ZIMASCO (PRIVATE) LIMITED
versus
PORTNEX INTERNATIONAL
(PROPRIETARY) LIMITED
and
KEVIN TERRY (N.O.)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 30 March and 28 April 2021

Opposed Application

D. Tivadar, for applicant
T. Mpofu with *T.L. Mapuranga*, for 1st respondent
No appearance, for 2nd respondent

TAGU J: The Applicant brought this application pursuant to Article 13 of Schedule 1 of the Arbitration Act [*Chapter 7:15*] for the recusal of Mr. Terry, the second Respondent, as Arbitrator of Applicant's dispute with the first Respondent.

The background facts to this application are that the Applicant and the first Respondent (the parties) entered into a Lease Agreement on 29 June 2017, whereby the Applicant leased to the first Respondent its Furnaces 1, 3, 4 and their associated infrastructure at its Ferrochrome production facility in Kwekwe. By letter dated 9 October 2018 pursuant to clause 4.1.3.2 the Applicant waived the requirement for reline and refurbishment of Furnace 1 and it was agreed that Furnace 1 would no longer be leased to the first Respondent. However, disputes arose between the Applicant and the first Respondent under the lease agreement. One of the dispute between the Applicant and the first Respondent related to the question of what currency the rent was payable under the lease agreement. The Applicant argued that rent was, and remained, payable in United States Dollars (USD) or alternatively, since February 2019 it was payable in Zimbabwe Dollar (ZWL) converted at the exchange rate applicable at the time of payment. The first Respondent argued that the rent was payable in ZWL at a rate of 1:1 both before and after February 2019.

The parties agreed that Mr. Terry, the second Respondent, be appointed as an Arbitrator to determine the parties' disputes. They further agreed that the question of what currency the rent was payable under the lease agreement be dealt with by way of Partial Award since the issue of

the applicable currency was one that had not yet been settled by the Courts. Mr. Terry heard the arguments and rendered his Partial Award on 2 March 2020. In his Partial Award he found in first Respondent's favour. He further made a cost award in first Respondent's favour on the legal practitioner and client scale, which is punitive. At no time did Mr. Terry attempted to explain the basis on which a punitive cost award was appropriate in the present case. Nor did he invite submissions on the appropriate scale on which costs should be awarded. An application to set aside the Partial Award has since been filed in HC 2446/20. Despite several requests the Arbitrator has refused or neglected to provide the reasons to date. In fact he has acted in a manner that shows partiality and favoured the first Respondent. An application was made for the Arbitrator to recuse himself. The Arbitrator refused to be recused. This caused the Applicant to doubt his independence hence has approached this court for his recusal as the Arbitrator pursuant to article 13 of Schedule 1 of the Arbitration Act (*Chapter 7:15).*

The first Respondent is resisting the application. The 1st Respondent raised a number of points in *limine* in its Notice of Opposition. However, at the hearing of this application *Advocate T. Mpofu* with *T.L. Mapuranga* raised a new point in *limine* based on MANGOTA J's judgment in case HC HH 34/21 (dealing with application to set aside the Partial Award) which he said could dispose of this matter at this stage. The judgment in question was produced. They submitted that MANGOTA's judgment created an issue Estoppel. *Advocate T. Mpofu* said on the basis of this judgment this application is incompetent before this court due to the sentiments expressed by MANGOTA J in HH 34/21. Alternatively, when there is Partial Award, the matter is not settled. Applicant must wait for the finalization of the matter pending before the Arbitrator. The arbitration process must be allowed to run first. He prayed that this application either be struck of the roll or be dismissed.

Advocate *D. Tivadar* opposed the point in *limine* based on issue estoppel. His submissions were that this point is not in the founding affidavit as well as the heads of argument. He said further, that an application stands or falls on the papers. He questioned the basis on which point in *limine* was being raised. On estoppel, he submitted that certain requirements must be met. He conceded that the first requirement has been met, but argued that the other requirements have not been met such as the cause of action must be the same, the relief must be the same and that the court does not even have the papers from MANGOTA J. To him this is not a point in *limine*. Finally,

he opposed the alternative claimed by first Respondent, arguing that first Respondent is a probating and reprobating by saying wait until matter is finalized.

In response *Advocate T. Mpofu* said that it is trite that a point of law can be raised at any point even on appeal. He further responded to say estoppel is different from res judicata, but *Advocate Tivadar* went on to deal with requirements of res judicata. For requirements of issue estoppel he referred the court to the case of Willowvale Mazda Motor Industries v Sunshine Rent-a-Car 1996 (ZLR) 415 (S). He therefore persisted with his point *in limine*.

At the close of the submissions I reserved my ruling on the point *in limine* raised by *Advocate Mpofu* and his colleague. I indicated that I will deal with it first in my judgment. I allowed the parties to address me on the merits. I will therefore dispose of this point *in limine* first since it has the potential of disposing the matter. In the event that I dismiss it I will deal with the merits of the application.

Firstly, it is true as observed by *Advocate Tivadar* that the point in *limine* on estoppel was not raised in the Opposing Affidavit and the heads of argument. *Advocate Tivadar* questioned the basis on which it was being raised at this stage. I however, agree with *Advocate Mpofu* that a point of law can be raised at any point even on appeal. There are authorities to that effect. The point is therefore trite. I found nothing wrong for *Advocate Mpofu* to raise a point in *limine*, which is a point of law at the commencement of the hearing.

What I need to do is to examine if the point in *limine* is merited or not.
The distinction between issue estoppel and res judicata, as well as the requirements for the two was discussed in the case of Wiilowvale Mazda Motor Industries supra. In that case it was further firstly held that-

> "This was not a situation where the principle of res judicata could be applied. Even though the matter was between the same parties and involved the same issues of law, the *merx* demanded was different. The subject matter was not the same in both proceedings.
>
> Held, further that even though the principle of res judicata could not be applied, this did not prevent the court from considering the question of issue estoppel. The doctrine of issue estoppel does not require for its application that the same thing must have been demanded. The requirements are that (1) the same question has to be decided; (ii) the judicial decision was final; and (iii) the parties are the same."

Having set out the requirements of issue estoppel, I have to examine the judgment of MANGOTA J. In deed I read judgement in HH 34/21. The Honourable Judge made some pronouncements quoted by *Advocate T. Mpofu* which have a bearing on this application. Firstly

let me state on the outset that the parties are the same, the same question was decided whether the Partial Award should be set aside before the Arbitrator finalized the issues placed before him, just in this case, the issue that will eventually be decided is whether the Arbitrator should be recused in the middle of deliberations before he finalized the issues before him. The decision in HH 34/21 is final. Lastly, the reliefs in both cases is different. As I said above it was held that the doctrine of issue estoppel does not require for its application that the same thing must have been demanded.

MANGOTA J on pages 5-6 of the cyclostyled judgment made the following sentiments referred to by Advocate T. Mpofu:-

> *"It is the parties which invited the arbitrator to hear and determine their case. They cannot wish away the issues which they went to arbitration for in the first place. A fortiori where they agreed between them that he would deal with all the issues which relate to their case. Those will continue to stare them in their face until they are, in some way or other, resolved.*
> *It follows from the foregoing that, where the arbitral award is set aside, a trial de novo will have to occur for the parties to be able to resolve the impasse which the Finance (No. 2) Act created for them. A de novo trial, is no doubt, more time consuming as well as more costly than a continuation of the parties' aborted proceedings.*
> *The parties agreed on the main issues and also on the issues which the first respondent raised in its statement of claim. They agreed to deal with issue of currency first and with the other issues later.* ***The parties are directed to deal with all the issues which they placed before the arbitrator with the result that only one arbitral award which is divided into two parts is allowed to come out of the proceedings. The piecemeal approach which the applicant adopted in casu is totally discouraged. It does not allow for logic and consistency. It, in any event, runs contrary to decided case authorities." (***my emphasis***)***

Having said the above the Learned Judge dismissed the application for setting aside the Partial Arbitral Award with costs. In short the judge directed that the parties should let the Arbitrator finish his proceedings first.

In the present application the Applicant wants the Arbitrator to be recused before he finished his task. I am totally in agreement with MANGOTA J's sentiments because it means everything will have to be started *de novo* before a different Arbitrator. The issue estoppel raised by *Advocate T. Mpofu* has merit. Surely, issue of costs in the Partial Award cannot stall the ruling by the Arbitrator on the outstanding issues. I will uphold the point of law raised by *Advocate T. Mpofu* and this application must be struck off the roll without dealing with the merits of the application. The parties are once more directed to first finish the issues they placed before the arbitrator.

IT IS ORDERED THAT

1. The point in *limine* is upheld.
2. The application is struck of the roll.
3. No order as to costs.

Gill Godlonton and Gerrans, applicant's legal practitioners
Mlotshwa & Maguwudze, 1st respondent's legal practitioners.