ZIMBABWE POWER COMPANY (PVT) LTD
And
CLOVEGATE ELEVATOR COMPANY (PVT) LTD & ANOR.

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 08 & 10 November 2022 & 4 May 2023

Mr. N.B Munyuru, for the Applicant
Adv. Hashiti, for the 1st Respondent.
No appearance for the 2nd Respondent.

NDLOVU J. This is an application in terms of ***Article 34(2) (b)(ii)*** of the ***Arbitration Act [Chapter 7:15]*** *[the Act]* for the setting aside of part of the arbitral award handed down by the 2nd Respondent *(Justice N.T. Mtshiya (Rtd))* on 27 May 2022. The application is founded on the allegation that the arbitral award conflicts with Zimbabwe's public policy.

The following is the arbitral award issued by the Arbitrator on 27 May 2022.

"In the circumstances, I make the following award;

1. *Except for the Elevator Maintenance Agreement, all the other variations to the contract alluded to by the claimant are null and void.*
2. *The respondent shall pay the claimant the sum of US$4550 or the equivalent at the prevailing bank at the time of payment, for the maintenance of additional elevator equipment as agreed in the Elevator Maintenance Agreement referred to in 1 above.*
3. *The respondent shall pay the claimant the sum of US$60 112.14 or the equivalent at the prevailing bank rate at the time of payment, for the 4 completed elevators.*
4. *The claim for specific performance is dismissed*
5. *Each party shall bear its own legal costs; and*
6. *The parties shall pay the arbitrator's fees in equal shares*
7. *This award replaces the composite award issued on 28 February 2022 in respect of the same matter"*

The relief sought by the Applicant is as follows: -

"1. Part of the Arbitral Award issued by the 2nd Respondent on the 27th of May 2022, in the arbitration proceedings between the Applicant and the 1st Respondent in Respect of Paragraphs two (2) and three (3) of the operative part of the arbitral award, be and is hereby set aside.

2. No order as to costs".

SUMMARY OF THE FACTS

On 29 May 2011, the parties entered into a contract **ZPC17/11** *(the Contract).* The contract was for the refurbishment of 7 elevators at Hwange Power Station. Of relevance to this application are the following clauses of the contract.

"13.3 Payment for services will be effected by ZPC in accordance with the following

(a) 90% of the contract value i.e. US$946 766.30 …. shall be paid to the Contractor at Contract signing by both parties
(b) 10% of the contract value i.e. US$105 196.30… shall be held as retention fees and shall be paid to the contractor after a period of one year after the completion and commissioning of the lifts"

"16. AMENDMENT

No variation or modification of the terms and Conditions of this contract shall be binding unless reduced to writing and signed by both parties."

It is common cause that only 4 out of 7 elevators were ultimately refurbished fully and commissioned. The 1st Respondent herein then took the Applicant to Arbitration. The 1st Respondent's case was that there had been a variation of the contract agreed to by it and the Applicant which led to an increase in the scope of works to be done and by extension the expenses involved.

At the conclusion of the hearing, the Arbitrator made the arbitral award quoted in full above.

GROUNDS FOR THIS APPLICATION.

This application is hinged on the following grounds:

1. *The arbitral award rendered by the 2nd Respondent was made in United States of America Dollars [US$], a foreign currency, or the equivalent at the prevailing bank rate in clear violation of our currency laws.*

2. *The arbitral award rendered by the 2nd Respondent ordered the Applicant, to pay retention fees in relation to the 4 completed and commissioned elevators when it was only supposed to be paid after a period of one year after the completion and commissioning of 7 elevators as per the terms of the contract.*

3. *The arbitral award rendered by the 2nd Respondent in the sum of US$4 550.00 in favor of the 1st Respondent for the maintenance of additional elevator equipment or the equivalent at the prevailing bank rate at the time of payment, when the Applicant had paid in full the contract price which was inclusive of the fees for maintenance services.*

POINT IN LIMINE

The 1st Respondent at the hearing took a *point in limine* on a point of law. The Court indulged the parties to file supplementary Heads of Argument addressing the *point in limine* raised. The Court is grateful to both counsels for their industry in that regard. The point taken by the Respondent is that ***Article 34(2)(b)(ii)*** grounding the Applicant's application *in casu* does not

allow for the severance of an arbitral award, yet the relief sought is for the severance of paragraphs 2 and 3 from the 7 paragraphs award. The Applicant has argued otherwise.

The 1st Respondent argues that ***Article 34(2)(b)(ii)*** does not make provision for severing an award for purposes of setting part of it aside as prayed for by the Applicant. It goes further to argue that Arbitral proceedings are statutorily provided for, the court sits in terms of ***Article 34*** of the Act and the Court must apply the statute only to the extent that the statute allows.

Relying on the authority of,

Car Rental Services (Pvt) Limited vs. Director, Customs & Excise 1988 (1) ZLR 402 (SC) @ 409

> *"It is not for the Courts to legislate or attempt to improve on the situation achieved by parliament through the language it has chosen in its enactment. Effect must be given to what the Act says or permits and not to what it may be thought it ought to have said or prohibited. If there is a cassus omissus in the Act, and if it could lead to undesirable consequences, the Court, has no power to fill it in. It is a matter for the legislature."*

the1st Respondent further argued that the case of Johannes ***Tomana & Anor vs***. ***Tian Ze Tobacco Company (Pvt) Ltd & Anor HH653/21*** on which the Applicant relied was wrongly decided because among other things it relied on authorities from foreign jurisdictions whose legislation on this subject matter is different from ours.

The Applicant counter-argued and submitted that nothing in the Act prohibits partial setting aside of an arbitral award. As a result, therefore in a case where the court finds an award bad with regard to some claims, it would be at large to severe the offensive parts of the award from the parts that do not suffer from any infirmity and uphold the award to that extent. To do otherwise, according to the Applicant, would result in the Court having to set aside that portion of the award that suffers from no infirmity as well.

The Applicant relied on the authority of ***Johannes Tomana*** *(supra)* in which *Chirawu-Mugomba J* held that a bad portion of an award that had been sought to be set aside for being contrary to the public policy of Zimbabwe was severable from the rest of the award, and did severe a portion of that award.

The doctrine of severability forms part of our law and has been applied to statutes and contracts, so argues the Applicant. In some cases, it is not possible to sever the award when the bad part of the award is intermingled with the good part of the award and that is not the case in the present

matter. This approach reflects a logical and sensible construction of the provisions of ***Article 34 (2)*** of the Act.

The Applicant also placed reliance on the authority of,

RioZim Limited vs. Maranatha Ferrochrome (Pvt) Ltd & Anor SC 30/22

TO SEVERE OR NOT TO SEVERE AN ARBITRAL AWARD?

It admits to no argument that in statutory interpretation, the duty of the court is to interpret and implement the statute as passed by the Legislature. Words in a statute must be given their ordinary and literal meaning *(golden rule of interpretation*) unless if to do so will result in an absurdity that objectively speaking could not have been the intention of the legislature. Only then, is a court allowed to employ other canons of statutory interpretation that will assist it to arrive at the intention of the Legislature when it passed the statute in question. A statutory provision should be given a meaning which is consistent with the context in which it is found.

Godfrey Tapedza & Otrs vs. ZERA & Anor SC30/20

Chegutu Municipality vs. Manyora 1996 (1) ZLR 262 (S) @ 264 D-E

RioZim Limited case (supra).

THE STATUTE.

Article 34 (2) (b) (ii) provides as follows: -

> *"An arbitral award may be set aside by the High Court only if the High Court finds that the award is in conflict with the public policy of Zimbabwe."*

Section 2 (3) of the Act provides for the interpretation of the Act as follows: -

> *"2 Interpretation*
>
> *(1)…*
>
> *(2)…*
>
> *(3) The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law, that is to say, the travaux pre'paratoires to the Model Law, and****, in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application"*** (my emphasis)

In the ***RioZim Limited*** case *(supra)* the Supreme Court per *Uchena JA* had the following to say with regard to this subject matter:

> *"**Courts should therefore always be conscious of the need to achieve international uniformity when interpreting provisions of the Model Law. This means the Model Law's interpretation by other jurisdictions should be taken into consideration subject to the exclusion of irrelevant interpretation of modifications by those jurisdictions**. It must be stated that relevant interpretations of modifications by other jurisdictions which bring out the correct interpretation of the Model Law can be taken into consideration."* (my emphasis).

See also: -

> ***Courtesy Connection (Pvt) Ltd and Anor vs. Mupamhadzi 2006 (1) ZLR 479 (H) @ 483 B-C*** per *Makarau J* (as she then was). This is what she said in recognition of the international ancestry of the Model Law.
>
> *"I am further persuaded to hold as I do by the fact that **the Act is of international pedigree and certainty and finality of legal proceedings were paramount in its formulation. …** Section 2 of the Act specifically provides that in interpreting the Model Law, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application."* (my emphasis)

Nowhere in ***Article 34 (2)(b)(ii)*** of the Act is the severability or non-severability of an award mentioned.

I am alive to this issue arising in the case of the ***Confederation of Zimbabwe Industries vs. Mbatha HH 125/15.*** In that matter Mathonsi J (as he then was) was dealing with ***Article 34(2)(a)(iii)*** and found that the article allows a severance of the offending part of the award where appropriate. I am also aware of this issue coming up once again in the case of ***Prichard Matthews vs. Craster International (Private) Limited HH 707/15*** in which Mafusire J was dealing with an application for registration as opposed to an application for setting aside part of the arbitral award. *Adv-Hashiti* in his arguments relied on the decision by Mafusire J tha*t* to split or severe an award amounts to transforming the arbitral award. The judgment was however upset on appeal ***(SC 151/20).*** The Supreme Court however did not deal with the issue of severability, having found that the judgment needed to be evacuated on another overarching ground. Chirawu-Mugomba J in the ***Johannes Tomana*** cases *(supra),* had the following to say: -

> *"The law on setting aside arbitral awards has been developing over the years as cases challenging registration or seeking orders to set aside awards have been rising".*

The Court went on to consider and was persuaded by, and applied what other jurisdictions have done with respect to the severability of part of the arbitral award. The Court cited with approval the following cases: -

"…. In ***Palabora Copper (Pty) Ltd vs. Motlokwa Transport & Construction (Pty) Ltd*** *(****298/2017) [2018] ZASCA 23 (22 March 2018),*** *the South African Supreme Court considered the issue of severability in the context of the Arbitration Act 42/65 as amended and stated that,*

> *"… An award bad in part may be good for the rest. If, notwithstanding that some portion of the award is clearly void, the remaining part contains a final and certain determination submitted,* ***the valid portion may well be maintainable as the award, the void part being rejected*** *… The bad portion, however, must be clearly separable in its nature in order that the award may be good for the residue …* ***the faulty direction will alone be set aside or treated as null…***
>
> *That approach seems to me to reflect a logical and sensible construction of the statute.* ***There does not appear to be any sound reason why an arbitration, that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue ... this approach ... gives effect as far as possible to the parties' agreement to have their dispute determined by the arbitrator.*** *It is also an approach that is consistent with those cases in which our courts have set aside portions of an award as being beyond the powers of an arbitrator, but made the balance of the award an order of court*." *[my emphasis]*

In ***William Hare UAE LLC vs. Aircraft Support Industries Pty Ltd, NSWSC 1403,*** the New South Wales Supreme Court considered the issue of severability under the International Arbitration Act of 1974, **DARKE J** had this to say, (citing from **BROOKING JA**).

> *"Sometimes it is laid down that severance is possible if it may be effected without injustice. It has been said that for severance to occur it must appear that the residue that is to be allowed to stand was in no way affected by the part of the award that is rejected****: McCormick v Grey (1851) 13 Howard 26 at 37; 14 Law Ed. 36 at 41.*** *According to* ***Blackburn J.****, the award is void altogether only if the void part is so mixed up with the rest that it cannot be rejected."*

I have not been directed to any authority upsetting Chirawu-Mugomba J's decision in the ***Johannes Tomana case*** *(supra*). In that case, the Court severed an award in an application to set aside the award, brought under ***Article 34(2)(b)(ii)*** like in the case *in casu* by extricating one of the Applicants from the award on the basis that he could not be found liable in a contract in which he had been a mere agent of the principal-contractee.

In this case, the need to ensure international uniformity in the application of the Model Law, because of its international stemma, which is intended to govern both domestic and international arbitrations and the authorities referred to above, sufficiently move me to dismiss the *point in limine* taken by the 1st Respondent. The *point in limine* is dismissed.

MERITS

THE LAW

The High Court can only set aside an arbitral award if it finds that the award is in conflict with the public policy of Zimbabwe.

> *"It is settled that a cautionary approach ought to be adopted when determining whether or not an arbitral award can be set aside."*
>
> ***Riogold (Private) Limited v. Falcon Gold Zimbabwe & Anor SC 7/23*** per Mwayera JA.
>
> > *"... the approach to be adopted is to construe the public defence - - - restrictively in order to preserve and recognize the basic objective of finality in all arbitrations and to hold such defence applicable only if some fundamental principle of law or morality or justice is violated."*
> >
> > *"**An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law."** (*my emphasis*)*
> >
> > per *Gubbay CJ* in the locus classicus on the subject matter, ***Zimbabwe Electricity Supply Authority v. Maphosa 1999 (2) ZLR 452(S).***

Malaba DCJ (as he then was) remarked as follows in respect of the above remarks in ***Alliance Insurance v. Imperial Plastics (Pvt) Ltd and Anor SC 30/17***.

> *"The import of these remarks is that the court should not be inclined to set aside the arbitral award merely on the basis that it considers the decision of the arbitrator wrong in fact/or in law.*
>
> *If the courts are given the power to review the decision of the arbitrator on the ground of error of law or of fact, then it would defeat the objectives of the Act, it would make arbitration the first step in a process that would lead to a series of appeals."*

1. ***Whether or not denominating the award in US$ is in violation of the currency laws and contrary to the public policy of Zimbabwe***.

   In *para- 26* of the ruling, the arbitrator stated as follows: -

   > *"Refurbishment works remain outstanding at the power station. The contract is also clear that the retention fees, as agreed, were only to be released upon completion of works. There is nothing that justifies interim payments by the claimant when works have not yet been completed"*

Long after 22 February 2019, the parties took each other to the 2nd Respondent. The 1st Respondent was claiming payment from the Applicant and the Applicant was denying a duty to pay the 1st Respondent (challenged its *locus standi*) and the basis and amounts of the claim. The plain import of the above positions by the parties is that as of 22 February 2019 according to the Applicant, at worst it had no liability towards the 1st Respondent and at best it did not owe what the 1st Respondent claimed.

In accounting terms, an asset or a liability has an ascertainable monetary value which is recorded in the relevant books or statement of account. ***Ingalulu Investments [Private] Limited & Anor vs NRZ & Anor SC 42/22***.

Even in this application, the Applicant is still fighting the decision that ordered it to pay the 1st Respondent. So, in both accounting and legal terms there was no asset and there was no liability to talk about between the parties as of 22 February 2019. There was no ascertained monetary value and therefore ***SI 33 /19*** does not apply in this case. The award to pay in US$ was legal and perfectly made as it was made long after 22 February 2019 which is the cut of date.

In addition to the above conclusion, ***Treasury Circular No. 9 of 2019*** dated 09 August 2019 clearly deals with ***SI 33/2019*** and by extension ***Finance (No.2) Act, 2019***. It directs entities like the Applicant to settle contractual obligations formulated prior to the promulgation of ***SI 33 of 2019*** and ***SI 142 of 2019*** in foreign currency to avoid among other things unjust enrichment by such entities. The custodians of currency and fiscal issues in this country are the Treasury.

I find nothing against the public policy of Zimbabwe in denominating the award in US$ and I duly dismiss that ground.

2. ***Whether or not part of the arbitral award issued ordering the Applicant to pay retention fees in respect of the 4 completed and commissioned elevators is contrary to the fundamental principles of contract law and by extension in conflict with the public policy of Zimbabwe***.

The termination of the contract became agreed upon and specific performance no longer achievable, the arbitrator concluded as follows in paragraph 27 of his ruling.

> *"On the other hand, I agree that Respondent would be unjustly enriched if it fails to pay for the completed works upon termination of the contract. It only seems fair that in the event that parties terminate the agreement; the respondent should pay for all completed works under the contract"*

Faulting such reasoning would be unreasonable and illogical. The Applicant is simply not happy with the Arbitrator's decision. That is not the law. Its attention needs to be routed to ***Clause 22.4*** of the contract between it and the 1st Respondent which reads as follows:

> "*22.4 The award of the arbitrator **shall be final** and binding on both parties who undertake to carry it out immediately without raising any condition, exception or objection whatsoever." (*my emphasis*)*

The High Court will not set aside an arbitral award lightly even if it is wrong at bad at law. The authorities are clear on that aspect. I find nothing offensive to one's sense of justice in the arbitrator's decision and/or reasoning in this regard. To do otherwise, in my view, would constitute a palpable inequity, outrageous in its defiance of logic or accepted moral standards. There is nothing contrary to the fundamental principles of contract law in this award. All there is, is a decision unfavorable towards the Applicant. I duly dismiss this ground too.

3. Whether or not part of the arbitral award in relation to the payment of maintenance of additional elevator equipment in contravention of Contract ZPC 17/11 was contrary to the Public policy of Zimbabwe.

The arbitrator in his assessment of the evidence made the following finding of fact.

> *"- - - my finding with respect to this contract is that there was no agreed variation to the scope of works and the claimant is not entitled to Payments in terms of intended variations except those mentioned in the Elevator Maintenance Agreement……Compensation can only be granted for work actually executed under an existing contract. This would therefore only apply to the Elevator Maintenance Agreement signed by both parties clearly states that it was a variation to contract 17/11."*

Whether this finding was wrong on a fact or on law is neither here nor there. This court cannot and should not interfere with it, because it is a finding of fact. It does not appear to give the slightest impression that the arbitrator let go of his senses to come up with that finding and conclusion. This court is neither a review nor an appeal court I duly dismiss this ground as well.

DISPOSITION

The application is dismissed with costs.

Muvingi Mugadza & Partners, Applicant's Legal Practitioners.

Chivore Dzingirayi Attorneys, 1st Respondent's Legal Practitioners.