

EX TEMPORE

ELPHAS MAVUNE MAPHISA
v
BULAWAYO MUNICIPAL COMMERCIAL UNDERTAKING
GORDON GEDDES

SUPREME COURT OF ZIMBABWE
GOWORA JA, PATEL JA & ZIYAMBI AJA
BULAWAYO, 27 NOVEMBER 2017

The appellant in person

L. Nkomo, for the first respondent

No appearance for the second respondent

PATEL JA: This is an appeal against the judgment of the High Court, dated 13 July 2017, dismissing an application for review of the determination of an arbitrator which had dismissed preliminary issues raised by the appellant relating, *inter alia*, to the legal status of the first respondent and its capacity to enforce a franchise agreement between the parties.

The court *a quo* found that the appellant had proceeded erroneously by not invoking the procedure prescribed for setting aside arbitral awards under Article 34 of the Model Law scheduled to the Arbitration Act [*Chapter 7:15*]. The court further found that, even if the application had been mounted in terms of ss 26 and 27 of the High Court Act [*Chapter 7:06*], the appellant had not alleged any valid grounds of review to set aside the

determination of the arbitrator. In our view, we entirely agree with the court *a quo* that there was no proper review before it. We also take the view that the court should have stopped after making those findings and should not have proceeded to deal with the merits of the review application.

We note that the appeal herein is stated to be against the whole judgment of the High Court. However, the grounds of appeal set out in the notice of appeal are confined to the merits of the arbitrator's determination on the preliminary issues. They do not in any way impugn the main findings of the court relating to its powers of review and the impropriety of the purported review application before it.

We also note that, following the determination of the arbitrator on the preliminary points, the arbitration proceedings were continued with the active participation of the appellant. The arbitrator then rendered his final award on 3 December 2015. Thereafter, the appellant instituted further review proceedings on 24 May 2016 against the final award. These proceedings were also dismissed by the High Court on 27 October 2016 on the basis that the review was improperly instituted. Both the final award of the arbitrator and the judgment of the High Court remain extant. As was grudgingly conceded by the appellant, this fact renders the present appeal academic and futile.

As regards costs, Mr *Nkomo*, for the first respondent, sought costs on a punitive scale. The reasons therefore were that the appellant has yet to relinquish the franchised premises, notwithstanding his contention that the franchise agreement is a

nullity, and that he has obstinately resisted the first respondent's attempts to repossess the premises. We agree with Mr *Nkomo* that the appellant has continually abused court process and still continues to do so. It is therefore necessary to make an appropriate award of punitive costs.

In the result, it is ordered that the appeal be and is hereby dismissed with costs on a legal practitioner and client scale.

GOWORA JA: I agree.

ZIYAMBI AJA: I agree.

Calderwood, Bryce-Hendrie & Partners, 1st respondent's legal practitioners