FARPIN INVESTMENTS [PRIVATE] LIMITED
versus
NETONE CELLULAR [PRIVATE] LIMITED
and
JUSTICE L.G. SMITH [RETD] - ARBITRATOR

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 17 November 2015 & 13 January 2016

Opposed application

F.B. Chirimuuta, for the applicant
Adv. E. Matinenga, for the first respondent
No appearance for the second respondent

MAFUSIRE J: This was an application for the setting aside of an arbitration award. The arbitrator, the second responded herein, was a retired Judge of this court. The basis of the application was that the arbitrator had misconstrued the factual basis of the applicant's claim before him. It was also said that the arbitrator's second and final award had contradicted the findings in his first award. This misdirection was said to have led the arbitrator to make an award that was so palpably iniquitous as to be in conflict with the public policy of Zimbabwe, as envisaged by art 34 [2][b][ii] of the Model Law, which is incorporated in the Arbitration Act, [*Chapter 7: 15*].

The applicant also challenged the arbitrator's order of costs against it on the punitive scale of attorney and client and said, or implied, that it was irrational, especially in circumstances where not only the arbitrator had given no justification or explanation for it, but also where the first respondent had not asked for such a scale. Finally, the applicant also challenged the arbitrator's order that his costs be met by the applicant alone. The award of costs in such a manner was cited as another example of the lack of logic in, and the iniquitous nature of, the award.

The second respondent opposed the application. It supported the arbitrator's award and submitted that the applicant had misconstrued the arbitrator's findings in his initial

award, which, it was argued, were no more than a re-statement or formulation of the issues for arbitration.

The papers were moderately voluminous. From the onset, I endorse the applicant's self-criticism in its heads of argument, that: "***…*[*T*]*he arguments in the submissions by the parties are somewhat convoluted and in some instances intended to confuse the real issues***." Not only that, but the applicant's affidavits were prolix, repetitive and argumentative. But shorn of that, I believe the facts and the issues were simple and straightforward. They were these.

[a] **The facts**

The first respondent was a public cellular telephone operator. It was a private company. The applicant was also a private company. The genesis to the dispute between the two was the relationship that they entered into on 23 February 2009. As at that date, the first respondent was a 60% shareholder in another company called Zellco Cellular [Private] Limited ["***Zellco***"]. This shareholding had come about following a debt-equity swap. The arrangement had been induced by Zellco's failure to remit what had been due by it to the first respondent.

Zellco's indebtedness to the first respondent had arisen out of a relationship that had existed between it and the first respondent since year 2001. That relationship had been created in terms of a certain written agreement titled "**Service Provider Agreement**" [hereafter referred to as "***the SPA***"]. In terms of it, Zellco had been appointed to supply and distribute, *inter alia*, the first respondent's radio-linked telephone services to Zellco's own customers whom it would bill, and collect payments from, in connection with those services. In return, Zellco would be paid a commission by the first respondent. This would be deducted up-front, and the net remitted to the first respondent.

The life-span of the SPA had been five years, but had been subject to renewal. As at 23 February 2009 when the first respondent entered into the aforesaid relationship with the applicant, the SPA had been renewed for another five years, from 21 November 2006 to some date in 2011. Thus, when the applicant and the first respondent started their relationship on 23 February 2009, the SPA had still about two more years to run.

The relationship that the applicant and the first respondent created on 23 February 2009 as aforesaid was a straightforward sale of shares agreement. They executed a written document titled "**Agreement of Sale of Shares**"] [hereafter referred to as "***the ASS***"]. In substance, the first respondent sold to the applicant its entire shareholding in Zellco, i.e. the

aforesaid 60% equity, for a certain sum of money. It seemed common cause that the applicant had paid the purchase price in accordance with the agreement.

The fall-out between the parties was in respect of clause 13 of the ASS. The dispute was multi-faceted. As I understood it, and in my own words, the applicant's position was that the first respondent had breached clause 13 and that, as a result, the first respondent had become liable to it in damages. The first respondent disputed that it had breached the ASS or that the applicant had been entitled to damages. It accused the applicant of purporting to step into the shoes of Zellco, and suing as if it were Zellco, allegedly in violation of basic tenets of company law. The applicant's rejoinder was that it had not purported to step into Zellco's shoes; that but for it to claim from the respondent it had necessarily had to compute what Zellco had been owed by the first respondent by way of commissions in terms of the SPA, both as accrued in the past, and as projected in the future; that the net amount, after deductions for expenses and contingencies, had constituted the value of its investment in Zellco, and that that was what it had lost as a result of the first respondent's breach. Initially the quantum of applicant's claim was $13 912 700-61. Subsequently, this was revised upwards to $14 962 121-82.

Zellco was not part of the dispute. By the time of the arbitration, it had filed for voluntary liquidation. What had forced Zellco into voluntary liquidation was in contention. The arbitrator made a finding that the reason for the voluntary liquidation had been capital constraints which had left no prospects of the shareholders injecting equity into the company. The applicant disputed that finding. This became an aspect of the arguments before me.

The background to Zellco's voluntary liquidation was the cancellation of the SPA by the first respondent. The first respondent claimed Zellco had breached the SPA by not remitting the net of what it was collecting from its customers. The figure was put at just over $14 million dollars. The first respondent said it had obtained summary judgment for the amount against Zellco. The applicant disputed that the judgment had been obtained summarily but, rather, in default, and that an application for its rescission was pending. That was another facet of the dispute before me.

When the first applicant had purported to cancel the SPA, Zellco obtained from this court a provisional order on an urgent basis to reinstate the SPA. The provisional order also directed the first respondent to retract its reasons for cancellation. This would be done by the first respondent sending text messages directly to Zellco's customers in the same way that the first respondent had done it when it had purported to cancel. Furthermore, in its text message

sent directly to Zellco's customers purporting to cancel the SPA, the first respondent had instructed that all future bills for the telephone services would be paid directly to it, not Zellco. In the provisional order, the first respondent was directed to reverse that instruction and inform the customers that future bills would be paid to Zellco.

The first respondent said it had complied with the provisional order. The applicant said it had not. It accused the first respondent of having unilaterally crafted the wording of the retraction and of departing from the substance of the directive of the court order. The applicant then went on to cite for contempt of court, not only the first respondent, but also its chairman, managing director and the legal advisor – cum – company secretary, as being the persons responsible for the first respondent's defiance of the court order. The two cases, i.e. the provisional order which was due for confirmation or discharge; and the application for contempt of court, were consolidated by consent. In a judgment by GOWORA J, as she then was, the first respondent was found guilty of contempt of court and sentenced to a fine[1]. But the first respondent's chairman, managing director and legal advisor – cum company secretary, were all exonerated on the ground that they had not been parties to the proceedings leading to the grant of the provisional order and that, in any case, there had been no evidence of proper service of the provisional order on them.

All that background to Zellco's voluntary liquidation was part of the arguments before me.

Clause 13 of the ASS was undoubtedly the only link between the SPA and the ASS. As such, it was what connected the applicant to the SPA, an agreement to which it was otherwise not a party. The nature and extent of the applicant's connection, or rather the nature of the rights or obligations of the parties under the SPA, was yet another facet of the arguments before me.

Clause 13 of the ASS, particularly sub-clause 2 thereof, read as follows:

> "**13 Duration of Agreement and Life of Service Provider Agreement**
>
> 13.1 ……..
>
> 13.2 NetOne undertakes to renew the Service Provider agreement between Zellco Cellular and themselves in order for Farpin to have the opportunity to realise full value on the shares procured by a further five [5] years from the date of expiry of the current agreement between NetOne and Zellco."

[1] See *Zellco Cellular [Pvt] Ltd v Netone Cellular [Pvt] Ltd & Ors* 2012 [1] ZLR 164 [H]

[b] **Arbitration**

The dispute between the parties, or rather facets of it, was arbitrated upon twice by the second respondent. In the first arbitration, the applicant challenged the jurisdiction of the arbitrator saying that the dispute was not one to be resolved by arbitration. The arbitrator ruled against it. In the course of his award, he made reference to the cancellation of the SPA by the first respondent as not constituting a breach of the ASS, but that the effect of the cancellation had given rise to such breach since the respondent could then not comply with the ASS. From there the arbitrator directed the parties to file their statements of claim for the second arbitration on the two issues that he had identified. The first respondent was ordered to meet the costs of that initial award.

The arbitrator conducted a second hearing at which among other things, the applicant's witness, an accountant, gave *viva voce* evidence on how the applicant's damages had been computed. The proceedings did not go to the "defence" case. The first respondent applied for the discharge of the applicant's claim. The application was granted with costs on an attorney and client scale. The arbitrator's findings and conclusions were as follows:

> "Having given careful consideration to the submissions made by the legal representatives of the parties I consider that there is no privity of contract between the parties. Clause 13.2 of the SPA does not provide a nexus which would entitle the Claimant to claim damages for the loss of commission and profits suffered by Zellco because of the cancellation of the SPA. The Claimant cannot step into the shoes of Zellco and claim the alleged damages suffered by Zellco. In clause 7 of its Statement of Claim as amended the Claimant submitted that as a consequence of the cancellation of the SPA it suffered damages in the sum of $14 962 121.82 which is made up of three elements, the first being commission amount due to it (not to Zellco) up to April 2011, the second being loss of income [from] April to May 2014 and the third being projected loss of income [from] June 2014 to November 2016 and then claim that that was the amount of the damages it suffered. If income in the sum of $6 688 988.96 was lost by Zellco that does not mean that Zellco did not make a profit of $6 688 988.96 which it would have passed on to its shareholders. It would have incurred expenses which would have had to be paid from the income received."

After that the applicant applied to this court for the setting aside of the arbitrator's decision.

[c] **Issues**

In order for me to arrive at the conclusion whether or not the arbitration award was impeachable by reason of a violation of the public policy of Zimbabwe, as envisaged by article 34[2][b][ii] aforesaid, the issues, as I see them, were these:

[i] What is the approach of the court where an arbitration award is sought to be impeached?

[ii] Did the arbitrator contradict himself in his two awards?

[iii] Did the first respondent breach the ASS; was the applicant entitled to damages?

[iv] Did the arbitrator misdirect himself by awarding the first respondent costs on a higher scale and ordering the applicant to meet the costs of the arbitrator on its own?

I now proceed to consider the law on the point and to determine the issues as I have identified them above.

[i] **Approach of the court *vis-à-vis* impeachment of arbitral award**

In terms of art 34 of the Model Law in the Arbitration Act, this court may set aside an arbitral award only on the grounds specified therein. One of those grounds, which the applicant has expressly relied on in these proceedings, was that the arbitration award was in conflict with the public policy of Zimbabwe as envisaged by sub-article [2][b][ii] of art 34.

Sub-article [5] of art 34 states:

"(5) For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

Other than paragraph [b] above, none of the other grounds listed by art 34 on which this court may set aside an arbitral award, applied to the applicant's situation herein. The definition of "public policy" in sub-article [5] does not limit the generality of that term as used in sub-article [2][b][ii].

The respondent alleged that the arbitrator misconstrued the premise upon which his claim had been presented before him, and that, as a result, he had seriously misdirected himself. It was argued that such misdirection had led him to come to a wrong conclusion. This was said to constitute a palpable and intolerable inequity that would hurt the conception of justice in fair minded persons.

The onus lies on the party that seeks to set aside an arbitral award under art 34 of the Arbitration Act. In my view, it is an extremely heavy onus. I believe that in the same way as in they exercise their review powers, superior courts restrain themselves from unnecessarily interfering with the exercise of judicial discretion by the inferior courts or tribunals. Unless the exercise of discretion by the inferior court or tribunal was injudicious or so grossly wrong as to amount to a miscarriage of justice, the superior court will let the decision pass even though it might itself have come to a different decision.

Dealing with the old Arbitration Act, before it was repealed and replaced by the current one, where the ground for setting aside an arbitral award was misconduct of the proceedings by the arbitrator, or the improper procurement of the arbitrator, or of the award, GUBBAY CJ, in *Zimbabwe Electricity Supply Authority* v *Maposa*[2] said, at p 462E – H:

> "…[A] party seeking to set aside an arbitral award could succeed only if able to establish either misconduct on the part of the arbitrator or the fact that the award was improperly procured. The word 'misconduct' was to be understood in the sense of some wrongful, dishonest or improper conduct; **a *bona fide* mistake whether of law or of fact on the part of the arbitrator could not be relied upon as a ground for setting aside the award**." [my emphasis]

At p 466E the learned Chief Justice, dealing with the current Act, said:

> "**An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside**.
>
> Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision." [my emphasis]

In casu, both parties relied on *Maposa* above. In particular, the applicant quoted the passage at 466 above, and evidently found support in what the learned Chief Justice went on further to say, at p 466F – G:

[2] 1999 [2] ZLR 452 [SC]

> "Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

I now turn to examine the alleged palpable, far reaching, illogical and outrageous inequity by the arbitrator which fair minded persons would consider would hurt the conception of justice in Zimbabwe if allowed to stand. This leads me to consider the rest of the issues as I have identified them above.

[ii] **Did the arbitrator contradict himself?**

One of applicant's refrain was that in his first award, the arbitrator had made a positive finding that the first respondent had breached clause 13.2 of the ASS by having cancelled the SPA and that the effect of that cancellation had given rise to a breach of the ASS. Having made that finding, it was argued, all that had remained, as indeed the arbitrator himself had gone on to direct, was the filing of the parties' statements of claim.

I understood the applicant's argument on this to be that the liability of the first respondent for breach of clause 13.2 of the ASS had already been settled by the first award and that the purpose of the second arbitration had merely been to settle quantum.

On the other hand, the first respondent accused the applicant of having misconstrued the arbitrator's statement in the first award. It disputed that the arbitrator had made a finding that there had been a breach and said that he had merely identified that aspect as being one of the issues for arbitration, otherwise he would not have called on the parties to file their statements of claim.

I find against the applicant on this point. Regarding the generic statement in question, the applicant was guilty of, firstly, selective quoting; secondly, quoting the statement out of context, and thirdly, misconstruing it altogether.

The applicant repeatedly quoted [i.e. in the founding affidavit, answering affidavit and heads of arguments] the arbitrator's statement in the first award as follows:

> "In my opinion, … … … … the effect of the cancellation did give rise to a breach of the Agreement because Claimant [*sic*] did not comply with the provisions of Clause 13.2"

But that was not all that the arbitrator had said on the point. The arbitrator's full statement, relevant to that point, was this [with the words removed by the applicant restored and highlighted, and those directly contradicting it highlighted and underlined]:

> "**It is clear that the cancellation by Respondent on May 2011 of the Service Provider Agreement it had entered into with Zellco did not constitute a breach of the Sale Agreement Respondent had entered into with Claimant**. …….. In my opinion, **although the actual cancellation by Respondent of the service Provider Agreement did not constitute a breach of the Sale Agreement and therefore could not be subject to arbitration in terms of clause 14**, the effect of the cancellation did give rise to a breach of the Agreement because Claimant [*sic* - obviously Respondent] did not comply with the provisions of Clause 13.2. **Had Respondent renewed the Service Provider Agreement in November 2011 and cancelled it a few months later there would have been no breach of the agreement. I consider that there are two issues giving rise to a dispute between the Parties**.
>
> [a] **under 14.1.3 the respective rights and obligations of the parties under the agreement once clause 13.2 became incapable of performance**; and
>
> [b] **under 14.1.4, because Respondent breached the agreement by failing to comply with its undertaking in terms of clause 13.2 to renew the Service Provider Agreement for a further 5 years from November 2011**."

The first respondent was right. In his first award, the arbitrator did not, as it were, settle the question of the first respondent's liability for the alleged breach of clause 13.2 of the ASS. He had merely identified that aspect as being one of two issues to be settled in the second arbitration. As paragraph [a] of his formulation of the issues put it, the second arbitration would determine "… **the respective rights and obligations of the parties under the agreement** …"

The applicant forgets that at that stage, the issue before the arbitrator was whether or not the dispute was one to be settled by arbitration. The arbitrator said it was. He then went on to identify what the issues were. The applicant's selective quoting of the arbitrator's statement in this regard, and quoting it out of context for that matter, was a self-serving stratagem which was intended to mislead.

Therefore, it is my finding that the arbitrator did not contradict himself in his two awards in question.

[iii] **Did the first respondent breach the ASS; was the applicant entitled to damages**?

Without doubt, there was no privity of contract between the applicant and the first respondent in terms of the SPA. The SPA was between the first respondent and Zellco. That agreement started and ended with these two parties only. It seems there had been some stray or loose argument to the effect that both Zellco and the applicant had a common shareholding in some respects. Certainly, at the relevant time, Zellco's chief executive officer also happened to be the chairman of the applicant. But this set up could not have had any consequence by itself. Zellco and the applicant were separate *l*egal *personae*. A wrong done to one was not necessarily a wrong done to the other.

Before me, the applicant accused the arbitrator of misconstruing the premise of his claim before him when he made a finding that by suing the first respondent directly for damages the applicant was attempting to step into the shoes of Zellco. The applicant said it never stepped, or ever wanted to step, into Zellco's shoes. It said it was not suing the first respondent on the basis of the SPA, to which it was not a party. It was suing the first respondent only on the basis of its breach of the ASS, to which it was a party.

It is important that I capture accurately the gravamen of applicant's argument on this point. It was the jugular vein. The applicant put its argument this way[3]:

> "Contrary to Respondent's allegations and the basis of the ruling by the Arbitrator on the issue, Applicant did not claim everything Zellco would have earned as its profits. ……. Zellco's commission was calculated in terms of the SPA as a percentage of the total income generated from its clients based on the usage of the Respondent's network. It therefore is no rocket science that in order to determine the commission Zellco would have earned, Applicant needed to calculate or estimate the said total income. Having determined the commission, Applicant went on ……. to deduct from the commission all the operating and administrative expenses Zellco would have incurred in earning such commission. The result is what Zellco would have earned from the operations as its profit and it is this profit that accrues to the shareholders of Zellco and distributed to them as dividends or retained earnings or some other form. It is this profit, calculated as such that Applicant is clearly claiming in its statement of claim and particulars of damages. To the extent that the arbitrator's ruling failed to appreciate this simple fact it cannot be based on sound legal principles at all and allowing any finding or ruling based on grossly unsound appreciation of fact and such fundamental legal principles to stand would be such an aberration of justice that would no doubt be contrary to the public policy of Zimbabwe which requires that sound legal principles and justice be upheld in such matters."

Earlier[4], the applicant had put forward the same argument as follows:

[3] Para 10.3 of the answering affidavit

> "The only way the Claimant could have stepped into the shoes of Zellco and sued Respondent for damages suffered by Zellco as a result of the cancellation of the SPA is by suing Respondent in terms of breach of a specific clause of the SPA. Zellco had no shoes in the SSA (no privity of contract) and by suing Respondent for breach of Clause 13.2 of the SSA, the Claimant could not have been doing so in the shoes of Zellco but its own as it clearly has privity of contract."

I saw no difference. To me it was all a question of semantics. The applicant was approbating and reprobating. Plainly, it purported to step into Zellco' shoes and to sue, under the guise of damages, the respondent for money that allegedly would have been due to Zellco. I find no fault in the arbitrator's findings. But I explain the situation in my own way. In terms of the SPA, Zellco supplied first respondent's products to members of the public. The profit belonged to the respondent. All Zellco was due was a commission. Applicant had no stake in that. As a shareholder in Zellco, it would have had to wait for the declaration of a dividend.

If Zellco was pilfering first respondent's money, then that was a breach of the SPA. Indeed the first respondent complained that Zellco was pilfering its money. As a result, it instituted proceeding in HC 3507/11 saying it had commissioned a firm of auditors who had discovered that Zellco had diverted an amount in excess of $14 million to its other project which had nothing to do with the first respondent. It said it had obtained summary judgment from this court in respect of that money. All that the applicant said on this point was that the judgment had not been summary judgment, but merely a default judgment against which an application for rescission had been filed. But to me, that was neither here nor there. At the time of arbitration, Zellco had an unfulfilled judgment of over $14 million in respect of first respondent's money. What was worse, Zellco had filed for bankruptcy.

On these facts, clearly the first respondent had been entitled to cancel the SPA. It had done so. But apparently it had botched the cancellation procedure. For that, it had been ordered by this court to reverse the cancellation. It had also been found guilty of contempt of court and fined for having failed, neglected or refused to reverse the cancellation as had been ordered. But that was not the dispute that the arbitrator had been seized with. This was merely an aspect of, or the background to, it. At any rate, the first respondent contended that there had been yet another cancellation subsequent to the one in respect of which the applicant had obtained a provisional order and which the applicant had never challenged. Of course, the

[4] Para 8.1 of the founding affidavit

applicant disputed that. But in my view, the goings-on between Zellco and the first respondent which were playing out in this court, could not preclude the arbitrator from holding that there had been no privity of contract between the applicant and the first respondent in terms of the ASS. I find no fault with that decision, let alone one that could be classified as a palpable iniquity that was so outrageous in its defiance of logic or acceptable moral standards and would therefore be in conflict with the public policy of Zimbabwe.

The applicant fixed its sails to the mast of clause 13.2 of the ASS. That clause obligated the first respondent to renew the SPA for a further five years. The purpose for the renewal was so that the applicant could have the opportunity to realise full value on the shares that it had acquired from the Respondent in terms of the ASS.

Clause 13.2 was the only place in the whole ASS that made reference to the SPA. The clause did not say what would happen if the respondent did not renew as envisaged. Notwithstanding that, the applicant claimed it knew what would happen. In paragraph 8.7 of its founding affidavit, it said logic and equity demanded that any claim for damages in such circumstances would be a claim based on the applicant recovering that same value from the SPA that it would have derived had that agreement not been cancelled by the first respondent, which cancellation had resulted in the failure by the first respondent to renew the SPCA.

But there was a problem in the applicant's formulation of its alleged cause of action for damages against the first respondent. In my view, clause 13.2 did not override the entirety of the SPA. It only revised the rights and obligations of the parties under the SPA regarding ***renewal***, and not cancellation. Those parties were Zellco and the first respondent. The SPA had provisions relating to the rights and duties of the parties under it regarding cancellation. If Zellco frittered away the first respondent's money and the first respondent moved to cancel the SPA, the applicant could not invoke clause 13.2 of the ASS and seek to block the first respondent from cancelling. Clause 13.2 did not have that effect. That, in my view, was why the arbitrator, in his first award, had surmised that had the first respondent renewed the SPA in November 2011 and cancelled it a few months later, there would have been no breach of the SPA.

There was yet another problem with the applicant's formulation of its damages claim. Any rights arising out of any breach of the SPA by the first respondent would accrue to Zellco, not the applicant. The applicant may have been the majority shareholder in Zellco, and clause 13.2 of the ASS may have been inserted for its benefit. But to argue that the value accruing to Zellco was the measure of the applicant's damages under the ASS - never mind

Zellco's own breach of the SPA, would, in my view, run counter to basic tenets of company law. The applicant was no more than a shareholder in Zellco. Zellco's money or assets were not applicant's money or assets. Zellco's debtors were not applicant's debtors. The applicant could only rely on such rights as were conferred by its ***shares*** in Zellco.

What is a share? What rights does it confer to the holder?

In *Borland's Trustees v Steel Brothers & Co Ltd*[5] the plaintiff suggested that a share was a sum of money which would be dealt with in a particular manner by what were called, for the purpose of argument, executory limitations. The suggestion was emphatically rejected by the judge, FARWELL J[6]:

> "To my mind it is nothing of the sort. A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se …. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract [i.e. the articles of association], including the right to a sum of money of a more or less amount …"

CILLIERS AND BENADE on *Company Law*, Durban Butterworths, at p 83 say:

> "The term 'share' as such denotes that the holder thereof has a claim on part of the share capital of the company – **and does not refer to a right of ownership in any part of the net assets of the company**. A share in a company is not a corporeal object but represents a complex of rights and duties." [my emphasis]

Some of the rights accruing to a shareholder via his shareholding in the company, and depending on the type of shares, are the right to dividends when they are declared, and the right to participate in a distribution on liquidation. There is also the right to vote at meetings, and so on.

For applicant to have sued the first respondent directly to recover what would have accrued to Zellco, simply by virtue of an alleged breach of clause 13.2 of the ASS, which, in any case, did not provide for such a right, amounted to the applicant assuming some derivative right of action but which it has not explained, let alone link to any tenet of company law. The applicant's claim before the arbitrator was evidently based on numerous assumptions, not least, that Zellco had not been in breach of the SPA – despite the judgment of this court; that Zellco was trading profitably and would have made money, not only for the

[5] [1901] 1 Ch 279
[6] At p 288

first respondent, but also for itself via the commissions – despite Zellco filing for voluntary liquidation; that Zellco would have declared dividends in all the succeeding years up to November 2016 when the SPA would expire if it had been renewed, and so on.

I am satisfied that when the arbitrator refused to recognise such a formulation for a damages claim, there was nothing palpably iniquitous in his decision that could be said to be far reaching and outrageous in its defiance of logic that sensible and fair minded persons would consider that the conception of justice would be intolerably hurt.

Therefore, on this ground again I find against the applicant.

[iv] **Did the arbitrator misdirect himself by awarding the first respondent costs on the higher scale and ordering the applicant to meet the costs of the arbitrator alone?**

The applicant's claim before the arbitrator was dismissed with costs on the higher scale of attorney and client. Further, the applicant was ordered to meet the costs of the arbitrator on its own.

It has not been clear to me the basis upon which such scale of costs was ordered, or why the applicant was made to meet the costs of the arbitrator all by itself. The first respondent did not ask for such a scale. The arbitration clause in the ASS made no provision for the costs of the arbitration. The only provision relating to costs was clause 15. But this confined itself to the costs of, or incidental to, the negotiation, preparation and execution of the ASS.

In his award, the arbitrator did not explain why he granted such a scale of costs, or why he ordered that his costs be paid by the applicant alone. *In casu*, the applicant has made a frontal challenge on the arbitral award on this point. The first respondent's response has been rather muted or equivocal.

The award of costs is wholly a matter in the discretion of the judicial officer: see *Graham* v *Odendaal*[7]; *Kruger Brothers & Wassermen* v *Ruskin*[8] and *Rautenbach* v *Symington*[9]. Unless a party is guilty of some misconduct, costs are normally awarded on the ordinary scale. That is my understanding of the general principle in the civil courts. But I see no reason why, in the absence of an agreement to the contrary, or of some other factors

[7] 1971 [2] SA 611 [AD]
[8] 1918 AD 63
[9] 1995 [$] SA 583 [O]

affecting it, the principle should not be extended to other fora or bodies exercising judicial or quasi-judicial functions.

In my view, the arbitrator misdirected himself when he awarded costs on the higher scale. The applicant's claim may have been misconceived. But the misconception was not so out of the ordinary as to warrant the applicant being mulcted in costs.

Although, even in these proceedings the applicant may still be kicking against the legal pricks [see *Corderoy* v *Union Government [Minister of Finance]*[10]], in my view, it has not so gone out of bounds as to attract an adverse order of costs beyond the ordinary scale.

Regarding the order that the costs of the arbitrator should be borne by the applicant alone, again I have found no explanation anywhere for this. In my experience, the costs of the arbitrator are generally met by the parties in equal shares. In the absence of an explanation for a departure from this practice, the arbitrator's costs have to be shared by the parties equally.

In the circumstances, the order of costs by the arbitrator against the first respondent is set aside and substituted with one of costs on the ordinary scale, with the costs of the arbitrator being shared equally between the parties.

In casu, the applicant has only been partially successful, i.e. on the question of costs. But to me, such success has been so infinitesimal as to warrant interference with the general principle that the costs should follow the result. Therefore, I make no special order as to costs.

DISPOSITION

1 The application is hereby dismissed with costs.

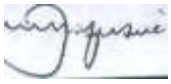
2 Paragraph 2 of the arbitration award by the Honourable Justice L. G. Smith [Retired] on 2 December 2014 relating to costs, is hereby set aside and substituted by the following:

2.1 The Claimant shall pay the Respondent's costs.

2.2 The costs of the arbitrator shall be borne by the parties in equal shares.

13 January 2016

[10] 1918 AD 512, p 520



Chirimuuta & Associates, applicant's legal practitioners
Coghlan, Welsh & Guests, first respondent's legal practitioners