



Zanele Investments Holdings Limited & another v Alexander Forbes Emerging Markets (PYT) Limited & another (Miscellaneous Application E715 & E855 of 2021 (Consolidated)) [2023] KEHC 22992 (KLR) (Commercial and Tax) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E715 & E855 OF 2021 (CONSOLIDATED)
JWW MONG'ARE, J
SEPTEMBER 28, 2023**

BETWEEN

ZANELE INVESTMENTS HOLDINGS LIMITED APPELLANT

AND

ALEXANDER FORBES EMERGING MARKETS (PYT) LIMITED RESPONDENT

AS CONSOLIDATED WITH

MISCELLANEOUS APPLICATION E855 OF 2021

BETWEEN

ALEXANDER FORBES EMERGING MARKETS (PYT) LIMITED .. APPLICANT

AND

ZANELE INVESTMENTS HOLDINGS LIMITED APPELLANT

RULING

- On 27th September 2021 Zanele Investments Holdings Limited (hereinafter referred to as ‘Zanele’) filed an application seeking to set aside the Arbitral Award dated 27/6/2021 delivered by A.E BHAM, SC in the arbitral proceedings between the parties herein held at Sandton, South Africa(hereinafter referred to as ‘the award’). On 24th November 2021, Alexander Forbes Emerging Markets (P.Y.T.) Limited (hereinafter referred to as ‘Alexander Forbes’) seeking to recognise and enforce the award.



2. The recognition and enforcement of International Arbitration Awards is governed by section 36(2) of the [Arbitration Act](#), 1995. Section 36(3) provides the procedure to be followed by a party seeking to apply for enforcement of the award which includes furnishing the court with the original arbitral award or a duly certified copy and the original arbitration agreement or a duly certified copy of the same.
3. The enforcement and recognition may be opposed before the High Court under section 37 of the [Arbitration Act](#). The said section 37 provides the grounds upon which the High Court may decline to recognise and enforce the arbitral award, which grounds include that the award is contrary to the public policy of Kenya among other grounds.
4. The application filed by Zanele was filed under section 37 of the [Arbitration Act](#), 1995, citing the grounds for which it sought to have the award set aside as being that the same was contrary to public policy of Kenya in that Alexander Forbes duped the Kenyan Government agencies in approving a sale that was contrary to law and repugnant to justice and morality, and the loan agreement, subject matter of the Arbitration proceedings, was premised on a blatant violation of the laws of Kenya, among other grounds adduced and contained in the supporting affidavit sworn by Geoffrey Nzau and annexed to the application.
5. On the flipside, Alexander Forbes filed its application of 24th November 2021 seeking to have the court recognise and enforce the Arbitral Award dated 27/6/2021 delivered by A.E BHAM, SC, as a decree of the court. The Application has been brought under section 35 of the [Arbitration Act](#), 1995. In seeking to have the courts enforce the award, Alexander Forbes reiterates that the Kenyan [Arbitration Act](#) is modelled around the UNCITRAL model Law which contains three fundamental principles shared worldwide by States with similar arbitral laws. These principles include the principle of non-interference by the courts. The aim of this principle is to restrict reach of judicial intervention in arbitration proceedings. The second UNCITRAL principle is the finality of the arbitral awards. Thus, section 32A of the [Arbitration Act](#) specifically provides that an Arbitration Award is final and binding upon the parties and that courts can only interfere in specific circumstances set out under section 37 and 39 of the Act. The third principle of the UNCITRAL model Law is that Arbitrators are masters of facts and therefore courts have no jurisdiction to under section 35 of the Act to review decisions of Arbitral Tribunals for purposes of substituting it with their own views and conclusions.
6. Both parties filed their respective responses to the two-application opposing the same. Both parties also filed substantive submissions and bundle and list of authorities to reinforce their positions on the two applications.

The Preliminary Objection

7. On 17th April 2023 Zanele filed a Notice of Preliminary Objection in the Application filed by Alexander Forbes that sought to recognise and enforce the award dated 24th November 2021.
8. In the case of *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors* [1969] EA, the Court defines a Preliminary Objection as follows:-

“a Preliminary Objection consists of a point of law which has been pleaded or which by clear implication out of pleadings, and which if it is argued as a preliminary point may dispose of the suita Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of a Preliminary Objection does



nothing but unnecessarily increase costs and on occasion, confuse the issue, and improper practice should stop.”

9. In its submissions in support of the Preliminary Objection, Zanele argues that the Application by Alexander Forbes filed on 24th November 2021, Alexander Forbes has annexed to its application the final arbitral award dated 27th June 2021 and marked as Exhibit KM-2, annexed to the supporting Affidavit of Khumo Mpye, dated 23rd June 2023 that has not been signed. The said Arbitral Award does not disclose the seat of the Arbitral Tribunal as required by law. In the Preliminary Objection, Zanele argues that the said final Award is incapable of being recognised and enforced by the court in the current form. That the same is incurably defective and violates the mandatory provisions of sections 32(1), (4) & (5) of the Arbitration Act, 1995. Sections 32(1), (4) & (5) of the Arbitration Act, 1995, provides as follows:-

“Form and contents of arbitral award;

- 1 An arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators.
- 4 The arbitral award shall state the date of the award and the juridical seat of arbitration as determined in accordance with section 21 (1), and the award shall be deemed to have been made at that juridical seat.
- 5 Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.”

10. The Applicant, to reinforce the above argument that the above provisions of the Arbitration Act are mandatory and have the effect of rendering the award a nullity, have cited several cases from other jurisdictions where the Arbitration process are modelled around the UNICITRAL model law and are signatories of the New York Convention on Enforcement and recognition of arbitral awards just like Kenya. Zanele referred the court to the decision in the US case, GE Energy Power Conversion France SAS, Corp. v Outokumpu Stainless USA, LLC, 590[2020] where the court held that an unsigned award cannot be considered an “award” within the meaning of the New York Convention and therefore cannot be enforced. The same position was taken in the English Courts in the case of Walker International Holdings Ltd. v Republic of Kazakhstan [2020] EWHC 565(Comm). The English court found that under the English Arbitration Act, an award must be in “in writing and signed” by the Arbitrator(s) and an unsigned Award does not meet this requirement. There are several other decisions from other jurisdiction that Zanele relied on which I shall not reproduce here.
11. It is important to bear in mind that decisions are persuasive and not binding to this court. In Kenya, Arbitral Awards have the force of law as a judgment of the court. The Kenya courts have held that an unsigned judgment cannot be enforced as a judgement of the court and is therefore a nullity. The authorities cited by Zanele include case of Ferdinand Indangasi Musee & Another v Republic of Kenya [2013] eKLR where the Court of Appeal found that in a two-judge bench where the judgment of the High Court was signed by only one Judge was irregular. Similarly in the case of Lwakwachama v Republic[2005] KLR 379, the Court of Appeal declared invalid a judgment of the High Court because it was unsigned. These decisions are binding upon this court as they emanate from the Court of Appeal.
12. Alexander Forbes opposed the Preliminary Objection. In its submissions before the court, Alexander Forbes argues that Zanele has sought in its application to set aside the said Arbitral Award to rely on the same Arbitral Award in their application of which it now seeks to have the court strike out. Alexander Forbes further argues that the authorities relied on are from different jurisdictions and have



no force of law and cannot be used in Kenya as the same are merely persuasive. Alexander Forbes faults Zanele's reliance on decisions of the Court from criminal cases and argues that the same are irrelevant and have no bearing in this case. Alexander Forbes argued that Zanele had placed reliance on the said Arbitral award even without it being signed dated or the place of seat of arbitration being indicated in the award and cannot therefore run away from it and term it as invalid. Alexander Forbes further argues that section 32A makes an arbitral Award final unless set aside in the manner prescribed in the Act and that there is no provision in law to declare an award invalid for want of signature, date or seat of the Tribunal. Alexander Forbes further submitted that Zanele was estopped from running away from its own application in which it sought to rely on the impugned arbitral award in its setting aside application.

13. Alexander Forbes submitted further that the Preliminary Objection does not meet the threshold of setting aside an arbitral award as provided for under section 35 of the Act and that none of the ground set out there have been established as a basis for the Preliminary objection to succeed. Both parties placed reliance on the case of Mukisa Biscuit(supra) in setting out the parameter for which a preliminary objection can be successful with Alexander Forbes arguing that the same has not been established in the current application. Alexander Forbes urged the court to dismiss the Preliminary objection and allow its application for recognition and enforcement of the arbitral award.

Conclusion and Final Disposition

14. I have carefully considered the rival arguments in the Preliminary Objection filed by Zanele and the response put forward by Alexander Forbes in opposition to the Preliminary Objection. Section 32(1) envisions that an arbitral award for it to be deemed a proper award shall be signed. The said section provides as follows; "(1) An arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators" Section 32(4) requires that the award do contain the date and seat of the Tribunal. The said section states; "(4) The arbitral award shall state the date of the award and the juridical seat of arbitration as determined in accordance with section 21(1), and the award shall be deemed to have been made at that juridical seat.". And section 32(5) requires that a signed copy be delivered to the parties subject to payment of costs under section 32B. To my mind, it is clear that an award is valid if it meets the requirements set out above under section 32(1) and 32(4). Without these ingredients, an arbitral award cannot be considered a valid award for purposes of the *Arbitration Act*.
15. I am therefore convinced that the Preliminary Objection raised by Zanele is merited and I shall allow the same. The effect of the above findings is that the Arbitral Award dated 27/6/2021 delivered by A.E BHAM, SC fall short of the mandatory requirements set out under section 32 (1), (4) and (5) of the *Arbitration Act*, 1995 and is therefore incapable of being recognised or enforced as a decree of the High Court in its current form.
16. The upshot of the above finding is that the Application by Alexander Forbes dated 24th November 2021 is dismissed for failure to adhere to mandatory provisions of the *Arbitration Act*, 1995. Similarly, the application filed by Zanele on 27th September 2021 seeking to set aside the arbitral award fails as the court having found the said Arbitral Award invalid, cannot therefore entertain an application to set aside. There is no award before this court capable of being set aside in the circumstance. The said application is equally struck out. In conclusion, the Court therefore finds and holds that the Preliminary Objection has merit and will allow the same with costs to Zanele, the Applicant in the Preliminary Objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

- 1. Mr. Oyoo for the Claimant - Alexander Forbes**
- 2. Mr. Miano and Cheluget holding brief for Mr. Waigwa and Mr. John Ohaga SC for Respondent
- Zanele Holdings**
- 3. Amos - Court Assistant**

