BEKIMPILO GUMBO
and
THE GAS BOYS (PRIVATE) LIMITED
and
THE HONOURABLE MR. DAVID WHATMAN N.O.

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 1 & 9 December 2021 and 25 March 2022

Opposed Matter- Setting Aside of Arbitral Award

Mr T Zhuwarara, for applicant
Mr M Muzaza, for 1st respondent
No appearance for 2nd respondent

MUTEVEDZI J: The applicant, a private individual approached the court seeking the setting aside of an arbitral award. The arbitral award was made in favour of the first respondent which is a business incorporated in terms of the company laws of Zimbabwe. The second respondent is the arbitrator who presided over the arbitral proceedings and was cited in his official capacity.

Background

For some odd reason, the applicant omitted to disclose the background to this dispute. It only became apparent from a reading of the first respondent's statement of claim in the arbitral proceedings which was attached to this application as an annexure. It is that, in May 2019, the applicant and the first respondent signed a commercial agreement under which the first respondent leased haulage trucks to the applicant. They agreed that the applicant would pay a rental fee of ZAR 100 000 per month for leasing the trucks. A few months after the arrangement commenced, the applicant failed to honour his part of the bargain. Despite demand by the first respondent for the applicant to remedy the breach no payment was forthcoming. The first respondent was left with no choice but to cancel the agreement and recall its haulage trucks. It also proceeded to cause the issuance of summons against the applicant under case number HC 9692/19. That action was however later withdrawn. The parties met and resolved to pursue out of court remedies. They agreed on how the applicant would pay the outstanding amounts and how the first respondent would reclaim its vehicles. In a bid to mitigate its losses,

the first respondent also undertook to pay for the repair of some of its trucks which had broken down as well as the cost of moving others from South Africa to Zimbabwe. To the first respondent's eternal frustration, nothing again materialized from those arrangements as the applicant continued to be evasive. It once again chose legal recourse. This time it pursued the arbitration route in terms of clause 26 of the arbitration agreement between the parties. That clause provided that the parties would choose their arbitrator but due to the acrimony that appeared to exist between them they failed to agree on that issue. They approached the Commercial Arbitration Centre for appointment of one in terms of the same clause of their agreement. That led to the appointment of the second respondent in this case. The first respondent then filed its claim on 22 March 2021. The applicant in turn lodged his statement of defence. In that statement he raised preliminary objections to which the arbitrator directed the parties to file legal arguments. The parties complied.

In the preliminary objections, the applicant challenged the jurisdiction of the arbitrator on the basis that the agreement between the parties was unlawful. After considering the parties' submissions the second respondent rendered his decision. Admittedly, his ruling was difficult to follow. Its practical effect was however that the preliminary objection had failed. Aggrieved by that decision the applicant approached this court beseeching it to set aside the ruling.

The instant application was filed in terms of Article 34(2) of the Model Law as set out in the Arbitration Act *[Chapter 7:15]* (herein after the AA). The applicant argued that the interlocutory award made by the second respondent in favour of the first respondent is not only a contravention of statute but is also shocking, palpably iniquitous and manifestly injurious to the public policy of Zimbabwe. The first respondent opposed the application. It first raised an objection in *limine* in that the second respondent had not issued an arbitral award as contemplated by the Act. The relief which the applicant was seeking was therefore improper. It developed that objection by arguing that an arbitral tribunal has discretion to rule on its jurisdiction either in a preliminary phase or in an award on the merits. In this case the arbitral tribunal had made the decision to rule on the objection to its jurisdiction on the merits after hearing the evidence. Because that determination did not constitute an arbitral award, the High Court had no jurisdiction under Article 34 of the Model Law to the Act (herein after the Model Law). Where an arbitral tribunal refuses to deal with an objection to its jurisdiction as a preliminary issue that refusal is not subject to judicial review by the High Court. The applicant on the other hand insisted that the decision of the arbitrator was an arbitral award in every

sense. As such the Act allowed him recourse to the High Court for the setting aside of that award.

The court was therefore obliged to dispose of the preliminary argument first.

The Issues

` The issue which loomed large in the preliminary objection was whether the second respondent sitting as an arbitrator made an arbitral award which would entitle the High Court to review its decision.

At the hearing I delivered an *extempore* ruling and held that indeed the decision of the second respondent on the parties' dispute in relation to his jurisdiction was an arbitral award. I advised the parties that the full reasons for that decision would follow in due course. These are they.

The Law

I searched high and low but there appears to be no case in our jurisdiction where the term arbitral award was judicially interpreted. In my view, the generally accepted notion and ordinary meaning of the term arbitral award suggest that an award is simply the formal decision of an arbitrator or an arbitral tribunal on a dispute brought before him or it in terms of an arbitration agreement. The award can be final, interim, default, by consent or partial. My conception finds support from renowned author Bernardo M. Ceremades, *The Leading Arbitrator's Guide to International Arbitration* –second Edition, 2008, [*Chapter 23*] where he points that:

> "There is no internationally accepted definition of arbitral award…Accordingly an arbitral award could be defined as the final and binding decision made by a sole arbitrator or an arbitral tribunal which resolves wholly or in part the dispute submitted to his or its jurisdiction."

Black`s Law Dictionary (4th ed. p. 135), describes an "award" as

> "… the judgment or decision of arbitrators…on a matter submitted to them."

Although it does not define what an award is Article 31(7) of the AA provides that:

> (7) Unless otherwise agreed by the parties, an arbitral tribunal shall have the power to make an interim, interlocutory or partial award."

The common thread which runs through all the above attempts at defining an arbitral award is that there appears to be three essential elements which constitute an arbitral award. These are that:

i. It is a formal decision by an arbitrator or arbitral tribunal
ii. The decision must be on a dispute submitted to him or it
iii. The decision must resolve the dispute wholly or in part

My comprehension is therefore that the existence of a dispute is central in establishing whether an award has been made in arbitration proceedings. If there is a dispute and the arbitrator makes a formal pronouncement on resolving that dispute, that decision constitutes an award. MAKARAU J (as she then was) in *Cargill Zimbawe* v *Culvenham Trading (Pvt) Limited* HH-42-2006 approving the observations of the authors Butler & Finsen stated that

> "Arbitration is a process for resolving a dispute between the parties regarding their existing rights. The requirement of a dispute is used to distinguish arbitration from certain other contractual provisions for referring matters to a third party……. Apart from being an essential characteristic of arbitration, the existence of a dispute is necessary to render an arbitration agreement enforceable and to establish the arbitrator's jurisdiction."

Application of the Law to Present Facts

In the present case, the applicant attached to his application as annexure F a document titled 'Adjudication and Ruling in terms of Article 16(3) of the Model law- Preliminary Objection to Jurisdiction." That document purports to be dealing with the objection to the second respondent's jurisdiction which was raised by the applicant who was respondent in the arbitral proceedings. After discussing various issues, the second respondent in the penultimate paragraph of the ruling proceeded to state in unequivocal terms that:

> "Accordingly, the preliminary challenge must fail as such it is so ruled."

In the last paragraph the second respondent again emphasised that:

> "The preliminary point fails at this stage."

I have already said the form of the decision, as in it being interlocutory or final, is immaterial in the determination of whether it constitutes an award. A dispute remains an arbitral dispute even where it relates to a part of the main dispute between the parties. There cannot therefore be any doubt that a dispute between the parties on the jurisdiction of an arbitrator is a dispute as contemplated by arbitration law. The second respondent was formally presented with that dispute. He formally decided it. That the pronouncement appeared to have been inelegantly drawn does not detract from the fact that it is a formal decision of the arbitrator. It fully resolved the question whether the second respondent had jurisdiction to deal with the arbitration proceedings or not.

To hold that *'the preliminary objection fails'* not once but repeatedly, in circumstances where the objection related to the jurisdiction of the arbitrator is not dissimilar to holding that the arbitrator had jurisdiction to hear and determine the dispute that was before him. Once that conclusion is drawn, Article 16(3) of the Model Law necessarily kicks in. It clothes the High Court with power to hear an application to set aside that arbitral award. Whether the applicant would satisfy the requirements for the setting aside of the award is a matter for argument at another stage after hearing the merits of the case. The question of what an award is, is one that cannot be determined by form but must go to the substance. The argument that the 2nd respondent (arbitrator) did not make any ruling becomes unsustainable considering these findings. He ruled that he had jurisdiction to deal with the arbitral dispute.

The paradox exhibited by the arbitrator's ruling where he unequivocally held on one hand, that the preliminary objection had failed and appearing to defer his decision to after hearing the merits of the case on the other is created by the unhelpful and muddled wording of Article 16(3) of the Model Law. That section provides that:

> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the *High Court* to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Confusing as it appears, what is clear is that the arbitrator cannot have his cake and eat it at the same time. He cannot rule on the dispute to jurisdiction both as a preliminary question and as an award on the merits as happened in this case. The approach envisaged by the provision is that the arbitrator must choose one or the other method of disposition. The word *or* used in the section is a disjunctive and entails that the two scenarios are mutually exclusive of each other. Like already indicated, the substance of the second respondent's decision is that he ruled on the dispute as a preliminary question and made the determination that he had the jurisdiction to preside over the proceedings. What I find ironic about the choice given to the arbitrator is that the provision postulates a scenario where the arbitrator can refuse to rule on the issue of jurisdiction as a preliminary point and decide on it as an award on the merits. The jurisdiction of a tribunal is its power to hear and determine a matter. Without jurisdiction, a

tribunal is not allowed to proceed further. It astounds me and I find it illogical that an arbitrator can proceed to hear the merits of a dispute only to later rule that he had no jurisdiction to do so. In my view, it only makes sense that whenever jurisdiction is challenged, that challenge must be fully resolved before the arbitrator can proceed to hear the dispute on the merits.

Disposition

In the final analysis, I find that indeed the second respondent made a ruling on the dispute that was before him. He resolved the issue in favour of the first respondent. The applicant was therefore within his rights to seek the review and setting aside of that arbitral award in terms of Article 34(2) (b) of the Model Law. The objection in *limine* by the first respondent is therefore dismissed.

The Application on the Merits

The background facts of this case have already been narrated. Nothing will be served by fully repeating them at this stage. What is important to recite is that in his own words, the applicant says he seeks to have the arbitrator's decision impugned on the basis that it is not only contrary to statute but is also shocking, palpably iniquitous and manifestly injurious to the public policy of Zimbabwe. When however, the façade of the high sounding descriptive words used is removed all that the applicant appeared to be saying is that the decision of the arbitrator is contrary to public policy because it allows the first respondent to seek to enforce an illegal contract. The alleged unlawfulness of the contract is that it is denominated in South African Rand in contravention of the laws of Zimbabwe. In opposing the application, the first respondent denied that its arbitral claim is prohibited by any law. It further argued that the contentious agreement between the parties was concluded on 13 May 2019 at a time when there was no law which prohibited the denomination of contractual obligations in foreign currency. In any event, the applicant's cause is premised on a misconception of the law as no law in Zimbabwe prohibits the denomination of contractual obligations in foreign currency or the receipt of payments in foreign currency.

The issue

There is a sole issue for determination in this case. It is whether the determination by the second respondent that he had jurisdiction to determine the dispute submitted to him by the

first respondent as claimant and the applicant as respondent in terms of their arbitration agreement is contrary to the public policy of Zimbabwe.

The Law

The power of the High Court to set aside an arbitral award is derived from Article 34 of the Model Law. That article provides as follows:

> ARTICLE 34
> *Application for setting aside as exclusive recourse against arbitral award*
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
> (2) An arbitral award may be set aside by the *High Court* only if—
> (*a*) the party making the application furnishes proof that—
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or
> (ii) …
> or
> (iii) …
> (iv) …
> or
> (*b*) the *High Court* finds, that—
> (i) …
> or
> (ii) the award is in conflict with the public policy of *Zimbabwe*.
> (3) …
> (4) …
> (5) *For the avoidance of doubt, and without limiting the generality of paragraph* (*2*) (*b*) (*ii*) *of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—*
> (*a*) *the making of the award was induced or effected by fraud or corruption; or*
> (*b*) *a breach of the rules of natural justice occurred in connection with the making of the award*

There is no gainsaying that in the present case, the applicant solely relies on Article 34(2)(b)(ii) of the Model Law in that the award conflicts with the public policy of Zimbabwe. An analysis of decided cases reveals that the practice of the courts has been to apply the "public policy" standard for setting aside an arbitral award in a restrictive manner. In the case of *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452(S) at 465C-D GUBBAY CJ described the approach to assessing whether an arbitral award violates public policy as follows:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if

> some fundamental principle of law, morality or justice is violated. This is illustrated by the dicta in many cases."

His Lordship continued at 466E-H and said:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside."

In my understanding, Articles 34 and 36 of the Model Law do not confer the High Court with appellate jurisdiction allowing it to 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. In other words, the High Court cannot set aside the decision of an arbitrator solely on the basis that it considers it to be faulty. The power given to the High Court is review power. It can only set aside the decision where the reasoning or conclusion of an arbitrator in an award went beyond mere faultiness or incorrectness. To be contrary to public policy, the decision must be palpably inequitable. The word inequity connotes lack of equality or fairness. The requirement is that the inequity must be 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. Put bluntly that level of inequity is closer to iniquity which refers to injustice, wickedness or sin. What is clear therefore is that ordinary fault or incorrectness of an arbitral decision comes nowhere near satisfying the requirements for the setting aside of the award based on being contrary to public policy. Where an arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the magnitude described above it can equally be a basis for setting aside of the award.

In the case of *Stonewell Searches (Private) Limited* v *Stone Holdings (Private) Limited* SC-22-21 MAKONI JA weighed in on this debate and held that:

> "In any event, a high threshold has been set for setting aside of an arbitral award under Article 34 on the basis that it is contrary to public policy. 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."

See also the cases of *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81(S) at 85C-D; *Muchaka v Zhanje & Anor* 2009 (2) ZLR 9(H) at 11E-G.

In the present case it ought to be assessed whether in the circumstances, the second respondent's decision is a palpable inequity. It must further be assessed whether allowing a

dispute regarding a contract denominated in foreign currency to be heard before him was so outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by that decision.

A contract within a contract

Where an arbitrator is faced with an arbitration agreement, the approach generally is to treat that arbitration clause or agreement as a contract within a contract. The arbitration clause is a standalone contract. Article 7 of the AA provides that:

Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

That provision envisages that an arbitration clause can exist as a separate agreement from the contract defining the rights and obligations of the parties wherein it is contained. This is so to the extent that even in a situation where the parent contract is declared to be terminated or void *ab initio* for one reason or the other; the arbitration contract or clause itself can survive that fatality. That principle is called the doctrine of separability.

Kompetenz Kompetenz

Another tool designed to aid the doctrine that an arbitration agreement is severable from the main contract is the principle of *kompetenz kompetenz.* It is a German term which simply refers to "competence." It confers an arbitrator with jurisdiction to assess and decide matters relating to his jurisdiction. The concept has two legs. The first one gives the arbitrator power to determine his own jurisdiction. The second leg is the power of the seat of arbitration to decide challenges to its jurisdiction either as a preliminary question or as an award on the merits as already discussed above. Separability and *kompetenz kompetenz* operate hand in glove. They exist to ensure the autonomy of the arbitration process. [1]

[1] This is a position supported by international law. See guiding sentiments instruments such as the UNCITRAL Rules art. 23 (as revised in 2010), in art. 16 of the Model Law which is our AA domesticating international law.

Sanctity of Contracts

If there was any debate about the separability of the arbitration clause from the main contract, then such debate is ended by the principle of sanctity of contract in contract law. That concept prescribes that contracts between parties are sacrosanct. Courts must be wary of unnecessary encroachment. The Supreme Court put that beyond question in *Book v Davidson* 1988(1) ZLR 365(S), when it held that:

> "There is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the ideal of freedom of trade. It is the sanctity of contracts ... If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract ... to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, prima facie at all events, contrary to the interests of any and every country."

See also *Kempen* v *Kempen* SC-14-2016.

In essence the Supreme Court was clear that the public policy regarding sanctity of contract may be regarded as more venerable than any other facet of public policy.

More importantly, the purpose and objectives of arbitration must never be lost in all this debate. The court system in most African countries is generally slow because of the congestion of cases before the courts. The Zimbabwean courts despite the best efforts of judicial officers are no exception. Arbitration is an alternative mechanism to the court system directed at achieving faster resolution of cases than provided by the courts. It is an alternative dispute resolution mechanism. It does not exist to supplant the jurisdiction of the courts but to compliment the formal court system in making decisions between conflicting parties. In *Peruke Investments (Private) Limited* v *Willoughby's Investments (Private) Limited & Anor* SC-11-2015 at p.7 PATEL JA (as he then was) held that:

> "I have no doubt that the purpose of arbitration proceedings is to enable the expeditious resolution of disputes."

The courts therefore must as far as is practicable, attempt to hold parties to the terms of their contracts where they have elected that their disputes will be resolved by way of private adjudication such as arbitration. It is contrary to the spirit of the law and administrative exigencies for courts to wantonly interfere with arbitration proceedings. This is more so in

issues regarding the jurisdiction of arbitral tribunals since the law gives them the latitude to decide on their own jurisdiction.

The English case of *Zermalt Holdings SA v. NuLife Upholstery Repairs Ltd* [1985] EGLR 14, per BINGHAM J, cited in *Fidelity Management* v *Myriad International Holdings* [2005] EWHC 1193 (Comm.) at 2 summed up the courts' approach when it held:

> "The courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found in it."

Embracing this approach, where a court is faced with an arbitral award, the aim should be to save it if the arbitrator decided on the matters brought before him.

Application of The Law To The Present Facts

In *casu*, the applicant and the first respondent signed a contract by which the applicant leased haulage trucks from first respondent at a rental fee of ZAR 100 00 per month. They agreed in their contract that if any dispute arose it will be resolved through arbitration. When the dispute before the second respondent arose, they duly submitted it for arbitration in compliance with terms of their contract. In my assessment, it is not necessary for me to decide the legality or otherwise of the provision allowing the applicant's contractual obligation to be discharged in foreign currency as a basis for impugning the arbitrator's decision on the grounds of it being in conflict with public policy. This case turns on the consideration of the severability of the arbitration clause from the main contract. The jurisdiction of the arbitrator was not conferred on him by the entire contract but by the arbitration clause as a separate agreement for the parties to submit to arbitration. Even if it were to be assumed that the contract is unlawful- which is highly unlikely-the severability of the arbitration agreement would entail that the second respondent's jurisdiction cannot be ousted by virtue of the so-called illegality of the contract. The applicant was fully aware of the terms of his agreement with the first respondent. He cannot repudiate them before the institution which he undertook to submit to in the case of a dispute arising between them decides on those issues. He intends by devious means, to ensure that the dispute between himself and the second respondent is not adjudicated upon. He contracted that he would submit to arbitration. The sanctity of contracts requires that this court holds him to the terms of his agreement with first respondent. As correctly noted by the second respondent in his ruling, the contract between the parties was signed on 13 May

2019. The instrument that legislated the Zimbabwean dollar as the sole legal tender SI 142/2019 only came into existence in June of the same year. It is clear therefore that at the time that the contract was signed the multi-currency regime in Zimbabwe was still operational. I mention these issues not because I intend to decide the case on that basis but simply to show that the second respondent's decision was rational and based on logic.

I indicated earlier on that the ruling by the first respondent was inelegantly written. But that is the only blemish which can be apportioned to it. The inelegance is unfortunately not enough for this court to set aside the decision. It does not make the second respondent's ruling palpably iniquitous or so outrageous in its defiance of logic that a reasonable man would think that justice in Zimbabwe is spinning on its head. In the case of *Gaylord Brundi* v *Kemark Builders (Pvt) Ltd* HH 4/12, PATEL J (as he then was) highlighted that the purpose of public policy was meant to accomplish simple justice between man and man. He added that what the courts must be careful not to enforce is that which is inimical to societal interests. The defence of public policy can only be upheld in instances where a fundamental principle of law or morality or justice has been violated. In this case, I perceive nothing contrary to public policy where an arbitrator rules that he has jurisdiction to hear and determine a contractual dispute between parties who voluntarily subscribed to the mechanism of arbitration. I even note in passing that the basis of alleging illegality of the contract will be very difficult to prove.

Disposition

When all is said and done, it is apparent that what the applicant seeks for is for the court to emasculate the arbitrator of his power and competence to rule on issues to do with his jurisdiction. Yet the arbitrator is within his powers to decide on his own jurisdiction. An arbitration agreement is not unlawful even where the remainder of the agreement may be declared to be unlawful. It is up to the arbitrator to decide those issues. The parties must go back to enable the second respondent to continue with the proceedings.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

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