plaintiff. Although there was no trans-shipment of the freighted cargo, the Defendant increased the tonnage of the cargo in 97% of the shipment when transporting the cargo on the Plaintiff's behalf to Eastern Province but charged the true rate while transporting on behalf of the suppliers. In one example, the Defendant's so-called "Chalimba Bill" to Chalimba Farms shows the following features: (a) date; (b) potato vine bundles; (c) tonnage; and (d) rate per trip. The said "Chalimba Bill" was in fact received by the Plaintiff on 12th January, 2007 and will be relied on hereafter to prove the extent of the fraud perpetrated against the Plaintiff by the Defendant.

The affidavit in reply also discloses that when the Court considers the transactions in question it will notice that out of 32 trips from Kapiri Mposhi to Lusaka en route to the destinations in Eastern Province the bills for transportation of the sweet potato vines are low in the case of Chalimba Farms and abnormally high when undertaken on the Plaintiff's behalf, even though there is no trans-shipment of the cargo. For example, out of 32 trips, 22 of them had an abnormal adjustment as against the Plaintiff alone of at least 100%. A description of these discrepancies is more particularly shown on the annexure of an analysis prepared by the Plaintiff's finance director, comparing the trips for the Defendant-Chalimba Farms on the one hand and the Defendant-Plaintiff on the other, for the same quantity of sweet potato vines (see exhibit "JK/MC 1-3"). Between Kapiri Mposhi and Lusaka, Chalimba Farms used the

Defendant to transport the vines at an average weight of 33 metric tones, yet as against the Plaintiff, it was in explicably increased by the Defendant for the trip from Lusaka to Eastern Province to an average weight of 175.7 metric tones. It is apparent, therefore, that the weight had been fraudulently inflated for again. Because of the said exaggeration of the tonnage of the sweet potato vines, the Defendant could afford to reduce the weight for the sweet potato vines without any rational justification whatever, the original invoice to the Plaintiff by K1,425,968,984.00. The original invoice was valued at K2,621,089,959.20. Due to the reduction the Defendant suffered an apparent loss of 54.4 % on its transaction. The Plaintiff has so far paid the sum of K884,649,714.40 to the Defendant to discharge the falsified bill of K2,621,089.959.20. In terms of Section 28(1) of the Value Added Tax Act Cap 331 of the Laws of Zambia, the Defendant is a registered supplier of business services, and it is unlawful for it to make such an arbitrary reduction because that amounts to defrauding the State out of K458,690,742.80 VAT which should have been paid to the Zambia Revenue Authority on the said bill. The Defendant was paid the sum of K884,649,714.40 by the Plaintiff as a result of the said fraud and the Plaintiff therefore counterclaims any money that shall be found to have been paid in excess by the Court.

The affidavit in reply further discloses that to arrive at the said bill of K2,621,089,959.20, the defendant based its fees on an average tonnage per trip of 175.7 metric tones which is in fact forbidden by the law on the Zambian roads. For example, on 16th January, 2004 the Defendant claims to have freighted 360 metric tones from Lusaka to Petauke in Eastern Province on the Plaintiff's behalf. However, in order to move cargo to Petauke from Lusaka, the Defendant's truck had to pass through the suspended Luangwa Bridge which allows a maximum of 55 tones at any given time. The weight alleged by the Defendant is therefore false as it cannot possibly be transported across the bridge. During the arbitration hearing, the tribunal moved on site at the Plaintiff's request for the purpose of physically examining the Defendant's trailers alleged to have freighted the abnormal loads averaging 175.7 metric tones per trip but Mr. Keren Kibrom, the Defendant's managing director failed to produce the

trailers in question. In the case of Konkola Copper Mines bound vanguard truck (see exhibit "JK/MC 4 – 6"), 160 wheels had to be installed on the trailer so as to sustain the abnormal load of 140 metric tones for the "cold box" imported from England through the Namibian port of Walvis Bay, which incidentally, according to the Defendant's claims weighs 35.7 metric tones less than its trucks allegedly used for shipment to the destinations in Eastern Province on the Plaintiff's behalf.

On behalf of the Plaintiff, Mr. Hang'andu submitted that there is sufficient proof in form of affidavit evidence to show that the Defendant defrauded the Plaintiff in the sense contemplated in Section 17(2)(b) (iii) of the Act. Counsel argued that even though the arbitrator ordered that the Plaintiff was still indebted to the Defendant in the sum of K310,471,260.80 the decision was affected or induced by fraud. He contended that it was not necessary to justify the setting aside of an award under Section 17 of the Act to show that the arbitrator himself is guilty of fraud in order for the Court to set aside the award; but for the applicant to merely show that the award was induced by fraud perpetrated by one of the parties without the knowledge of the arbitrator as was in this case.

Mr. Hang'andu submitted that fraud was perpetrated by the Defendant when it successfully convinced the arbitrator that it carried the Plaintiff's bundles of patato vines with an average weight of 175.7 metric tonnes for each single trip. He contended that according to the Plaintiff's evidence, it was not possible to freight cargo from any part of Zambia to Eastern Province through the Luangwa Bridge which only allows freight tonnage of 55 metric tonnes.

Mr. Hang'andu also submitted that if the Court were not to find that the making of the award was affected by fraud, it should in the alternative find that it was induced by misrepresentation. According to counsel, misrepresentation arose when the Defendant presented false evidence pertaining to its contract with the Plaintiff by which it successfully deceived the arbitrator to make an award and he referred the Court to

the learned authors of Cheshire, Fifoot and Furmston's Law of Contract 12th edition at page 274 which reads:

"2 THE MEANING OF INDUCEMENT

A representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the reasons which induced him to make the contract. A false statement, whether innocent or fraudulent, does not per se give rise to a cause of action.

It follows from this that a misrepresentation is legally harmless if the Plaintiff:

- (a) never knew of its existence, or***
- (b) did not allow it to affect his judgment; or***
- (c) was aware of its untruth."***

It was Mr. Hang'andu's contention that because of the misrepresentation, the Plaintiff unwittingly agreed to pay K884,649,714.40 and K50,000,000.00 out of the total bill of K2,621,089,950.20.

Mr. Hang'andu further submitted that since the evidence shows that there was fraud, the doctrine of estoppel could not have been accepted as the arbitrator did, in a situation of this nature and he relied on the learned authors of G. H. Trietel, The Law of Contract, 12th edition at page 89 to the effect that:

"It has been said that willful misrepresentation of law was ground for equitable relief."

He also cited the case of ***Greer v Kettle*** on the principle that:

"Estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in a deed must be taken as binding between the parties and privies and therefore as not admitting any contradictory proof. It is important to observe that this is a rule of common law, though it may be noted that an exception arises when the deed is fraudulent or illegal..."

Mr. Hang'andu submitted that the arbitrator allowed the Defendant to use estoppel as a sword to sue when it can only be used as a shield. Counsel accordingly urged the Court to set aside the entire award with costs.

I have considered the affidavit evidence, skeleton arguments, authorities relied on the arbitral award and the oral submissions of counsel for the Plaintiff.

This originating summons is made pursuant to Section 17(2)(b) (iii) of the Act which reads:

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

(b) if the court finds that –

(i)...

(ii)...

(iii) the making of the award was induced or effected by fraud, corruption or misrepresentation."

It is necessary at this juncture to underscore the purpose of an action to have the award set aside. The purpose is to preserve the integrity of the arbitral process. The point should be noted that setting aside proceedings do not serve as a means to achieve a review of the tribunal's decision on the merits. This Court's view is fortified

by the learned authors, ***Redfern and Hunter, Law and Practice of International Commercial Arbitration (Sweet & Maxwell, Third Edition, 1999)*** at pages 417 and 418 where they state that:

"Arbitral rules, such as those of UNCITRAL... provide unequivocally that an arbitration award is final and binding. These are not intended to be mere empty words. One of the advantages of arbitration is that it is meant to result in the final determination of the dispute between the parties. If the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the cause to the highest court in the land, they should opt for litigation. By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, final and binding. It is not intended to be a proposal as to how the dispute might be resolved; nor is it intended to be the first step on a ladder of appeals through national courts."

For an application under Section 17(2)(b) (iii) to succeed, the applicant must satisfy the Court that the arbitral award was obtained by fraudulent means, corruption or misrepresentation. The question to be determined by the Court, therefore, is whether from the affidavit evidence on record the Plaintiff has satisfied the requirements of Section 17(2)(b) (iii) of the Act.

The Plaintiff's application is anchored on the allegation that the award is tainted with fraud and/or misrepresentation because the Defendant based its original fees or charges by falsifying the tonnage of the goods transported on the Plaintiff's behalf as a result of which it fraudulently charged the Plaintiff K2,625,085,059.20. To buttress this allegation, Mr. Hang'andu submitted that the fraud was perpetrated by the Defendant when it successfully convinced the arbitrator that it carried the Plaintiff's bundles of potato vines with an average weight of 175.7 metric tonnes for each single trip to the Eastern Province when the Luangwa bridge only allows freight tonnage of 55 metric tonnes. I do not agree with this contention, for the reasons given below.

At page 18 of the award, the arbitrator made the following finding in paragraph two:

"The Claimant claims that after the Respondent disputed the tonnage the two parties agreed to resolve issue by the appointment of an ad hoc committee on which both parties would be represented in order to establish the true weight of the vines. The committee consisted of CW2, CW5, two officials from DMMU, two officials from the Zambia Weights and Measures and a Mr. Sibanda representing the Respondent although the Respondent has submitted that their representative did not attend the verification. After weighing five samples the committee agreed and resolved that the average weight of the bundles be 22.5 kg per bundle."

And at page 19 of the award in paragraph four, the arbitrator made a finding that:

"The fact that of the seven member ad hoc committee four were from independent organizations, i.e., two members from the DMMU and two from the Zambia Weights and Measures Agency is a manifestation of the transparency of the committee and which lends credence to the average weights of 22.5 kg per bundle determined by the committee. This is because the four had no interest to serve and the weighing itself took place at a neutral venue. Although one of the Respondent's witnesses submitted that the Claimant deceived the Respondent I am not persuaded by that argument."

Further, at pages 19 and 20, the arbitrator's finding was that:

"... the Claimant has adduced evidence to show that in calculating the re-adjusted statement they used the actual number of bundles recorded as received by the Respondent's servants, multiplied by 22.5 kg. The Respondent's witness RW1 had testified that he made a note

of any shortfall in the quantities delivered on the Goods Received Note. For example on the Delivery Notes on pages 45, 46 and 47 of the Respondent's Bundle of Documents, RW1 had indicated the shortfalls in the bundles received.

On page 45 for example RW1 had noted that he received only 2, 485 bundles out of 3,600. On behalf of the Claimant, Counsel for the Claimant, Major Mushemi submitted that in re-calculating the subsequent bill the quantity of bundles was corrected. Major Mushemi drew the Tribunal's attention to the re-calculated bill on pages 31 to 33 of the Applicant's Bundles of Documents. Line 17 on page 32 shows that the Claimant used 2,485 to calculate the tonnage by multiplying 2,485 with 22.5 kg and the contractual rate of K320 per metric ton, bringing the total amount due on that delivery to K13,508,406.00.

Again on page 46, RW1 had noted that he received 2, 174 bundles instead of 3,580 bundles. Line 21 on page 32 shows that the Claimant used 2,174 to calculate the amount due. Similarly on page 47, RW1 had again indicated that he received 3,257 bundles out of 4,015. Line 14 on page 32 shows that the Claimant used the figure 3,257 to calculate the amount due."

From pages 20 to 21 of the award, the arbitrator stated as follows:

"I am satisfied that bill No. 1232 which appears on pages 45 to 47 of the Claimant's Bundle of Documents was subsequently revised and corrected and that the Claimant took into account the discrepancies in the number of bundles that were delivered. The Claimant has also adduced evidence which was not controverted, apart from allegations of trickery, that the parties agreed on 75 tons as the maximum tonnage per delivery. I am satisfied that the re-adjusted bill as it

appears on pages 31 to 33 of the Claimant's Bundle of Documents reflected the corrections and that is why it was agreed to by both parties. The Managing Director of Keren Motors signed the reconciled statement on behalf of the Claimant while the then Country Director of ADRA signed on behalf of the Respondent. The Respondent has not convinced me that there was any deception on the part of the Claimant. In my view the concerns that the Respondent is raising now are issues that they ought to have raised at the material time before completion of the contract."

On the issue of estoppel, the arbitrator stated at page 21 in paragraph two that:

"I agree with the Claimant that agreement that the parties signed estops the Respondent from refusing to honour the agreement to pay the K360,471,260.80. The Respondent did in fact make a payment in the sum of K50,000,000.00 towards the liquidation of the outstanding balance. The Respondent's letter dated 13th January, 2006 under the hand of the then Country Director addressed to the Claimant was confirming the Respondent's liability. The doctrine of estoppel simply provides that a person is barred from denying or alleging a certain fact or state of facts because of that person's previous conduct."

The arbitrator finally concluded in paragraph four at page 21 that:

"In view of the foregoing I find on a preponderance of probability that the goods transported were of the correct tonnage and that the Respondent did not over pay the Claimant. The Claimant's claim therefore succeeds and I so hold."

Having critically examined the evidence adduced before the arbitrator, his analysis of the evidence and the findings he made, I do not see any impropriety in his conclusion. In particular, I am of the firm opinion that the Plaintiff has not shown to

this Court that the award was tainted with fraud. On the contrary, the view of this Court is that the arbitrator properly found, after analyzing the evidence before him, that an ad hoc committee which included representatives from independent organizations and the two parties determined the average weight applicable in calculating and re-adjusting the agreed amount of K360,471,260.80 due to the Claimant. I cannot agree more with the arbitrator's finding that the suggestion by the Respondent of using a weigh bridge came as an afterthought.

Mr. Hang'andu also submitted that if the Court were to find that the making of the award was not affected by fraud, it should in the alternative, find that it was induced by misrepresentation. As in the case of the allegation relating to fraud, I have no difficulty in concluding that the Plaintiff has also not shown to the satisfaction of this Court that the award was induced by misrepresentation. While the principles espoused in the authorities cited by the Plaintiff are good law, the position I take is that on the facts of this case, they cannot aid the Plaintiff in any way.

In the final analysis, I conclude that the Plaintiff has not satisfied the requirement of Section 17(2)(b) (iii) of the Act. This action is accordingly dismissed with costs to be taxed if not agreed. The upshot of this conclusion is that the order for stay of execution granted on 8th December, 2008 is forthwith discharged.

Leave to appeal to the Supreme Court is granted.

DELIVERED THIS 3RD DAY OF MAY 2011

**C. KAJIMANGA
JUDGE**