VOEDSEL ENTERPRISES (PVT) LTD

versus

RICHAW SOLAR TECH (PVT) LTD

and

KEVIN TERRY N.O

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 1 June 2023

OPPOSED APPLICATION

B. Mahuni, for the applicant

B.M Maunze, for the 1st respondent

No appearance for the 2nd respondent

CHIRAWU-MUGOMBA J: On the 1st of June 2023, I dismissed, *ex tempore,* with costs on a higher scale an application for setting aside an arbitration award. I have been requested for reasons. These are they.

On the 14th day of August 2019, the 2nd respondent handed down the following arbitral award in favour of the 1st respondent (claimant) against the applicant (first respondent).

a. Judgment is awarded in favour of the claimant in the amount of US$ 5.100. 00.

b. First respondent to pay claimant's costs on a legal practitioner to client scale.

c. First respondent to pay the costs of the arbitration.

The applicant filed an application seeking the following order.

a. The arbitral award issued by the 2nd respondent on the 14th of August 2019 in favour of the 1st respondent against the applicant be and is hereby declared to be contrary to public policy in Zimbabwe in terms of Article 34(2)(b)(ii) of the ANCITRAL model

law which is attached as an Annexure to the Arbitration Act [Chapter*7:15*] and is accordingly set aside.

b. The 1st respondent shall pay costs of this suit.

In its founding affidavit, the applicant made the following averments. It attacked the award on the basis that it offends the public policy of Zimbabwe. Applicant amplified this assertion on the following basis. That the 2nd respondent wrongly asserted that the there was no issue raised regarding the validity of the agreement upon which the relief was sought . This was backed by the submissions made on its behalf dated the 7th of August 2019. The 2nd respondent made the award after submissions on illegality had been made. The award made seeks to enforce an illegal agreement. The applicant further averred that the agreement, being one of purchase and sale of foreign currency in Zimbabwe, was subject to exchange control regulations of 1996. The agreement was never approved by the Reserve Bank of Zimbabwe and hence its illegality. The 1st respondent could not obtain specific performance based on an illegality. Further that the agreement contained conditions precedent that had not yet been fulfilled.

The 1st respondent strenuously opposed the application. It contended as follows. The request for arbitration was made on the basis of the claim being rooted in breach of the tripartite agreement between the applicant, 1st respondent and Nedbank Limited. The latter should have been cited as it is mentioned in the arbitral award. A meeting was convened on the 1st of August 2019 between the parties. At such meeting, the applicant undertook to pay the money owed thus solving the issue of liability. The issues left were when payment was to be made and costs. As the issue of liability was resolved, it was agreed that 1st respondent would not pursue its claim against Nedbank. The report of the meeting was sent by the 2nd respondent by all parties and the applicant took no issues with it. The 1st respondent proceeded to address the 2nd respondent on how long applicant would have to pay and also question of costs. In its response to the 2nd respondent, the applicant put it on record that it wished to be given 90 days to make good its breach. The 1st respondent persisted in its claim and accordingly, the 2nd respondent handed down the award that is now the centre of the dispute. The relief sought was the granting of time to pay and not a dismissal of the claim. The issue before the 2nd respondent related to the terms on which the applicant was to pay the

admitted debt and not whether or not any debt was due. The applicant admitted the debt and never sought to withdraw such admission.

The 2nd respondent did not appear at the hearing but nonetheless filed a notice of opposition and opposing affidavit. He contended as follows. At the pre-arbitration meeting held on the 2nd of August 2019, the applicant consented to the award in favour of the 1st respondent in the amount owed in United States Dollars. The applicant at the same meeting agreed to make payment into the 2nd respondent's account held at Nedbank, an amount of one million United States Dollars by the 9th of August 2019. The award made on the 14th of August 2019 was for the full amount owed and consented to as the one million dollars as promised had not been paid.

The applicant did not file any answering affidavit.

In its heads of argument filed in support of its claim, the applicant challenged the validity of the award as being contrary to the law, i.e. section 4 of the Exchange Control Regulations. This specifically refers to prohibition of the sell and purchase of foreign currency by unauthorised dealers. It therefore contended that the agreement between itself and the 1st respondent was illegal. The upholding of the agreement by the 2nd respondent was therefore tainted because of reliance on an illegal contract. It also submitted that the contract was subject to a suspensive condition, therefore it did not come into existence as the conditions were never fulfilled.

On the other hand, the 1st respondent submitted as follows in its heads of argument. It raised two issues, namely whether the issue of illegality was placed before the 2nd respondent and whether or not the court should refuse to enforce the agreement between the parties without unjustly enriching the applicant at the impoverishment of the 1st respondent. It contended that the issue of illegality was never placed before the 2nd respondent. That an arbitrator derives her or his powers from the arbitration agreement. Article 16 of the Arbitration Act [Chapter *7:15*]. The 2nd respondent was therefore within its power to make the award as it did.

I note that the heads of argument filed on behalf of the applicant and the 1st respondent by its erstwhile legal practitioners are somewhat disappointing. The issue at hand, in my view

revolves around the meaning and interpretation of 'contrary to public policy'. I would have expected that the legal practitioners file meaningful submissions given that there are many cases dealing with that aspect.

The applicant's main contention is that the award is contrary to public policy because the agreement between the parties is illegal. On the other hand, the 1st respondent's contention is that the applicant admitted liability. The 2nd respondent's undisputed version is that the applicant requested for time to pay. As McNALLY JA said in *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

When the court engaged with the applicant's counsel, perhaps the heat became too much resulting in the following exchange.

Court: So what do you want us to do honestly, when the applicant said we want time to pay, give us time, so you want us to set aside what? It is astounding counsel.

Mr Mahuni: I think, in that event my Lady, I will (sic) it is unfortunate that I do not have my client with me, I would have withdrawn the matter but …

As pointed to him, a withdrawal cannot be made after setting down and hearing of the matter without consent of the other party- see *Meda vs Sibanda and ors,* 2016(2) ZLR 232 (CC). Hence at the end of the hearing, I concluded that the application has no merit.

The law on setting aside of arbitral awards has been set out in a plethora of cases – see *Peruke Investments (Pvt) Ltd* v *Willoughby's Investments (Pvt) Ltd and anor,* 2015 (1) ZLR 491 and also Article 34 of the Model Law (First Schedule to the Arbitration Act) on the procedure and substantive grounds for setting aside an award. The case is also one of the authorities for the set legal position that courts are reluctant to invoke the limited ground of

public policy 'except in the most glaring instances of illogicality, injustice or turpitude'.

In *Decimel Investments (Pvt) Ltd* v *Arundel Village (Pvt) Ltd and anor,* 2012 (1) ZLR 581(H), MATHONSI J (as he then was) stated as follows: -

> "It should be appreciated that the limited grounds of attacking an arbitral award are meant to ensure international uniformity in the application of the model law contained in the Arbitration Act. That law is of international origin and is intended to govern both domestic and international arbitrations. *Pamire & Ors* v *Dumbutshena N.O. & Anor* 2001(1) ZLR 123(H) at 125 E."

As rightly observed by GOWORA J (as she then was) in *Pioneer Transport (pvt) Ltd vs. Delta Corporation and another,* 2012 (1) ZLR 58, the UNCITRAL model does not define the concept of public policy. In our law however, the standard was set in *ZESA* v *Maposa*, 1999(2) ZLR 452(S) where at 466 E-G GUBBAY CJ said:

> "Under articles 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair- minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above".

In my view, the applicant did not put the validity of the contract to be adjudicated in issue. As appears on page 25 of the record and as rightly alluded to by the 1st respondent, applicant went to great lengths to point out issues it considered to be pertinent, then concluded by stating unequivocally, *' Wherefore, Voedsel prays that it be given 90 days to make good its 'breach'.* Given this state of affairs, it is astounding that the applicant now seeks to hide behind what it terms an illegal agreement. It is also noted that in paragraph 15 of submissions to the 2nd respondent, the applicant submitted as follows. *" In the spirit of upholding their agreement, wishes to pay Richaw. However, that can only be achieved if the respondent is given some time to look for that money…..*

The applicant now wants this court to 'review' the award based on issues that were never put before the 2nd respondent. There was no misunderstanding by him of the assignment. It was a plea by applicant to be given time to pay. It undertook to pay United States one million dollars by a certain time frame. It failed. An award was made against it. How that can be termed contrary to public policy is baffling especially when applicant abandoned issue of the

illegality of the agreement by agreeing to pay. Applicant, it is noted was legally represented and should not be heard to parrot the song of an illegal agreement. It had every opportunity to put this issue before the 2nd respondent. It did not. Applicant made its bed and must lie on it. The applicant has dismally failed to show how the award is contrary to public policy.

On costs, Mr *Maunze* for the 1st respondent submitted that the applicant was aware as far back as the 5th of August 2019 that it was supposed to pay. By its own admission, all it asked for was time to pay. The 90- day period has expired. It is nearly four years and still no payment has been forthcoming. It is an act of utmost bad faith to seek the setting aside of the award. In the heads of argument filed on behalf of the 1st respondent; the applicant was notified of the fact that costs would be sought on a punitive scale. The application is tantamount to an abuse of court process.

Mr *Mahuni* submitted as follows. The basis of the application was a misunderstanding that the court would play an oversight role and not endorse an agreement made by the parties even if endorsed by the 2nd respondent. The illegality can be raised *mero motu* even if they are silent in the pleadings. Therefore, costs ought to be on the ordinary scale.

I agree with Mr *Maunze,* that the application has no merit. It was filed merely to buy time, especially in view of the admission of liability made by the applicant and merely asking for time to pay. The applicant clearly put the 1st respondent out of pocket and prolonged the date of payment. The 1st respondent is still waiting to be paid. Accordingly, costs ought to be on a punitive scale.

DISPOSITION

1. The application be and is hereby dismissed with costs on a legal practitioner -to-client scale.

Mahuni and Mutatu, applicant's legal practitioners.

Mawere Sibanda, 1st respondent's legal practitioners.