BUPPE KIHWAJA CHANGARA
versus
ROW CROPPERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 6 September 2021 and 1 June, 2022

Opposed Chamber Application for
Registration of Arbitral Award

H Mutasa, for the applicant
T S Manjengwa, for the respondent

CHITAPI J: The applicant filed a chamber application in terms of Article 35 of the Arbitration Act [*Chapter 7:15*] for the registration of an arbitral award granted in her favour by the arbitrator dated 25 February 2020. The respondent opposed the application on the broad ground that the award conflicted with public policy of Zimbabwe in the manner contemplated by Article 36 of the Model Law which is set out as a schedule to the Arbitration Act, [*Chapter 7:15*].

To briefly contextualize the award, it arose from a dispute concerning the termination by the applicant of a joint venture agreement which the applicant executed in writing with the respondent on 1 October 2015. The applicant is the holder of an offer letter granted by the Government of Zimbabwe dated 8 January 2007. In terms thereof the applicant was offered and she accepted to occupy and utilize for agricultural purposes, a certain piece of land called subdivision 1 of Cons of W & PTN of VA of the Great Riversdale in Mazowe, Mashonaland West Province measuring 979.34 hectares in extent. The applicant then entered the joint venture agreement aforesaid in terms of which for ten (10) years from the dated of its execution the respondent would carry out farming operations on the land on certain agreed terms and conditions set out in the joint venture agreement. To the extent that it may be necessary some of the terms will be related to later in the judgment.

The applicant alleged that the respondent had breached certain terms of the Joint Venture Agreement which breach(es) entitled the applicant to cancel the agreement and seek the eviction of the respondent and ancillary relief. Whether or not the applicant was entitled to

terminate the joint venture agreement and to ancillary relief was broadly speaking the subject matter of the arbitral award of Arbitrator C. Kuhuni whose registration is sought but opposed by the respondent. The parties as they are cited herein were similarly cited before the arbitrator as applicant and respondent.

Having given an overview of the dispute and that it was settled by the arbitrator, I revert to explore the challenge to the registration thereof. I deal with the law on the registration and challenge to the registration of an arbitral award. Section 35 of the Model Law as noted supra provides that:

> "**ARTICLE 35**
> Recognition and enforcement
> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and upon application to the High Court, shall be enforced subject to the provisions of this article and article 36.
> (2) ……"

The upshot of the quoted provisions is that the High Court can only refuse the recognition on enforcement of an arbitral award on limited grounds set out in Article 36. In relation to a refusal to recognize or enforce an arbitral award on the grounds that to do so would be contrary to the public policy of Zimbabwe, again the legislature has provided key considerations to be taken into account in subs 3 of Article 36 as quoted without fettering the discretion of the court to consider any other factors which the court may consider to hold as such, as being contrary to the public policy of Zimbabwe.

The challenge to the recognition or enforcement of an arbitral award on the grounds of public policy constitutes the bulk of cases which come before the court. The invocation of public policy grounds to justify the non-recognition and/or setting aside of an arbitral award on the grounds set out in sub-article 3 of Article 3 where the grounds are established must follow as a matter of law. In relation to any other grounds which the court may consider, it seems to me that generally speaking the court must minimize interference with arbitral awards on alleged public policy grounds outside of the ones set out in sub-article (3) of Article 36 unless the award fundamentally offends Zimbabwe law or where the award is unconscionable or shocks the court's conscience. Parties after all adopt the alternative dispute settlement mechanism of arbitration by choice. The approach of the court should therefore be one of restraint from interference and to adopt an approach that promotes arbitration as an alternate dispute settlement mechanism. The public policy exception save where circumstances set out in subs. 3 of Article 36 are established must be narrowly applied. There has to be finality of

arbitral awards. Partly autonomy to choose the mode of dispute resolution through arbitration must be given prominence because it constitutes the guide to the spirit of arbitration.

In the case of *ZESA* v *Maposa* 1999(2) ZLR 452, the learned Chief Justice enunciated the approach of the court to a challenge to an arbitral award, on the grounds that the arbitral award is contrary to the public policy of Zimbabwe. He stated as follows on pp 465-466:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitration are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside. Under Article 34 or 36, the court does not exercise an appeal power by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion is an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reading and outrageous in its defiance of logic or acceptable moral standards that a sensible 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.
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> The same consequences apply where the arbitration has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above." See *Peruke Investments (Private) Limited* v *Willoughby's Investments (Private) Limited* and The Honourable Mr Justice Retired AR GUBBAY SC. SC 11/2015; *Muchaka* v *Zhanje & Another* 2009 ZLR (2)H and *Origen Corp* (Pvt) *Ltd* v *Delta Operators (Pvt) Ltd & Anor* 2003 ZLR(2)(S).

It is clear from the dicta in the ZESA case supra, that the objection to the recognition and enforcement of an arbitral award is restrictively applied. An objective test is applied. The reasoning or conclusion reached by the arbitrator must not just be faulty or incorrect but the faultiness and incorrectiness must result in or constitute a palpable or intense and perceptible inequity which defied logic and moral standards to the point that the reasonable persons conception of justice in Zimbabwe would be hurt. In my view the dicta aforesaid is expressed in a scholarly fashion intended not to fetter the discretion of the court in making a finding under the circumstances of each case on what factor(s) may offend the public policy of Zimbabwe. The approach is consistent with sub-article(3) of Article 36 of the Arbitration Act, as quoted (supra) which, whilst providing the specific instances where if established an award is deemed in law as contrary to public policy, still leaves is open to the court to determine on a case by case basis whether its circumstances qualify for a court to make the finding that the award is contrary to the public policy of Zimbabwe. There is scope for different interpretations on what will constitute a fact or circumstance which is contrary to public policy because of the wide scope given by law. The approach taken should again in my view be one which whilst upholding the Zimbabwe threshold of justice, should be underpinned by the recognition of the

existence of arbitration as a dispute settlement mechanism provided for by law and requires enforcement so as to promote the rights of the parties to the arbitration.

The respondent's challenge to the registration of the award in substance was based on the following averments that.

(a) The arbitrator breached the rules of natural justice by refusing to hear the applicant's counter claims and thus reached his award without hearing both parties.

(b) The arbitrator failed to respect the sanctity of the parties' contract. In particular the allegation was made that the arbitrator did not give attention to the notice provision located in paragraph G of the joint venture agreement. Secondly it was alleged that the arbitrator did not have regard to the fact that the applicant was entitled to 7% of the gross turnover of the proceeds of each cropping season and that any advance payments made to the applicant constituted advances which the respondent was entitled to recover.

(c) The arbitrator failed to properly interpret Article 31(4) of the Schedule to the Arbitration Act regarding the interpretation of when a party to an arbitral award is deemed to have had knowledge of the award.

(d) The arbitrator wrongly applied the doctrine of *res judicata* when he held that the alleged breach of the joint venture agreement had already been determined to exist in an earlier arbitral award by Arbitrator A. Moyo.

The summarized grounds of objection were expanded upon and in some instances repeated. However, a holistic consideration of the whole notice of opposition and opposing affidavit will show that the grounds can properly be said to be covered by the summation. I will therefore deal with them in turn. It is however necessary to first relate to the arbitral award of A. Moyo referred to in the grounds of challenge to this application. The arbitral award aforesaid was dated 12 June 2019 and concerned the same parties herein. Their dispute arose from the alleged breach of the same joint venture agreement herein by the respondent and cancellation of the same. The arbitral award of A. Moyo aforesaid was not challenged and remains extant. The issues which the parties agreed that they be determined were set out in the award as follows as set out in p 74 of the consolidated record:

> "1. Whether the respondent breached the agreement between the parties in the following respects?
> 1.1. Failing to pay the agreed amount for the usage of the farm hereby accruing arrears of RTGS$151 255.28;
> 1.2. Failing to meet the minimum crop hectarage requirements of 330 hectares and 200 hectares in respect of the summer and winter crops during the season 2017/2018;

1.3. Failing to pay ZESA utility bills.

2. Whether or not the claimant properly cancelled the agreement in accordance with clause G of the Agreement.
3. Whether or not the claimant is entitled to payment in the sum of RTGS$157 255.28, representing arrears.
4. Whether the claimant interfered with the farming operations in a manner that prevented the respondent from fulfilling any of its contractual obligations."

It is not disputed in so much as the arbitral award of A. Moyo clearly shows that he heard evidence and made findings on all the issues before him for his determination including costs. The arbitrator's determination was couched as follows as appears from the award on p 88 of the consolidated record.

"**F. Determination**
It is accordingly determined as follows:
1. The respondent breached the Joint Venture Agreement between the parties in the following respects:
   1.1. Failing to pay the agreed minimum amounts due to CBZ Bank thereby accruing arrears of RTGS$151 255.28.
   1.2. Failing to meet the minimum crop hectarage requirements of 330 hectares and 200 hectares in respect of the summer and winter crops during the 2017/2018 season.
2. The claimant failed to properly cancel the agreement in accordance with clause G of the Agreement.
3. Accordingly, at this stage, the claimant is not entitled to the relief sought as it is premature following the finding in paragraph 2."

It is I think important to refer to clause G in the joint venture agreement in order that the context of the award is understood or appreciated with ease. It reads as follows:

"**G. Breach and Termination**
In the event of any of the Parties ("the defaulting party") committing a breach of any of the terms of this agreement and failing to remedy such breach within a period of 10 days after receipt of a written notice from another Party ("the aggrieved party") calling upon the defaulting party so to remedy then the aggrieved party shall be entitled at its sole discretion and without prejudice to any other right at law, either to claim specific performance of the terms of this Agreement or to cancel this Agreement forthwith and without further notice and in either case, claim and recover damages from the defaulting party."

In the light of clause G aforesaid, the arbitral award of A. Moyo dealt with the issue of the respondent's breaches on the merits and the respondent's defences in that regard were rejected. The breached were outline in para 1; 1.1. and 1.2. of the determination. The arbitrator refused to grant the order of cancellation of the agreement on account only of the non-compliance by the respondent of clause G which required that there be a specific notice of breach given to the defaulting party to remedy a breach complained of by the aggrieved party.

In the arbitration before C. Kuhuni his terms of reference, specifically the issues for his determination were by agreement as set out in a letter dated 7 February 2020 drafted by the claimant's legal practitioners. The prior background to the letter was that consequent on the arbitral award of A. Moyo, the applicant claimed to have on 30 July 2019 and after collecting her copy of the arbitrational award of A. Moyo, given notice to the respondent to remedy breaches complained of in that letter. The letter gave the respondent 10 days to remedy the breaches in compliance with clause G on the notice period. The applicant then wrote a letter of cancellation of the agreement on 14 August. The respondent by letter from the its legal practitioners acknowledged receipt of both letters albeit it noted that the letters had been served on a different address from that provided for in clause C of the agreement. In the same response the respondent's legal practitioners noted that the respondent reserved its right in relation to the two letters and further noted that the letters had been written before the respondent had sight of the arbitral award of A. Moyo. Significantly, however, the letter stated as follows:

> "….However, to the contents of your letters, our client avers that they have not breached the parties' agreement in the manner alleged and cannot make the payments so demanded."

Therefore, before reference of the dispute to C. Kuhuni for the second arbitration the position of the respondent was that it was not in breach of the agreement in any of the manners set out in the notice to remedy breach. The issues for determination by C. Kuhuni were thus stated as follows:

> "1. Whether or not the Joint Venture Agreement between the parties was properly cancelled by the claimant through the letter dated 14 August 2019;
> 2. Whether or not the claimant is entitled to the eviction forthwith of the respondent, its sub-tenants assignees, invitees and all other persons claiming occupation through it from the claimant's farm namely. Riversdale in Mazowe.
> 3. Whether or not the claimant is entitled to the payment of holding over damages at the rate that is equivalent to the sums that will \fall due in terms of the Joint Venture Agreement between the parties calculated from the date of cancellation of the Agreement to the date of the respondent's eviction, and
> 4. Whether or not the respondent should be ordered to pay the claimant's costs of arbitration at the scale of legal practitioner and client."

In relation to the first issue, C. Kuhuni determined that due notice of cancellation had been given to cancel the agreement in line with the dictates of clause of the agreement. Receipt of the letters of notice to remedy breach and subsequently cancellation were acknowledged by the respondent's legal practitioners. The arbitrator dismissed the respondent's objection that the letters were presented at the given address upon the respondent's representative Mr Smit who, however, directed that the letters be delivered upon the respondent's legal practitioners.

The legal practitioners in any event took delivery of the letters and replied them. The arbitrator noted that there was effective service of the letters which did not detract from the agreement.

The arbitrator also dismissed the respondent's argument that the service of the notice of cancellation and the subsequent letter of cancellation was pre-mature for the reason advanced by the respondent that it had not had sight of the arbitral award of A. Moyo at the time that the applicant cited. The arbitration found that the respondent had not denied that it received the letter from the arbitrator dated 12 June 2019 advising about the availability of arbitral award for upliftment upon payment of the requisite arbitrator's fee. The applicant was vigilant and uplifted her copy of the award. Further the arbitrator determined that the mere fact that the respondent had not collected the award did not affect the force of the award. The arbitrator reasoned that if court orders were to have force on the date that an affected party sees the order, then parties could easily avoid service of an order whose outcome is adverse to that party. The arbitrator found that there was nothing pleaded by the respondent which hampered it from collecting the award after notification of the availability of the same.

Consequently, and upon the dismissal of the respondent's arguments on the validity of the process of cancellation the, arbitrator found that there had been a proper and procedural cancellation of the agreement. Further and again consequently, the claim for eviction was upheld. Further still, the arbitrator having found that the breaches complained of had not been remedied, damages were in terms of the agreement recoverable against the respondent. In relation to the damages, the arbitrator refused to award damages as the date of cancellation of the agreement after it was accepted by the parties that arrear rentals had since been settled by the respondent. The parties had also dealt with the issue of allowing the respondent in the event of eviction to remove its fixtures and equipment and related matters like the harvest of crops on the fields.

For the avoidance of doubt the operative part of the award of C. Kuhuni read as follows:

"**AWARD**

I accordingly award as follows:

1. The joint venture agreement between the parties was properly cancelled by claimant through her letter dated 14 August, 2019. Accordingly, the joint venture agreement between the parties be and is hereby cancelled with effect from the 14th August, 2019.
2. Claimant be and is hereby entitled to evict forthwith the respondent its subtenants, its assignees, invitees and all other persons claiming occupation through it from the claimant's farm Riversdale Farm in Mazowe.
3. Respondent to pay to claimant holding over damages at the rate of $80 000.00 per season from 14 August, 2019 to the date of the respondent's eviction.
4. Respondent to pay claimant's costs on a legal practitioner and client scale and any collection commission properly levied by the claimant's legal practitioner."

I turn to consider the grounds for challenge and to determine whether the arbitral award can be held to be contrary to the public policy of Zimbabwe. The respondent's averred that its counter claims were not determined and that the arbitrator's failure to do so offended the principles of natural justice in terms of which each side to a dispute must be heard before the dispute is determined by the court of decision maker. The issue of the counter-claim was dealt with by C. Kuhuni extensively in the arbitral award. It was an issue argued as a preliminary point. In short, the arbitrator agreed with the applicant's legal practitioner that the respondent's counter-claims were not properly before him for determination. They were not adopted as agreed issues on which the arbitrator was required to make a determination. The counter-claim was not dealt with nor did it form the subject of the pre-arbitration hearing meeting when the scope of the mandate of the arbitration was agreed on. It was also observed that since the counter claim would per force constitute a claim in its own right, the provisions of clause G of the joint venture agreement would have had to be followed. In other words, the aggrieved party would be required to give notice of breach and remedy before making a claim. The parties did not discuss this aspect. The arbitrator noted that Article 23 of the Arbitration Act listed the documents which are to be filed in arbitration proceedings envisaged in terms of the Act. Counter-claims were not provided for. The arbitrator took note of and dismissed the respondents' contentions that since the counter-claim was capable of being subject to arbitration, convenience and expediency required that the matters raised in the counter-claim should be determined to avoid delays and further costs.

In my view it is difficult to appreciate the point sought to be made by the respondent on the alleged breach of the principles of natural justice by C. Kuhuni. The respondent was allowed to make submissions on the competence of bringing up the counter-claim and it did so. The arbitrator was not persuaded to rule in favour of the respondent. The principle of natural justice to the effect that both sides to a dispute are heard before a decision on their dispute is determined does not mean that the decision maker should rule in a party's favour. The respondent's contentions were dismissed. Clearly the respondent was not satisfied that the decision of the arbitrator was correct. This is a far cry from contending that the respondent was not accorded an opportunity to address the arbitrator before a decision was made. The respondent's challenge must fail. The facts do not support the contention. No rule of natural justice contrary to the respondent's allegations was breached by the arbitrator. The ground of challenge has no substance.

The other challenge that the arbitrator failed to respect the sanctity of contracts is again difficult to appreciate. It was alleged that he did not give regard to Clause G of the joint venture nor to appreciate that the applicant was entitled to 7% of the gross turn over of the proceeds of the cropping season. The arbitrator dealt with the applicant's compliance with Clause G on the query of notice of breach and opportunity to remedy. It was found that the respondent had received notification of the availability of the award but did not timeously uplift a copy hereof. The applicant upon uplifting its own copy was entitled to protect and follow its rights. Importantly the applicant was found to have complied with Clause G by writing the letters of 30 July 2019 and 14 August, 2019 which the respondent received and responded to denying committing any breach albeit it raised the issue of place of service which matter has been dealt with. The respondents' representative Mr Smit did not deny that upon service of the letters he directed that the letters should be delivered on the respondent's legal practitioners.

The arbitrator also dealt with the objection on the premature invocation by the applicant of Clause G in that the respondent had not yet received the arbitral award of A. Moyo. The point has been dealt with as well as the arbitrator's determination in that regard. How the public policy argument evolves from the paper trail in what transpired is not apparent nor established. The argument that the arbitrator failed to comply with Article 31(4) of the Schedule to the Arbitration Act is equally not supported on the facts. Article 31(4) provides that signed copies of the award should be delivered to each party to the arbitration proceedings. The delivery envisaged therein is not a physical delivery by the arbitrator of the copies of the parties but that each party should have a copy. There is nothing wrong with the arbitrator advising parties to uplift their copies as was done in this case. The respondent did not deny that it received notification of the availability of the award of upliftment. It did not follow its rights. The arbitrator cannot be faulted for holding that the award was available to the parties upon notification of its availability on 12 June, 2019. In any event a wrong interpretation of the law or provision in an agreement does not constitute an event which is contrary to public policy.

The respondent further challenged the award on the basis that the arbitrator wrongly applied the doctrine of *res judicata* in making the determination that the respondent's breach had already been determined by Arbitrator A.Moyo. Again the Arbitraror Kuhuni dealt with the issue at some length as preliminary issue No. 2 in the arbitral award. I have already dealt with the issue at length as well. The stark or naked truth arising from the determination of Arbitrator Moyo was that he found that the respondent breached the joint venture agreement.

That award remains extant and so the finding of breach remains. The issue in any event became insignificant because C. Kuhuni did not award damages allegedly incurred prior to the date of cancellation of the agreement but those holding over damages which would accrue post the date of cancellation.

Considering the whole challenges overally, the respondent did not establish any public policy grounds which would be offended by the recognition and enforcement of the award. I am inclined to agree with the applicant that the challenge mounted by the respondent was filed as a matter of course without considering the prospects of its success. The grounds of objection were very much in the nature of an appeal. The arbitral award cannot be refused recognition and enforcement on the basis that the arbitrator was wrong in the assessment of the facts or law save to the extent set out in Articles 34 and 36 of the Arbitration Act. *In casu*, there was nothing established by the respondent to show that the reasoning or conclusion reached by the arbitrator went beyond mere faultiness but was so outrageous in its defiance of logic and accepted moral standards that any fair minded and sensible person would consider that justice in Zimbabwe has been intolerably hurt.

In consequence, the applicant must succeed in having the arbitral award registered. The respondent's challenge having failed, there is no good reason advanced as to why the respondent should not pay costs of suit. I therefore order as follows:

1. The arbitral award of C. Kuhuni dated 25 February, 2020 be and is hereby registered.
2. The respondent shall pay costs of suit.

Gill, Godlonton and Gerrans, applicant's legal practitioners
Wintertons, respondent's legal practitioners