MSONZA SAVANHU
And
HAMUNAKWADI & NYANDORO LEGAL PRACTICE

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 11 NOVEMBER 2022 & 03 MARCH 2023

Mr. S. Musapatika, for the Applicant
Adv. Zhuwarara, for the Respondent

NDLOVU J: This is an application for the registration of an Arbitral award granted in favour of the Applicant against the Respondent for the ejectment of the Respondent from certain premises and payment of several amounts of money by an Arbitrator. This application was filed with this Division of the High Court on 12 August 2022. The application is opposed.

POINTS IN LIMINE

The Respondent took several points ***in limine*** in this matter and they are;

1. Matter improperly before the court.
2. Award not authenticated/certified.
3. Answering Affidavit filed out of time.

1. <u>Matter Improperly Before the Court:</u>

The Respondent argued that this matter is improperly before the court because the same dispute is still pending in the General Division of the High Court under case number HC 2692/22. The following is evident from HC2692/22 file and from the Respondent's arguments.

This application was struck off the roll before *Chinamora J* on 25 July 2022. On 27 July 2022, the Applicant in this matter filed a withdrawal of the matter under HC 2692/22.

The Respondent argued that the withdrawal was defective and of no force. The Respondent amplified its argument by stating that in terms of the High Court Rules, 2021 and the Practice Directive 3/2013 the Applicant had to, within 30 days from 25 July 2022, rectify that which had caused the matter to be struck off the roll and have the matter re-enrolled and

heard on the merits in the General Division of the High Court. The Respondent further argued that the notice of withdrawal was filed without engaging the Respondent, and that conduct violated Rule 20(8) of the High Court Rules, 2021.

The Respondent argued that this application is therefore improperly before this court and should stand to be dismissed and the Applicant punished with an order for costs at a higher scale as a way to show the court's displeasure, at what the Respondent calls, forum shopping by the Applicant.

The Applicant's counterargument was that the provisions of the Practice Directive 3/13 are of no application to this matter because when a matter is struck off the roll, it simply means that it is no longer before the court. Applicant further argued that Rule 20(8) is not applicable to Application proceedings as it is located under Action proceedings in the High Court Rules, 2021, and does not mention Application proceedings. You cannot rely on Action Rules when dealing with an Application matter. The Respondent cannot and should not raise a point of law in the Heads of Argument without covering it in the pleadings so that the other party is enabled to answer it.

Paragraphs 3-4 of the Practice Directive 3/13 in essential parts reads as follows:

> **"*Struck off the roll***
>
> *3. The term shall be used to effectively dispose of matters which are fatally defective and should not have been enrolled in that form in the first place.*
>
> *4. …[If] a Court issues an order that a matter is struck off the roll, the effect is that such a matter is no longer before the court.*
>
> *5. Where a matter has been struck off the roll for failure by a party to abide by the Rules of the Court, the party will have thirty (30) days within which to rectify the defect, failing which the matter will be deemed to have been abandoned…"* ***[my underlining]***

The provisions of the Practice Directive 3/13 in particular paragraph 5 thereof have been critically evaluated by the Supreme Court in the matter of *Cuthbert Elkana Dube* v *Premier Service Medical Aid Society and Another SC 73/19*.

In paragraph 20 of that Judgment, the Court stated as follows;

> *"… paragraph 5 of the Practice Directive, as presently worded… in reality, is meaningless. …once it is accepted that there is no valid appeal before the court, there is no defect to correct. There is no matter pending before the court and consequently, there is nothing that can be deemed abandoned. Further, as there is nothing before the court, there is no matter to reinstate… The difficulty, … is that Practice Directive 3/13 and more specifically paragraph 5 thereof is still extant and bids compliance by litigants whose matters are, for one reason or*

another struck off the roll. Notwithstanding its obvious defectiveness, should I as a Judge of this court, continue to demand compliance therewith despite the fact that it is meaningless and is not capable of implementation"

Clearly, paragraph 5 of the Practice Directive 3/13 is still binding and has legal force on the litigants appearing in the Superior Courts of Zimbabwe.

Having had the matter struck off the roll on 25 July 2022 in the General Division of the High Court, the Applicant had 30 days within which to have the matter re-instated on the roll. Instead of doing that in the General Division as expected by the Respondent the Applicant withdrew the matter from the General Division with a tender for costs. A few days later he filed this application in the Commercial Division of the High Court.

Under *Rule 2(g)* of the Commercial Division Rules, enforcement (registration) of an Arbitral award of a business of a commercial nature is a commercial dispute falling to be resolved in this Division of the High Court. Even if one were to go by *paragraph 5 of the Practice Directive 3/13,* withdrawing the matter and tendering costs of an application matter effectively and legally meant that there was no matter pending before the High Court and the Applicant was therefore at large to file its fresh application in the High Court and in a Division thereof with the designated to deal with the matters of the nature of the Applicant's application. Rule 20(8) does not apply to Application proceedings. The point in *limine* taken is therefore dismissed.

2. Authentification/Certification

On this point, the Respondent argued that the purported certification by one Romeo, who identifies him/herself as a Legal Practitioner is not dated, in other words, there is no date on the impressed stamp. The Respondent further argued that that omission is improper because the court needs to know when the certification was done and when the documents were seen. As such, so argued the Respondent, there is no valid document in that regard before this court. The Respondent further argued that this issue of authentication has been one of the reasons why previously the matter has not been argued on the merits yet on three occasions the Applicant has not complied with the court's directives.

According to the Respondent, dating a certification of a document is critical because one would be telling the whole world when he saw the original copy of the document. The

requirement to certify a document is an evidential issue and certification is an event the issue of when it happened is critical as without the date the certification and the documents are incomplete for the purpose of the requirements of the statute involved. The discretion the court has in terms of the Arbitration Act is on the Rules and not the law.

The Applicant counter-argued saying the Arbitral award must be authenticated by the Arbitrator and that was done. The certification was done by one Romeo, a Legal Practitioner. The Respondent has not alleged that Romeo is not a Legal Practitioner and neither have they alleged that the certified copies are fake. This by the Respondent is an abuse of the court process in order to frustrate the Applicant's application.

Article 35(2) of the *Arbitration Act [Chapter 7:15]* provides as follows;

> *"(2) The party relying on an award or applying for its enforcement shall supply a duly authenticated original award, or a duly certified copy thereof and the original arbitration agreement referred to in Article 7 or a duly certified copy thereof..."*

A certified document cannot be invalidated by the absence of a date. In this case, the relevant statute provides that the original can be supplied at the hearing. There is therefore no prejudice to be visited on the opposing party. Certification by definition is a declaration that a document is a true copy of the original and the object is to avoid the use of fake awards a fact Respondent is not alleging the contrary to. In the circumstances, the Applicant's allegation that the attached documents are true and certified copies have not been challenged and therefore the allegation stands admitted.

Mathews -v- Craster International HH707/15, Fawcett Security Operations -v- Director of Customs & Excise & Otrs 1993(2) ZLR 121 SC.

The proceedings before me are application procedures as required by *Article 35* of the *Arbitration Act.* The application procedure in this Division of the High Court is governed by *Rule 26. Rule 26(5)* of the High Court (Commercial Division) Rules, 2020 reads as follows;

> *"(5) Where by any law a certificate or other document is required to be attached to or filed with any application, it shall be sufficient to attach or file a photocopy or other facsimile of the certificate or document*".

Nowhere in the applicable law [*Article 35 (2) or the Rules*] is it made mandatory that the certified copy must be endorsed with the date of such certification. The Respondent could

not direct the court to any authority in this jurisdiction that invalidates a certified but not dated document. The Respondent did not allege any other irregularity in relation to either the contents of the documents or the qualification of the one who certified them as being true copies of the originals. In any case the law allows for the supply of the original at the hearing. For the above reasons l dismiss the point *in limine* taken.

3. Answering Affidavit Filed Out of Time.

The Applicant filed his Answering Affidavit out of time. He appreciated this. The Respondent did not press much on this point ***in limine***, in fact, did not orally argue that the Answering Affidavit be expunged from the record.

The Respondent raised this *point in limine* in its heads of argument. The fact of the matter is that the *dies inducie* for the Applicant to file his answering affidavit was on 4 October 2022 but the Applicant filed on 6 October 2022. The Respondent in its papers argued that the answering affidavit be expunged from the record as a result.

Regard being had to the provisions of *Rule 33(1)* of the Rules of this Court, the number of occasions this matter has been in Court, the need for finality in litigation, the fact that no prejudice was visited upon the Respondent by the 2 days delay in filing the answering affidavit, and the challenges to mindset transition on the part of litigants between the High Court Rules, 2021 and the High Court (Commercial Division) Rules 2020, I will exercise my discretion in favour of allowing the answering affidavit to stand as part of the record.

This point *in limine* is also dismissed.

MERITS

This application is predominantly an administrative process. The registration process is basically procedural for the enforcement of the Arbitral award. An Applicant must satisfy 3 requirements for the registration application and they are;

1. Present to the High Court the original or a certified copy of the Arbitral award.

2. Present to the High Court the original arbitration agreement referred to in Article 7

3. If the award or arbitral agreement is in a language other than English, the applicant must provide a duly certified translation into English.

Once these 3 basic requirements are met the applicant is entitled on the face of it to register the Arbitral award as of right. It is trite that the registration procedure should not be confused with a review or appeal procedure. *Gwanda RDC vs Botha SC174/20*

This court has already said that it is not required or expected to interrogate the merits of the decision made in order to determine one way or the other its substantive correctness. *Riogold [Private] Limited vs Falcon Gold Zimbabwe Limited & Anor HH258/21*

Indeed the court is not really being called upon to blindly rubber-stamp the decision of an Arbitrator. However, its intervention, if any, and if really necessary must be minimal. Once the court finds that the award is on the face of it regular, and does not suffer defects contemplated by *Articles 34* and *36* of the Act, then the court will register that award and thereby enable its enforcement.

In opposition to the registration of the awards, the Respondent raised the following grounds,

1. That the awards are in violation of Public Policy in that;

    (i) They are contrary to and violate *s22(2)* of the *Commercial Premises (Rent Regulations) 1983* that were promulgated in terms of *s5* of the *Commercial Premises Lease Control Act 1983,* in that this Court cannot issue an order of recovery of a commercial premise on account of the fact that the Lessor had issued a notice of termination of lease. The Lessor must approach the Rent Board, so the Respondent argued.

    (ii) By ordering payment of holding over damages the Arbitrator acted contrary to Public Policy because Applicant's claim was never based on a breach of the lease agreement. It was illogical, unjust, and immoral for the Arbitrator to award holding over damages, to run from 01 September 2020 yet the Respondent was served with the notice to terminate on the 2nd of September 2020 and was entitled to three months before the expected date of vacation.

2. To register the Arbitral award of the 23rd of April 2021 (the additional award) would violate the sanctity of contract doctrine that prohibits a party to a contract from obtaining relief not contemplated by the agreement he voluntarily concluded. The Lease Agreement only allowed the recovery of holding over damages in instances where the Lessee was in breach. The Applicant did not terminate the lease agreement on account of the Respondent's breach but had impermissibly terminated the lease unilaterally.
3. The awarding of the additional award was in violation of *Article 33(1)* of the *Arbitration Act [Chapter 7:15]* in that the Arbitrator went far beyond the corrective jurisdiction of *Article 33(1)* and proceeded to unlawfully supplement his earlier award of the 18th of March 2021.

DETERMINATION

Clause 2(b) of the Lease Agreement between the parties reads as follows;

> *"2(b) Either party may terminate this agreement upon giving the other party (3) three months written notice".*

Clause 25:1 thereof provides as follows;

> *"25:1 Any dispute between the parties arising out of or in connection with this contract including any question regarding its existence, validity, or termination shall be referred to and finally resolved by arbitration. The parties hereby irrevocably agree that the decision of the Arbitrator in any such arbitration shall be final and binding upon each of them.*

Violation of Section 22(2) of the Commercial Premises (Rent Regulations) 1983.

This defence or objection was never raised by the Respondent before the Arbitrator. The Respondent is raising it now for the first time. These proceedings are not a platform to rehear the matter on its merits. A party should not be allowed to cure its omissions made at the arbitration proceedings on this platform. This objection does not speak to the award having

been made as a result of fraud or corruption nor does it suggest that rules of natural justice were violated in the making of the award. This objection stands to fail and it is duly dismissed.

Is the award of holding over damages contrary to public policy in the circumstances of this matter*?*

The Arbitrator had the following to say in his ruling in respect of the holding over damages *[Page 7 paragraph 2 of the 18 March 2021 Award]* refers.

> *"Although the evidence placed before me does not indicate clearly what rent, if any, is outstanding presently, it follows that Claimant is entitled to recover any unpaid rent up to the expiry of the three months' notice and thereafter holding over damages for any period thereafter. …. In the event that the parties are unable to agree on the amount of rent arrears or holding over damages, l am prepared to hear submissions in this respect and to thereafter issue a ruling thereupon."*

The Applicant had claimed rent arrears and holding over damages in his statement of claim. The Respondent was invited by the Arbitrator to make any representations it felt were necessary in regard to this aspect of the award and they did not take up the offer. Honestly one cannot deliberately omit to object when given an opportunity to and then be heard complaining about the outcome flowing from that process. The Arbitrator cannot be faulted for making this award and in his reasoning behind making the award in question. This objection is dismissed.

Does the awarding holding over damages violate the sanctity of contract doctrine in the circumstances of this case*?*

As already noted above, when called upon to make representations the Respondent did not take up the offer. The law is clear, this court should not clothe itself with appeal or review powers in matters of this nature and should not allow itself to be invited to indirectly rehear the matter. The Arbitrator found, rightly so, in my humble view that the termination notice was validly given and was given in terms of the Lease Agreement between the parties. In so doing he was giving effect to the doctrine of the sanctity of contract. Failure by to comply with a validly given termination notice of a contract is a breach of a contract in itself. To claim that giving a termination notice in terms of the applicable Lease Agreement is to act unilaterally is illogical. I find no fault, in the awarding of holding over damages in favour of the Applicant

by the Arbitrator in this matter. In any case, *Clause 18* of the Lease Agreement addresses this issue. This objection is with respect hopeless and stands to be dismissed and is dismissed.

Was the Additional Award granted in violation of Article 33(1) of the Arbitration Act?

This objection is, in my view, misguided. The additional award was issued in terms of *Article 33(3)* and not *Article 33(1).* The arbitrator rightly noted as follows in the additional award;

> *"Claimant's legal practitioner drew my attention to the fact that my earlier award did not address the issue of holding over damages although this had been properly claimed … I obliged to entertain it, particularly as there was no objection to the request itself by the Respondent. In my view, the request falls squarely under the provisions of Sub Article 33(3) of the Model Law and empowers me as an arbitrator to issue an additional award in respect of claims that were previously presented to me but omitted from my original award"*

The Arbitrator correctly interpreted the relevant law and applied it. This objection must fail and it fails and is dismissed.

Where parties voluntarily subject themselves to the arbitration process and undertake to be bound by the outcome therefrom, as they did in this case, the words of *Gwaunza JA* (as she then was) in *Ropa -v- Reosmart Investments (Pvt) Ltd & Anor 2006(2) ZLR 283(S) at 286B* become apt and remind them of what to do. *"For better or worse the parties must live with the award…"*

DISPOSITION

In the circumstances, the application succeeds as prayed for with costs on a legal practitioner and client scale.

IT IS HEREBY ORDERED THAT:

1. The Arbitral award issued by the Honourable Arbitrator Mr. M.P. Mahlangu dated 18th March 2021 as read with the Additional award dated 23rd April 2021 be and is hereby registered as an order of this Court.

2. The lease agreement termination notice issued on behalf of the Applicant (Claimant) on the 1st of September 2020 is declared to have been validly issued.

3. The Respondent be and is hereby ordered to vacate the Applicant (Claimant)'s property, Number 19 Chiremba Road, Hillside, Harare upon service of this order.

4. The Respondent is ordered to pay outstanding holding over damages in respect of its unlawful occupation of Applicant's number 19 Chiremba Road, Hillside,

   Harare premises at the rate of US$650.00 per month from the 1st of December 2020 to the date of ejectment together with interest on all arrear payments at the rate of 10% per annum.

5. The Respondent is to pay to the Applicant, Arbitration costs in the sum of US$1,500.00 and ZWL$10 000.00 plus legal fees for the Arbitration proceedings on the legal practitioner and client scale. The Registrar of this Court is ordered to tax the arbitration costs.

6. The Respondent shall pay costs of suit for this application on the legal practitioner and client scale.

7. The Arbitral award is declared to be final and binding between the parties.

Danziger & Partners, Applicant's legal practitioners.

Hamunakwadi & Nyandoro Law Chambers, Respondent's legal practitioners.