MAKANDI TEA AND COFFEE ESTATE (PVT) LTD
versus
THE ATTORNEY GENERAL OF ZIMBABWE N.O.
and
V. GAPARA N.O.

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 7 November 2014 & 1 July 2015

Opposed application

R Hashiti, for the applicant
N Mutsonziwa, for the 1st & 2nd respondent

MAKONI J: This is an application for review of the second respondent's decision in which he declined to stay proceedings before him in terms of s 7 of the Arbitration (Resolution of International Investment Disputes) Act [*Chapter 7:03*] (the Act).

The background to the matter is that the applicant is a company duly incorporated in terms of the laws of Zimbabwe, which is in the business of growing coffee, macadamia nuts, avocados and maize. On 8 July 2010, the applicant registered a request for Arbitration with the International Centre for Settlement of Investment Disputes (ICSZD), against the Government of Zimbabwe (State), in relation to land which the applicant lawfully owned and occupied before a dispute arose with the State. The State subsequently defended these proceedings which are pending.

On 28 April 2011, a director of the applicant, Bernard Alexander Josef von Pezold (Pezold) was summoned to appear at Chipinge Magistrates Court facing charges of contravening s 3 of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*]. It was alleged that the applicant continued in occupation of gazetted land without lawful authority. In his defence the applicant denied the allegations and asserted that the State is prohibited from bringing the charges under the Constitution of Zimbabwe, the statutes and international laws ratified by the State. The applicant relied on Article 26 of the convention which deals with the effect of arbitration and s 7 of the Act which deals with stay of court proceeding where the matter is within the jurisdiction of the ICSZD.

The applicant then mounted an application for stay of proceedings in terms of s 7 of the Act. It is this application that was dismissed by the second respondent which is the subject of this review.

The following are the grounds for review as set out in the Court Application:

"i. The effect of section 7 of the Arbitration (International Investment Disputes) Act [*Chapter 7:03*] ("the Act") as read with Article 26 of the International Convention on Settlement of International Disputes Convention (18 March 1965), ratified by the respondent on 20 May 1994;
ii. The significance of the Bilateral Investments Protection and Promotion Agreement (BIPPA) between Zimbabwe and Germany;
iii. The effect of s 16 (9b) of the Constitution of Zimbabwe on the dispute;
iv. The difference between ownership and occupation and as such, the fact that the applicant had a residual right with respect to occupation;
v. Instead, he erroneously suggested that a separate but related constitutional application had been dismissed by the Magistrates Court on the alleged ground that the applicant was abusing court process; and
vi. He erroneously reasoned that because a previous application, on with the same parties, on a different cause of action, had been dismissed, therefore the application before him was to be dismissed."

The application is opposed. The opposing affidavit was filed by the trial magistrate, the second respondent. The applicant took issue, *in limine*, with the propriety of the second respondent deposing to the opposing affidavit. It was submitted that the second respondent needed no protection which would justify his mounting of this opposition. The proper course would have been for a representative of the first respondent to depose to the opposing affidavit. The respondents did not make any submissions in opposition to this point.

In *Leopard Rock Hotel (Pvt) Ltd* v *Wallen Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 278 B-F the following was stated:

> "Such belief in the mind of the reasonable litigant is bound to be heightened by the fact that not only has the arbitrator refused to recuse himself, but he has descended into the arena of battle by actively participating in the proceedings for his removal and making common cause with the party maintaining that he should not recuse himself"'
> 7. The court continued at 279B-F
>
> > "In my view, in circumstances such as these, an arbitrator, umpire, judge or other adjudicating body has one of two choices. The first is that he could file an affidavit setting out facts which he considers may be of assistance to the court. So long as such facts are stated colourlessly, no-one could object, but if the affidavit should err plainly in support of one of the parties it might expose the adjudicator to the odium of the court.
> >
> > It is most undesirable that any arbiter or other adjudicator of a dispute should appear to be pitching camp with, or rendering assistance to, one of the contestants to the dispute before him. For the other party is likely to gain that impression that the arbiter and his adversary are conspiring against him. And such an impression would reinforce his belief that the arbiter is biased against him. See the remarks of Mc Nally JA in *Blue Ribbon Foods Ltd* v *Dube NO & Anor* 1993 (2) ZLR 146 (S) at 148. When the arbiter makes common cause with one of the parties in such proceedings,

> any façade of justice is shattered; the arbiter is seen to have descended into the arena with the possible consequential blurring of his vision by the dust of battle. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation.
> The second choice of the arbitrator or umpire when served with notice of motion for his removal, or to set aside his award, is to take no action and abide by the court's decision".

The proper approach in this matter would have been for the second respondent to set out facts which he considered would be of assistance to the court and end there. In the alternative, he would have asked a representative of the first respondent to file the opposing affidavit on behalf of the respondents rather than file an affidavit were he clearly supports one side.

The grounds upon which this court can exercise its powers of review are laid down in s 26 of the High Court Act [*Chapter 7:06*]. These have been canvassed in a number of authorities in our jurisdiction.

In *Tenesi* v *PSC* 1996 (2) ZLR 44, quoted with approval in *Ramilewa* vs *Secretary of the Public Service Commission* 1988 (1) ZLR 257 (H) at 262 B-F; Greenland J quoted with approval from *S.A. Defence and Aid Fund and Anor* v *Minister of Justice* 1967 (1) SA 31 (C), where Corbett J (as he then was) said at 34H-35D

> "The court can interfere and declare the exercise of the power invalid on the ground of a non-observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the pre-requisite fact or state of affairs existed, acted *mala fide* or from ulterior motive or failed to apply his mind to the matter. See eg *Minister of the Interior* v *Bechler and Others supra* [1948 (3) SA 409 (A)]; *African Commercial and Distributive Workers' Union* v *Schoeman NO and Another* 1951 (4) 266 (T); Sachs 1953 (1) SA 392 (A)."

In casu, the applicant contends that the second respondent failed to address his mind to the issues before him. He asked himself the wrong question and as a result addressed the wrong question. The position, in such cases was laid down in *Bridges & Hulmes P/L* v *The Magistrate, Kwekwe & Ors* 1996 ZLR 189 (HC) at 203 where it was stated:

> "Because of the wrong question of law he directed his inquiry at matters he should not have considered and failed to apply his mind to the matters an issue."

In casu, the applicant had previously applied for referral to the Supreme Court of certain questions relating to the violation of the Declaration of Rights. What was sought in that application was a determination of whether or not the applicant had been denied the right to the protection of law as guaranteed under s 18 (1) of the Constitution. The magistrate

dismissed the application. In the proceedings under review, the applicant made an application in terms of s 7 of the Act.

Section 7 provides;

"**7. Stay of court proceedings where matter within jurisdiction of Centre**

If any proceedings are instituted in any court in regard to any matter which, under the Convention, is required to be submitted to the Centre for conciliation or arbitration, any party to the proceedings may apply to the court to stay the proceedings, and the court, unless satisfied that the matter is not required to be submitted to the Centre under the Convention, shall make an order staying the proceedings".

The applicant argued before the second respondent that the criminal proceedings before him were proceedings within the contemplation of section 7 of the Act. He therefore applied for relief pending the determination of related proceedings in the ICSZD to which the Act applied.

The second respondent was therefore enjoined to interpret s 7 of the Act and determine whether or not the proceedings before him fall under the definition of proceedings as enunciated in the section.

The second respondent did not address his mind to this issue but instead said the following.

> "It is important to note that this application is preceded by another application under section 24 (2) of the Constitution of Zimbabwe wherein was sought a referral of the matter to the Supreme Court of Zimbabwe for the resolution of what the applicant alleged were constitutional questions. The application was dismissed by this court and the reasons for the dismissal are filed of record.
> The instant application was opposed by the State on the grounds, inter alia, that the applicant was abusing court process by bringing the same application before the Court which had already made its decision on it.
> I do not see the difference, in essence and content, between the two applications."

Clearly the magistrate fell into error as did the magistrate in *Williams & Anor* v *Msipa N.O and Anor* SC 22/10. In that matter on p 19 of the cyclostyled judgement, Malaba DCJ observed:

> "The reasons for the refusal by the magistrate of the request by the applicant for the referral to the Supreme Court of the two constitutional questions show that he raised for his consideration the false issue of the postponement of the trial."

In casu the magistrate raised the false issue that the present application, being made in terms of s 7 of the Act, is the same as an application made for the referred of a constitutional issue to the Supreme Court. This was not the same application. The issues are clearly different. In the first application the relief sought was referral to the Supreme Court on the basis that the prosecution was a breach of the applicant's fundamental rights. What the

second respondent was required to determine was whether the request was frivolous and vexatious. This question did not arise in the present proceedings. What the second respondent was required to determine, in the proceedings under review was whether prosecution of the applicant amounted to 'proceedings' within the contemplation of s 7 of the Act. If he had found in the positive, the second respondent would have no discretion. The section is couched in peremptory terms.

It is clear that the second respondent failed to apply his mind to these differences of substance. He considered that the two distinct and separate applications that required district and separate jurisdictional facts for the determination, were the same. The reasoning of the second respondent falls within the four corners of what has come to be known as the *Wednesbury* principles namely that:

> "It is true to say that, a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere."

See *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1947] 2 ALL ER 280.

The second respondent in its opposing affidavit and in his Heads of Argument does not address the pertinent question whether the proceedings before him were 'proceedings' as contemplated by s 7 of the Act. There is no mention of s 7 in his Heads of Argument at all. He did not apply his mind to the real issue before him.

Before I conclude I would want to observe that the second respondent, in his opposing affidavit, took offence by the adoption of the *Wednesbury* formulation in the court application. He felt that it was contempous of his office and that of the entire judicial system. Whilst the expression that the second respondent had taken long leave of mind "might have gone over board, it is not uncommon to find in court judgement expression such as "no reasonable authority could ever have come to it" See *Wednesbury* case; "He just did not apply his mind to the consideration of that question" See *Williams* case *supra* p 21. This is not meant to be an attack on the person of the second respondent or his office. This might also support the applicant's contention, dealt with earlier on in the judgement, that the opposing affidavit should have been done by a representative of the Attorney General.

Having found that the second respondent failed to apply his mind to the issue before him, I will therefore make the following order:

1) The order of the court *a quo* be and is hereby set aside.

2) The matter is remitted to the court *a quo* for determination before a different magistrate.
3) That the respondents pay costs on a legal practitioner/client scale, jointly and severally, the one paying the other to be absolved.

Wintertons, applicant's legal practitioners
Attorney General's Office, 1st respondent's legal practitioners