

ZIMBABWE ELECTRICITY TRANSMISSION AND
DISTRIBUTION COMPANY (PRIVATE) LIMITED
versus
TENDAI CLETOS MASAWI T/A
MASAWI & PARTENRS, LEGAL PRACTITIONERS
and
RETIRED JUSTICE N MTSHIYA N.O

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 19 February 2020 and 17 June 2020

Court Application

F. Girach, for the applicant
C. Chinyama, for the 1st respondent
No appearance for 2nd respondent

DUBE J:

[1] The applicant seeks an order to set aside an interim award of Retired MTSHIYA J pursuant to Article 34 of the Arbitration Act, [*Chapter 7:15*], [the Act], on the ground that it conflicts with the public policy of Zimbabwe.

[2] The course of events leading to this application are as follows. Around the 7th of June 2006, the applicant and the first respondent, entered into a verbal agreement wherein the respondent, a legal practitioner, was to provide debt collection services to the applicant. The first respondent was entitled to collect 5% collection commission on debts collected. The verbal agreement was later reduced to writing and a debt collection agreement, (the DCA), in terms of which Tendai Cletos Masawi t/a Masawi and Partners Legal Practitioners was to recover debts on behalf of the applicant executed.

[3] The first respondent's position is that the debt collection agreement was subsequently cancelled resulting in the parties starting to squabble and the dispute referred to arbitration. Retired Justice Mtshiya was appointed the Arbitrator. In claim one, the Arbitrator was asked to resolve whether the oral agreement of 7 June 2016 was still in force or has been cancelled. Claim two was based on a court order obtained by the respondent on behalf of the applicant against City of Kwekwe. Claims three, four and five were claims for collection commission

on monies collected from defaulters and legal fees in terms of clause 7.1 of the DCA allegedly withheld by the applicant. The sixth claim was for legal services rendered to the applicant.

[4] The applicant refuted the first respondent's claims. It filed a counterclaim claiming monies allegedly retained by the first respondent after collecting debts. At the commencement of the arbitration proceedings, the Arbitrator was requested to deal with a *point in limine* regarding the legality of clause 7.1 of the DCA.

[5] The contentious Clause 7.1 of the DCA provides as follows:

“Collection commission shall be 5% of every amount collected from every defaulting customer handed over and directly in connection with that particular customer.”

[6] Clause 7.1 of by-laws 70(3) and by-law 70 (2) of the Law Society of Zimbabwe By-laws, Statutory Instrument 314 of 1982, (as amended by S.I 157 of 2014), stipulates as follows,

“70 (2) A legal practitioner instructed to collect an uncontested claim for the trade debt shall be entitled and obliged, in lieu of any other fees and charges, save for disbursements, and save as to hereinafter provided, to charge his client a collection commission at the rate of –

- ‘(a) Ten per centum on the first thousand United States of American Dollars;
- and
- (b) Five per centum on the next four thousand United States of American dollars, and
- (c) Two comma five per centum on the balance, of any payment or instalment collected;”

[7] After considering the parties' submissions, the Arbitrator ruled that clause 7.1 of the DCA is contrary to By-law 70(2) and is illegal. The Arbitrator went on to make the following pronouncement,

- “(1) The DCA is legally enforceable and the objection *in limine* is dismissed
- (2) The issue of cause of action, as agreed between the parties, can only be determined on consideration of the merits
- (3) The respondent shall pay costs to the claimant at the ordinary scale.”

[8] In coming up with the ruling that the DCA is enforceable, the Arbitrator considered that there was performance of the illegal DCA and that the applicant's allegation of illegality would stand to unjustly enrich it at the expense of the first respondent. He opined that it is only those illegal agreements that have not been performed in any way that may be deemed unenforceable.

[9] This award has become the subject of these proceedings. The applicant submitted that an arbitral award includes an interim award that is determinative of the rights of the parties. It maintained that the Arbitrator made a substantive award which has final effect, is determinative of the rights of the parties and is therefore final and liable to be set aside. The applicant takes issue with the fact that the Arbitrator having found that the DCA was illegal, proceeded to

declare the DCA legally enforceable. It submitted that it is contrary to the public policy of Zimbabwe to enforce an illegal contract. It contended that the Arbitrator having found that the DCA was illegal was not at liberty to proceed and determine the first respondent's claim. It contended further, that in a case where there has been a relaxation of the *in pari delicto* rule, the courts, will at the very best provide for restitution but will not enable or facilitate the enforcement of any illegal agreement. The applicant prays that the award be set aside on the basis that it is contrary to public policy.

[10] The second respondent did not oppose this application. For convenience, the first respondent shall hence forth be referred to as the respondent. The respondent took three points *in limine*. The challenges regarding failure to bring the application on time contrary to Art 33 of the Arbitration Act and the authority of the deponent to the founding affidavit to depose to the affidavit were abandoned during argument. He submitted that the court's power to set aside an award in terms of Art 34 does not extend to interim relief which does not give substantive relief. He insisted that the award sought to be set aside is not a final award and that the applicant must wait for the entire arbitration proceedings to be completed before it can bring proceedings seeking to set aside the award made so far.

[11] On the merits, the respondent submitted that the DCA is legally valid and enforceable. He refuted that the interim award is in conflict with the public policy of Zimbabwe. His position is that there are exceptions to the general rule regarding illegality of the underlying contract and contended that this case falls within that bracket of such exceptions. He disagreed that all agreements that are illegal are legally unenforceable and submitted that where an agreement has been performed in part as in the present case, the court is obliged to give effect to it and that the enquiry does not end with a finding of illegality.

Types of awards

[12] The impugned decision was made during the pendency of the arbitral proceedings. The issues are whether the decision is an award as envisaged by Art 34 and liable to be set aside. Secondly, whether the Arbitrator could in fact proceed with the arbitration having found that the underlying contract is illegal. The court need not, in its consideration of the application, place much emphasis on the reasoning of the Arbitrator but the decision made.

[13] There are many types of arbitral awards. An understanding of the main types of awards and their consequences is pertinent. Generally, a final award is an award that contains the final decision of the Arbitrator on all matters submitted to it. It is a substantive and definitive award.

[14] This definition resonates with Art 32 which provides for termination of proceedings and stipulates as follows;

“ARTICLE 32

Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when—

(a) The claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.”

Arbitral proceedings may be terminated by a final award or order of the arbitrator. They may also be terminated in terms of Art 32(2) where the parties have agreed to termination of the proceedings, the claim has been withdrawn and where the arbitral proceedings have become unnecessary. A final award is enforceable and liable to be set aside in terms of Art 34.

[15] A final award has also been described as an award that settles,

“a portion of the dispute that can be separated from the remainder of the dispute but it does not necessarily terminate the arbitration or the mandate of the Arbitrator to consider the remaining portions of the dispute. Such an award has all the consequences of an award and that it is *res judicata* in respect of what is contained in it, and it would be subject to set aside proceedings”

See a paper on the *United Nations Conference on Trade and Development titled, Dispute Settlement, International Commercial Arbitration, Making the Award and Termination of Proceedings, United Nations, New York 2005*. This entails that where a portion of a dispute can be separated from the remainder of the dispute under arbitration and a decision rendered, the arbitrator can proceed to consider the remaining portions of the dispute. Such a portion of an award constitutes a final award. This is especially so when the portion of the dispute is rendered *res judicata*. The partial award is an award that is dispositive of part of the matters considered in arbitration proceedings.

[16] An interlocutory award is one made pending the arbitration proceedings. Interlocutory awards are usually procedural and do not decide the substance of the dispute. Interim awards are awards made during the pendency of arbitration proceedings. They may either be procedural or seek to protect the rights and obligations of the disputing parties pending arbitration. Interim awards do not usually decide the substantive issues before the arbitrator. If an interim award is not final and not determinative of the dispute between the parties, it cannot be enforced and be set aside. There is an overlap between interlocutory and interim orders.

[17] Art 17(2) (a) of the Act gives the arbitral tribunal power to grant interim measures in the form of interdicts and interim orders. This Article was designed to deal with protective orders which are temporary in nature. In their revision of the UNCITRAL Rules in 2010, the drafters left the question of interim, partial and interlocutory awards to be determined by the laws of each particular country. Art 32 (1) of the UNCITRAL Arbitration Rules allow the making of interim and interlocutory awards and provides as follows;

“In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory or partial awards.”

This analysis shows that there are many types of awards. Further, that it is competent for a court in addition to granting a final award, to make other awards including interim, interlocutory or partial awards. Whether an award is one that is capable of enforcement and liable to be set aside in terms of Art 34 depends on the characteristics of the award.

[18] Art 34 of the Act provides as follows;

“RECOURSE AGAINST AWARD
ARTICLE 34

Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the High Court only if—

(a).....

or

(b) the High Court finds, that—

(i)

or

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

Art 34 (2) (b) (ii) of the Arbitration Act lists public policy as a ground for setting aside an arbitral award. Art 34 provides only for grounds for setting aside an award and does not define the term, “award”. The article makes no specific reference to interim awards or other class of awards.

What is succinctly clear is that the award sought to be set aside must qualify as an award. Our Art 34 is modelled on almost exact terms as Art 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United National Commission on International Trade Law on 21 June 1985).

[19] Art 34 of the UNCITRAL Model Law does not define the term “award”. A module paper prepared for the United Nations Conference on Trade and Development titled, Dispute

Settlement, International Commercial Arbitration, Making The Award and Termination of Proceedings, United Nations, New York 2005, describes an award as follows,

“The award of the arbitral tribunal is the instrument by which the tribunal records its decision on arbitration... it is a final settlement of the matters contained in it... Not many decisions of the arbitral tribunal are awards. The tribunal will make many decisions during the course of the arbitration. Some of them are simply administrative, such as the scheduling of a hearing. Such decisions will normally be in the form of a procedural order. Other decisions are of more significance ... Yet other decisions may have a determinative effect on the arbitration without being a full and complete settlement of it. It is sometimes unclear whether such decisions should be denominated as “awards”, alternatively as “orders” or “decisions.”

The paper defines an award as the instrument “by which the tribunal records its decision on arbitration”. It must be a final settlement of the matters contained in it. The paper accepts that other decisions may have a determinative effect on the arbitration without being a full and complete settlement of it. The article states further that an award takes on a *res judicata* effect. Clearly not every decision of an arbitrator is an award. The paper gives insight into what the working group of the UNCITRAL Model Law had in mind during the drafting of the law. During the deliberations, an attempt was made to define the term “award”, and the proposal was as follows,

“An award means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determines any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.”

There was disagreement during the drafting, over the last part of the definition dealing with questions of procedure leading to the term “award” being left undefined.

[20] The role of defining what an award is as envisaged by Art 34 was left to the courts. In the case of *PT Assurance Jasa Indonesia (Persero) v Dexia Bank SA* 2007 (1) SA SLR 597, the court held that a determination of an arbitrator must be a decision on the substance of the dispute for it to be an award for the purposes of Article 34 of the Model Law. The judgment supports the position that an award is more than just the label placed on it.

[21] Having considered the views of the drafters, precedent and the provisions of the Act, it appears to me that an arbitration award as envisaged in terms of Art 34 must meet one or more of the following criterion;

- (a) it must be a final award,
- (b) be the instrument by which the tribunal records its decision on arbitration,
- (c) be a final settlement of the matters contained in it,
- (d) considers and disposes of all the issues submitted for arbitration,
- (e) finally determines any question of substance or of competence

- (f) or of procedure,
- (g) in the case of procedural questions, the arbitrator must term it an award and
- (h) the award must have the effect of *res judicata* in respect of what is contained in it.

[22] The jurisdiction of the court to set aside an award in terms of Art 34 of the Act is triggered only where an arbitrator has rendered an award. In order to determine if the decision challenged is an award that is capable of being set aside, the court looks at the substance of the award. An award may be a decision on the merits. If it is not a decision on the merits, it must be one that determines to finality any question of substance of a claim on the merits, question of competency of the arbitrator or of procedure. It is akin to a decision of a court. An award records the decision of the arbitrator. It must be a final settlement of the matters contained in it and must have the effect of *res judicata*. The arbitrator must consider it to be his decision and must record his decision over the arbitration. It must be an award that resolves all the issues in dispute and brings the arbitration to a close. An arbitrator's obligation ends only when he has rendered a final award.

[23] Not all decisions of the arbitrator are awards that enjoin the court to set them aside. The stage at which the award is made does not matter. It should not matter that an award is an interlocutory, interim or partial award. An interim award is liable to be set aside where it is an award as envisaged by Art 34 and meets the criterion of an award. Article 34 does not contemplate an application to set aside interim or interlocutory relief which does not deal with the substantive merits of dispute. An interim award is only capable of terminating arbitral proceedings if it is shown that it has the attributes of an award as envisaged by article 34. The court may only set aside an interim award that is fully determinative of the rights of the parties.

[24] In deciding whether a decision or ruling is an award as envisaged by Art 34, the court has considered the nature and effect of the decision made. The applicant has no entitlement to ask that the decision or ruling of the arbitrator be set aside at this stage of proceedings. The ruling of the Arbitrator has the effect of disposing of the question of the legality of the DCA and hence disposes only of the respondent's first claim regarding whether the DCA is still extant and is capable of performance. The dispute between the parties still remains to be resolved. All the respondent's claims and the counter claim of the applicant have not been considered and a determination given. The determination of the issue of legality of the DCA does not dispose of all the issues before the Arbitrator.

[25] The ruling of the Arbitrator is not a decision on the substance of the disputes between the parties. It does not deal with the merits of the dispute and is not fully determinative of the

rights of the parties. It not a final award in the sense that it is not a determination that considers and disposes of all the issues submitted for arbitration. It has no effect of finally determining all questions of substance referred for arbitration. It is not the final decision of the Arbitrator. The Arbitrator does not consider the decision to be his final award that disposes of the arbitration. It is not the instrument which records the final decision of the Arbitrator. The Arbitrator wishes to still consider the issue of unjust enrichment. The decision has no effect of a final resolution of the dispute of the parties. The ruling of the Arbitrator is not an award as contemplated by Art 34 and is not liable to be set aside.

[26] An arbitrator may be called upon to deal with many preliminary issues during the arbitration proceedings. These decisions are not subject of control by the courts unless if they have the effect of disposing of the dispute on the merits. A court will not entertain proceedings to set aside any other decision made by the arbitrator except decisions that decide the substantive merits of the case and disposes of the dispute between the parties, that is, the award. The decision made may be termed an interim award but it is not the instrument which records the final decision of the Arbitrator.

[27] Generally, it is not permissible for a litigant to approach the court during a pending arbitration with an application to set aside an award. Courts scorn at litigants who obstruct and delay arbitration proceedings by challenging interim orders which do not meet the criterion of an award. In order to ensure the independence and efficacy of arbitration proceedings, courts must desist from interfering with on-going arbitral proceedings and should only entertain applications to set aside awards that are final and in the case of interim awards, where the award has the effect of resolving all the substantive issues between the parties or is final in nature. It is undesirable to interfere with the unterminated proceedings of any court or tribunal unless special circumstances demand so. Autonomy and finality of arbitral awards must be maintained.

Approach of arbitral tribunals to illegal contracts

[28] The Arbitrator made a ruling on the status of the underlying contract only and there was no challenge to the arbitration clause contained in the DCA. The separability doctrine dictates that the underlying contract and the arbitration contract are separate contracts. This position is echoed in our Art 16 as follows,

“ARTICLE 16

Competence of arbitral tribunal to rule on its jurisdiction

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause

which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.”

[29] Art 16 is based on the UNICITRAL Model Law and codifies the concept of separability of the underlying contract from the arbitration clause. An arbitration agreement is an agreement by the parties to submit to arbitration in the event of a dispute. It is a separate and independent agreement from the terms of the underlying contract in which it may be included. The arbitration clause is severable from the underlying contract. Article 16 enables an arbitrator to rule on his own jurisdiction and any objections with respect the existence or validity of the arbitration agreement. Where an arbitrator makes a decision that a contract is null and void, that ruling does not necessarily render the arbitration clause illegal or null and void as well. In the absence of a challenge to the arbitration agreement, the arbitration agreement remains standing. The illegality or invalidity of the underlying contract has no bearing on the arbitration clause itself. It is from these principles and the approach laid out in Art 16 that the separability doctrine emerged.

[30] The separability concept was articulated in the case of *Buckeye Check Cashing, Inc. v Cardegna*, NO. 04 -1264 (US Sup Ct, 2/21 /06), where the Florida Supreme Court held that an arbitration clause is severable from the contract. The court held that even if the underlying contract is invalid, the arbitration clause may survive and is enforceable.

[31] In the case of *Templo Calvario Spanish of God v Gardner Constr Corp*, Cal Rptr 3D, 2011 WL 3386481 (Cal App. 16, 2011), the court ruled that an was entitled to proceed and make a decision on the merits of the dispute after having found that the underlying contract was illegal. See also, *Heyman v Darwins Ltd [1942] AC 356*; *Premium Nafta Products Ltd v Fili Shipping Co Ltd[2002]1 All ER 81* .

[32] The Indian Arbitration and Conciliation Act 1996, which is a worded along the same lines as the UNCITRAL Model Law on Arbitration makes provision in sections 16 (a) and (b) for the separability principle. It is identical to our Art 16 .In the case of *National Agricultural Coop Mktg Federation India v Gains Trading Ltd* 2007 (5) SCC 692, the Indian Supreme Court held that the arbitration clause is a collateral term of the contract which relates to resolution of disputes and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration clause would survive for the purpose of resolution of disputes arising under or in connection with the contract.

[33] An arbitrator derives the power to arbitrate from the arbitration agreement. The rationale of arbitration is to enable resolution of the dispute between the parties despite the status of the underlying contract and hence the inclusion of Art 16 in the Act. Art 16 entitles him to proceed with the arbitration in the face of an underlying contract that is null and void or illegal. Nothing bars an arbitrator who has ruled that the underlying contract is illegal from proceeding to resolve the dispute between the parties. Whilst an arbitrator does not have an entitlement to enforce performance of an illegal underlying contract, he has an entitlement to arbitrate on the dispute between the parties in terms of the arbitration agreement. Arbitration remains an alternative dispute resolution mechanism available to parties to a contract in the face of an illegal contract.

[34] The significance of the *National Agricultural case* is that an arbitration clause enclosed in the underlying contract is a separate term of the contract which relates to resolution of disputes and not performance of the contract. The fact that the underlying contract is illegal has a bearing on performance of the contract rendering the contract incapable of performance. The fact that an underlying contract is illegal does not render the arbitration clause illegal. The arbitration clause being a separate agreement existing on its own remains valid and is enforceable, for as long as the arbitration clause has not been challenged and remains in place. The arbitrator may, despite the illegality of the underlying contract, still continue and adjudicate over the matter. The arbitration clause remains alive for the purpose of resolution of the disputes between the parties under the contract.

The approach of the courts to illegal contracts

[35] The approach of the courts is somewhat different to that to be adopted in arbitral proceedings. Courts are strictly guided, in their application of the law by both substantive law and procedural law rules. The approach of the courts to illegal contracts was laid out in the case of *Chioza v Siziba* 2015 (1) ZLR 2523 (SC) where the court held that an illegal agreement cannot be ordinarily be enforced by the courts but held that there were exceptions to the rule and remarked as follows;

“Thus while the general rule is that illegal transactions will be discouraged by the courts, the exceptions show that where it is necessary to prevent injustice or to promote public policy the courts will not rigidly enforce the general rule. The identification of the exception to the rule, however, is a task which the court must take.”

[36] At p 265-266 the court dealt with what remedy a purchaser would be entitled to after a finding that the underlying contract is illegal and said the following;

“Thus while the general rule is that illegal transactions will be discouraged by the courts, the exceptions show that where it is necessary to prevent injustice or to promote public policy the courts will not rigidly enforce the general rule. The identification of the exception to the rule, however, is a task which the court must take in each case....the strict application of the *pari delictum* rule in the instant matter would result in a situation where the appellant holds the title deeds but the respondent retains possession of the property while neither party could resort to the courts for endorsement of the contract, it is conceivable that the applicant could transfer title to a third party against whom the respondent might have no resource. In the circumstances of this case it seems to me that public policy would not countenance the unjust enrichment of the appellant at the expense of the respondent----.” see *Dube v Khumalo* 1986 (2) ZLR 103 (SC).

[37] The courts are hesitant to enforce illegal contracts. The general rule is that illegal transactions are discouraged by the courts and are considered unenforceable. There are however exceptions to the general rule. Where it is necessary to prevent injustice or to promote public policy, the courts will not rigidly enforce the general rule and there will be a relaxation of the *in pari delicto* rule. In the *Chioza case*, the court relaxed the *in pari delicto* rule and provided a remedy outside the underlying contract.

[38] The DCA is the underlying contract. Clause 12 of the DCA is the arbitration clause and is the arbitration agreement of the parties. Clause 12 is an agreement in terms of which the parties contracted to have the dispute resolved by way of arbitration. It binds them. The arbitration clause is independent from the DCA. Having ruled that the underlying contract is illegal that is not the end of the matter. The agreement of the parties to arbitration remains intact and is enforceable. The arbitration clause enables the arbitrator to proceed and resolve the dispute between the parties even in the face of an illegal underlying contract.

[39] Enforcing an illegal contract has the effect of violating our public policy. The approach to adopt in determining whether an award is contrary to public policy was set out *Zimbabwe Electricity Supply Authority v Maphosa* 1999 (2) ZLR 452 (S). An award is set aside when,

“the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted 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.”

See also *Delta Corporations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZL 81 (S). The case of *Maphosa* speaks to an award that is outrageous in its defiance of logic that a sensible fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award. The award must be faulty or incorrect in a palpable and material respect. There being no award as envisaged by Art 34, no questions of the decision’s

compliance with public policy considerations come into play. The Arbitrator is at law entitled to proceed with the arbitration in the face of an illegal underlying contract.

[40] The ruling of the Arbitrator may not have been elegantly worded in the sense that he ruled that the DCA is enforceable when in actual fact only the arbitration agreement that remains enforceable. What the Arbitrator probably had in mind was that within the illegal DCA was an arbitration agreement that entitles him to proceed with arbitration. The fact is that the underlying contract is illegal and may not be further performed. A failure by an arbitrator to apply the law correctly on its own, does not constitute a ground to set aside an award.

[41] By proceeding with the arbitration proceedings, the in no way enforces performance of an agreement that is illegal. What is pertinent is that the Arbitrator is entitled to proceed with the arbitration and resolve the disputes between the parties.

[42] All the Arbitrator intends to do is to address the issue of unjust enrichment thereby resolving the outstanding disputes between the parties. Once the matter is dealt with on the merits, the parties will be afforded an opportunity to have all the disputes referred to arbitration resolved. Clearly, the Arbitrator had an entitlement to deal with the merits of the dispute and issues of unjust enrichment only and did not order performance of the terms of the DCA.

[43] The applicant has not shown the existence of special circumstances warranting the interference of this court. The arbitration proceedings must be allowed to run their full course and allow the arbitrator to make his pronouncements on all of all the issues before him. Such a course will enable the parties to recover the value of monies claimed under the illegal contract in terms of both their claims.

[44] The ruling of the Arbitrator cannot be challenged independently from the final award. Allowing parties to apply for setting aside of awards during the arbitration proceedings has the undesirable effect of staying proceedings whilst courts determine their enforceability and thereby causing delays. The application to set aside the ruling of the Arbitrator is misplaced. Accordingly, it is ordered as follows,

The application is dismissed with costs.