REPORTABLE (90)

JOHANNES TOMANA
v
(1) REUBEN TOMANA (2) TIAN ZE TOBACCO COMPANY (3) JOEL MAMBARA N.O

SUPREME COURT OF ZIMBABWE
MAKONI JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 31 MAY 2023 & 25 JULY 2024

T. Zhuwarara, for the appellant

No appearance for the first and third respondents

G. R. J. Sithole, for the second respondent

CHIWESHE JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) sitting at Harare, handed down on 24 November 2021, dismissing the appellant's application to set aside the arbitral award delivered by the third respondent on 8 October 2018 in favour of the second respondent, on the grounds that the said award offends the public policy of Zimbabwe.

Aggrieved, the appellant has noted the present appeal.

THE FACTS

The appellant is a commercial tobacco farmer. His farm is located in the Darwendale area of Mashonaland West Province. The second respondent's core business is the funding of tobacco farming by supplying inputs to farmers on credit. The first respondent is the appellant's brother. He manages the appellant's farm on behalf of the appellant. At all

material times the first respondent negotiated contracts of supply of inputs between the appellant and the second respondent. He did so as the appellant's agent. In this way the appellant and the second respondent entered into various tobacco farming contracts during the period 2008 to 2012. The last contract between the parties was for the 2011 to 2012 tobacco growing season. In terms of that contract, the appellant undertook to produce 40,000 kgs of tobacco and pay for the outstanding debt incurred in previous seasons. The appellant was unable to produce the 40 000 kgs of tobacco for that year he also failed to clear the outstanding debts. As at June 2015, the appellant was indebted to the second respondent in the sum of $114 749.80.

The matter proceeded to arbitration where the second respondent sought to recover the outstanding debts. Its prayer was granted by the arbitrator, the third respondent. It is that arbitral award that the appellant urged the court *a quo* to set aside. He did not succeed hence the present appeal to this Court.

GROUNDS OF APPEAL

The appellant's grounds of appeal are as follows:

"1. The court *a quo* erred in partially setting aside the third respondent's arbitral award of the 18th October 2018. At law an arbitral award is not severable and must be wholly set aside if any part of the said award offends the public policy of the land.

2. Furthermore, the court *a quo* grossly misdirected itself in finding that, the second respondent's cause at arbitration had not prescribed. A proper consideration of the papers signed *inter partes* reveals that the third respondent presided over a prescribed arbitral claim whose attendant award ought to have been set aside.

3. The court *a quo* also erred in determining that the third respondent could competently hold the appellant liable for the 2011-2017 contract, which contract the appellant never sanctioned, approved, signed or ratified.
4. The court *a quo* erred in determining that the third respondent could determine the disputation *inter partes* on the basis of undefined issues and questions. At law the third respondent's arbitral award is an affront to the public policy of the land as it is not predicated on issues that had been defined and delimited by the parties."

RELIEF SOUGHT

The appellant seeks the following relief:

"1. That the instant appeal succeeds with costs.

2. That the order of the court *a quo* be set aside and substituted with the following:

(i) the application is granted.

(ii) the arbitral award handed down on 18 October 2018 at Harare by the second respondent sitting as an arbitrator in terms of the Arbitration Act be and is hereby set aside.

(iii) the first respondent to pay the applicant's costs."

THE ISSUES

The grounds of appeal raise the following issues:

1. Whether an arbitral award is severable
2. Whether the second respondent's cause at arbitration had prescribed
3. Whether the appellant signed or ratified the agreement for the 2011 to 2017 tobacco season, and

4. Whether the third respondent resolved the dispute between the parties on the basis of undefined issues and, if so, whether it was permissible to do so.

ANALYSIS

1. Whether an arbitral award is severable.

This issue arose in the proceedings of the court *a quo* when it became apparent that the first respondent, being a mere agent of the appellant, should not have been joined as a principal in the arbitration. At all material times the first respondent acted as appellant's farm manager and signed the contracts under review as an agent of the appellant. It was for that reason that the court *a quo* removed or severed that part of the arbitral award binding the first respondent as a co-debtor.

The appellant avers that there was no legal basis upon which the court *a quo* could have severed that portion of the arbitral award. The court *a quo* should instead have set aside the whole award on account of the fact that it was against the public policy of Zimbabwe that a party not privy to the contract be made the subject of a court order and thus liable to pay a debt he never incurred.

It is true that Article 34(2) of the Arbitration Act [*Chapter 7:15*] which provides grounds upon which the court *a quo* may set aside an arbitral award -has no express provision empowering the court *a quo* to sever a portion or portions of the award it may deem iniquitous and save the other portion or portions of the award it may deem not to be in conflict with the public policy of Zimbabwe.

Article 34(2) of the Arbitration Act provides as follows:

2. An arbitral award may be set aside by the High Court only if:

(a) ----------

(b) the High Court finds that –

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or
(ii) the award is in conflict with the public policy of Zimbabwe.

It is now settled that the concept of public policy has been defined by the courts in various pronouncements, including the seminal case of *Zesa* v *Maposa* 1999 ZLR 452 (5) where at 466 E-G GUBBAY CJ had this to say:

> "Under articles 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognize 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 logical 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 issues and the resultant injustice reaches the point mentioned above."

In casu the court *a quo* set aside that portion of the award that would have offended the public policy of the land and left intact that portion that was not so afflicted. In the circumstances of this case, we are not persuaded that, in doing so, the court *a quo* erred or committed a misdirection. The appellant argues that the Act does not empower the court to deal with portions of an award with the object of severing the bad portions and retaining the good portions. If one portion is bad, the whole arbitral award must be set aside, without distinction, so argues the appellant.

We take the view that the phrase "an arbitral award may be set aside" by necessary implication includes the setting aside of the whole and where appropriate, a portion

thereof. It could not have been the intention of the legislature that wholesome portion or portions of the arbitral award be set aside merely because a portion of the award is deemed to be contrary to the public policy of Zimbabwe. The absurdity of such an approach would render nugatory the purpose of arbitration, namely to provide an alternative, timely and cost-effective dispute resolution mechanism.

The court *a quo* found persuasive the foreign judgment it relied on in determining the issues at hand. Whilst it is true that the foreign legislation referred to is not a carbon copy of our Arbitration Act, it is true that the legislation is in tandem with the Model Law and more importantly defines the power of the court to set aside an arbitral award but does not expressly provide for the setting aside of a part or portion thereof. For that reason, the foreign judgment relied upon by the court *a quo* constitutes persuasive jurisprudence. The court *a quo* was persuaded by the reasoning in the case of *Palabora Copper (Pvt) Ltd* v *Matlokwa Transport and construction* (298/2017) [2018} ZASCA 23 (22 March 2018) where the South African Supreme Court of Appeals considered the question of severability in the context of that country's Arbitration Act 42/65 and opined as follows:

> "Other standard texts on arbitration in South Africa do not address the issue in the context of a finding of gross irregularity in the arbitration. They do, however, accept that where arbitrators exceed their powers and the exercise of excessive powers does not infect the entire award, the good may be severed from the bad and enforced. Bearing in mind that s 33 (1) (b) of the Act deals with both exceeding powers and gross irregularity as grounds for setting aside an award, there seems no reason why the same principle should not apply where only part of an award is infected by a gross irregularity. The current English Arbitration Act addresses the problem directly by saying that where a court may set aside an award it may do so in 'whole or in part'. However, under its predecessor, the wording was the same as the current South African statute, namely that the court may set aside the award."

The appeal court then proceeded to consider the position in England before the adoption of the current English Arbitration Act. It observed that the English Act was worded

in the same way, that is, the court 'may set aside the award'. It also shed light as to how the English authorities then treated the question of severability of arbitral awards. It quoted a passage in the last edition of Russel on Arbitration, which reads as follows:

> "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 of every question 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. When it is so divisible, the faulty direction will alone be set aside or treated as null. If the objectionable provisions in the award are inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be separated is not at all affected by the faulty portion, the award would be altogether avoided."

The South African Supreme Court of Appeals accepted the above reasoning and adopted it in the following terms:

> "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 issues. Of course the court will need to be satisfied that the latter issue is wholly separate from the others, but, subject to that, this approach is consistent with the language of s 33 (1)(b) and 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. In my view it is correct and should be applied in this case."

The court *a quo* was persuaded by the reasoning and conclusion of the Supreme Court of Appeals of South Africa. We are similarly persuaded. The decision of the court *a quo* in this regard cannot be faulted.

In any event the appellant's argument is that the Arbitration Act does not give the court *a quo* the power to sever parts of an arbitral award. He does not say that the Act forbids the court *a quo* to sever portions of an arbitral award. It is trite that the court *a quo* has very wide jurisdictional powers and that it is often said that the High Court can do anything

that the law does not prohibit. In the context of this case, the court *a quo* was well within its powers to sever the offending portion of the award.

2. Whether the second respondent's cause at arbitration had prescribed.

There is no merit in this ground of appeal. It is trite that an acknowledgment of debt interrupts the running of prescription. It was common cause that the first respondent was at all material times acting as the appellant's agent. The first respondent, in his capacity as appellant's agent, wrote to second respondent admitting liability in the sum claimed. The letters constituted acknowledgement of debt which not only interrupts prescription but also supersedes the original cause of action. It is, on its own, a new cause of action. With it a new prescriptive period begins to run from the date of acknowledgement.

3. Whether the appellant signed or ratified the agreement for the 2011-2017 tobacco season.

This ground of appeal has not been persisted with in the heads of argument. However, it is common cause that the first respondent was appellant's agent. He was responsible for negotiating the loans and credit facilities extended to the appellant. His actions in that regard bound his principal, the appellant.

4. Whether the third respondent resolved the dispute between the parties on the basis of undefined issues, and if so, whether it was permissible to do so.

Again this ground of appeal has not been addressed in the heads of argument. It has no merit because the issues for determination had been set out in the parties' agreement contained in the statement of claim, and the statement of response read together with the documentary evidence adduced by the parties. In any event article 19 (2) of the Model Law

allows the arbitral tribunal the latitude to conduct its proceedings in the best manner it sees fit. This ground of appeal ought to be dismissed.

DISPOSITION

We conclude that it was permissible for the court *a quo* to sever that portion of the award binding a non-party to the arbitration agreement, namely the first respondent. As a mere agent, enforcing the award against him would have been against the public policy of Zimbabwe. An agent cannot be burdened with the liability of his principal.

Article 34 (2) of the Model Law allows the court *a quo*, by implication, to sever an offending portion of an arbitral award, retaining the portion that is not in conflict with the public policy of the land. Such severance can only be done if the offending portion is clearly separable in its nature and does not affect or infect the residue to be saved. In *casu* the court *a quo* only severed that portion of the award that sought to bind the first respondent. That portion is clearly separable in the sense that it has no effect whatsoever on the obligations and liabilities of the appellant. The award against the appellant remains intact and unaffected. For that reason it was permissible for the court *a quo* to so delete the offending portion of the award.

The foreign judgments relied upon by the court *a quo* are relevant and persuasive. They are in line with our view that the enabling section empowers the court to sever portions of an arbitral award if such portions offend public policy.

Similarly, the court *a quo* correctly dismissed the special plea of prescription as same had been interrupted by the acknowledgment of debt, a cause of action in its own right. Contrary to the appellant's contention that no evidence had been led to disprove that special

plea, the question had been raised in the papers before the arbitrator, including documentary proof of acknowledgment of debt. The issue was properly determined on the basis of the papers placed before the arbitrator. It is also not correct as contended by the appellant that the arbitrator proceeded in the absence of issues defined by the parties. The record shows that the arbitrator was guided by the issues defined and presented by the parties. Indeed no objections were raised by the appellant at the time as to the propriety of the procedures adopted by the arbitrator.

We conclude therefore that the appeal has no merit. It must be dismissed. Costs shall follow the cause.

Accordingly, it is ordered as follows:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs of the appeal.

MAKONI JA : I agree

CHATUKUTA JA : I agree

Mukweva Law Chambers, appellant's legal practitioners

Muvirimi Law Chambers, 1st respondent legal practitioners

J. Mambara & Partners, 2nd respondent's legal practitioners