M BHIKA BROTHERS (PRIVATE) LIMITED
t/a BK INVESTMENTS
versus
NERVEWAY TRADING (PRIVATE) LIMITED
and
TERIKET INVESTMENTS (PRIVATE) LIMITED
and
TUTSAN TRADING (PRIVATE) LIMITED
and
RAY MAKUVATSINE (PRIVATE BUSINESS CORP)

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 17 November, 2021 And 24 January, 2022

Opposed Matter

Mr *B Ngwenya,* for applicant
No appearance, for first respondent
Mr *G Chifamba,* for second respondent
Mr *Girach,* for third respondent
No appearance, for fourth respondent

MUCHAWA J: This is a consolidated judgment for matters HC 1338/21, HC 2366/21 and HC 3281/21. The matters were consolidated by consent of the parties. In this judgment, I refer to the parties as they appear in case HC 1338/21. The applicant seeks the registration of an arbitral award granted in its favor against first to third respondents. In case HC 2366/21, the third respondent seeks the setting aside of the same award whilst in case HC 3281/21, the second respondent also craves for the same relief.

The applicant is a duly incorporated company which is the owner of a property known as Silke House, Harare (the premises), in which all four respondents are tenants. A dispute arose between the parties when the respondents refused to vacate the premises after having been given

notice of termination of the lease agreements. The matter was referred to arbitration and the arbitrator confirmed the validity of the notices given by the applicant to the first, second and third respondents and also the termination of the leases. The first, second and third respondents were given fourteen days in which to vacate the premises, from 23 March 2021, being the date of the award. Further, the first, second and third respondents were ordered to pay holding over damages, in specified amounts till their vacation of the premises. The plaintiff's claim against the fourth respondent was dismissed. There was also an order relating to the costs of arbitration. The first, second and third respondents, advised the applicant, on the 1st of April 2021, that they would not vacate the premises and would apply for setting aside of the award or contest its enforcement. Resultantly, the second and third respondents filed the applications for setting aside of the award whilst the applicant filed the one for its registration. It was agreed at the hearing that since the matters are essentially the same and had been consolidated, I would hear the parties and come up with one judgment. If the award was then registered, it would mean that the applications for setting aside had been unsuccessful. Conversely, if the application for registration of the award was dismissed, it would mean that the applications for setting aside were successful.

Points in *limine* were raised at the hearing and I heard the parties on these and proceeded to hear the merits of the matter and reserved my judgment. I start off with the points in *limine.*

Whether there is no proper application before the Court for lack of compliance with the mandatory provisions of Article 35 of the model Law

This point was raised by Advocate *Girach* in third respondent's supplementary heads of argument. It was submitted that whereas Article 35(2) provides that a party applying for the enforcement of an award "shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement", the applicant had failed to comply with these mandatory provisions. It was pointed out that whilst in para 7 of the founding affidavit, the applicant states that a certified copy of the award has been attached, yet there was no such award. The criticism was that there is only a certifying stamp on the first page of the photocopy, with an indecipherable signature which is not that of the Arbitrator. It was also averred that there is no name or qualification of the certifying person on record page 6. Further, that there is no certificate of authentication from the Arbitrator and the original award was not availed. It was argued that the

application is therefore fatally defective and should be dismissed with costs. Mr *Chifamba* associated himself with Advocate *Girach*'s submissions.

Mr *Ngwenya* submitted that there is compliance with Article 35(2) as there is a duly certified award on record p 6. He argued that it is not true that only the arbitrator can authenticate or certify an award. The process of certification was laid out as one where a commissioner of oaths looks at an original and copy of a document and after comparing these he certifies if he is satisfied that the copy is a true copy of the original. Mr *Ngwenya* argued that the mischief sought to be dealt with by Article 35(2) is to ensure that fraudulent awards are not registered and a party should not be allowed to frustrate registration of an award by raising its authenticity merely to bar its registration. Reliance was placed on the cases of *Lourens M Botha* v *Gwanda Rural District Council* HB 151/18 at p 3 and *Anthony Lombard Knight & Anor* v *Rainstorm Pictures & Cooperatives* 2014 EWCA CIB 356.

Furthermore, Mr *Ngwenya* explained that he had the original award and tendered it saying that he could not have filed the original copy for the obvious reasons of it being lost. He prayed for dismissal of the point in *limine* for lack of merit. In the event of the point being upheld, it was prayed that the matter should not be dismissed but that it be struck off the roll as a nullity cannot be dismissed.

The proper starting point in the resolution of this issue is a look at Article 35 itself. It provides as follows:

> "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 in writing to the *High Court*, shall be enforced subject to the `provisions of this article and of article 36.
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in *the English language*, the party shall supply a duly certified translation into *the English language*."

Two scenarios are provided by article 35(2). They are that a party shall supply:

1. The duly authenticated original award, OR

2. A duly certified copy thereof.

In *casu* the applicant allegedly supplied a duly certified copy of the award. Contrary to what Advocate *Girach* said, the award on record p 6 is certified a true copy of the original on 9 April 2021 by one *Wisdom Vhudzijena,* who does so in his capacity as a legal practitioner and commissioner of oaths. There is nothing undecipherable about this. Though the rest of the pages were not so stamped, Mr *Ngwenya* tendered the original in order to prove that the arbitration award is not a fraud.

Though the case of *Lourens M Botha* v *Gwanda Rural District Council* HB 151/18 related to a case where the respondent had caused the non-availability of the full arbitral award due to non-payment of its share of fees, the full award was later availed and the court focused on the legislature's intention in article 35(2). It was held as follows;

> "The import of that provision which has some international flavor, as it ought to, being the United Nations Commission on International Trade Law (UNCITRAL) Model Law is to provide the registering court with an authentic document sought to be registered. It is for the benefit of the registering court which must ensure authenticity before registration. The legislative intendment is to prevent fraud or some other like vices as may lead to a false or forged document being registered thereby being turned into a court order unduly. It occurs to me that the provision should not be abused by a litigant bent on frustrating the objectives of arbitration."

I am satisfied that the applicant has substantively complied with the provisions of article 35(2) by providing a duly certified copy of the arbitral award and tendering the original thereof. As the registering court I believe that I have been supplied with an authentic document for registration. I am bolstered in my position by the provisions of r 5 of the High Court (Authentication of Documents) r1971 which provides as follows;

> "5. Nothing contained in these rules shall prevent the acceptance as sufficiently authenticated by any court,
> tribunal or public office of any document which is shown, to the satisfaction of such court, tribunal or public office, to have been actually signed by the p purporting to have signed the same."

I therefore find no merit in this point in *limine* and I dismiss it.

Whether there is a proper first respondent before the Court

The applicant raised the point that there is no proper first respondent before the Court as the deponent to first respondent's opposing affidavit, one Tawanda Nhengu who claimed to be first applicant's director lied under oath as one Mr Steady Munyanyi, who is a director of the first respondent, who had dealt with the applicant over the years had in fact vacated the premises upon receipt of the notice to vacate and was unaware that there were proceedings pending against it. Mr Munyanyi even attached a CR 14 which showed that Tawanda Nhengu had never been and was not a director of the first respondent. It was argued that the documentation filed for the first respondent, being an affidavit by Tawanda Nhengu and a board resolution was a fraud and Tawanda Nhengu and his legal practitioners deserved censure. Mr Ngwenya pointed out that due to this fraud, the first respondent had been saddled with an award against it and would likely be further saddled with an order of costs.

It is clear that Tawanda Nhengu made a false representation that he is a director of the first respondent, knowing very well that it was false and was material to the transaction and was a calculated deception meant to cause the applicant to proceed against the first respondent to its prejudice whilst Tawanda Nhengu enjoyed occupation of the premises under the guise of the first respondent. He knew he had no authority to act for and on behalf of the first respondent. The first respondent did not file any application for the setting aside of the award, most likely due to this constraint picked up by the applicant. The applicant picked out a very curious fact which is that the first, second and third respondents all had their board meetings to authorize the opposition to this matter, on the same date and time. As observed by the applicant, such a coincidence for three distinct companies is questionable. Even the font and style of writing of the resolutions is the same. There appears to have been a very serious dereliction of duty by the legal practitioners. Such conduct is not acceptable from officers of the court.

This means that the first respondent has been improperly dragged to court by Tawanda Nhengu and it is in fact not the first respondent litigating before me. The notice of opposition filed

for and on behalf of the first respondent is struck out. In the event of costs being awarded against respondents, the court is tempted to order punitive costs against Tawanda Nhengu in his personal capacity. In future, the court will not hesitate to order costs *de bonis propris* for conduct such as that exhibited by *Mugomeza and Mazhindu* law firm. It was their duty to verify that Tawanda Nhengu was indeed a director of the first respondent, which they did not do.

Whether there is a proper notice of opposition filed for the second respondent

Mr *Ngwenya* submitted that there is no proper opposition to the registration of the award as what both first and second respondents simply seek to rely on the third respondent's notice of opposition but the third respondent's own affidavit does not state that it is deposing its opposing affidavit on its own behalf and for first and second respondents too. I have already dealt with the first respondent's notice of opposition above and this issue is no longer of any consequence.

No heads of argument were filed for the second respondent and Mr *Chifamba* made no submissions on this point. It is clear that all the second respondent says in opposition to registration of the award is that;

> "I have read the opposing affidavit by the third respondent and fully associate second respondent with the contents of that affidavit"

In its notice of opposition, the third respondent does not say it is deposing to its affidavit on behalf of the second respondent. The effect is that the factual averments of the applicant have not been properly opposed by the second respondent in this application. The second respondent is only saved by the consolidation of this application for registration and its own application for setting aside of the matter in HC 3281/21 as I will take its grounds for setting aside to be its opposition.

The merits

The agreed facts before the arbitrator are that all the respondents were still in occupation of the premises as tenants when they were given three months' notice to vacate the leased premises because the owner of the premises intended to effect significant renovations thereupon. All the

respondents refused to comply with the notice. The monetary claims of the applicant for holding over damages were not disputed. It was also agreed that the applicant had purchased the premises although registration of transfer of the property into its name had not yet been effected and that all respondents had been paying rentals to the applicant.

The contested issues were set out as follows:

1. "Whether or not there is in existence an arbitration agreement in terms of which the matter had been referred to arbitration and further whether the arbitrator had jurisdiction to deal with the matter;
2. Whether or not the applicant had *locus standi* or right to give notices to vacate and have the respondents evicted from the premises;
3. Whether or not the applicant has any ownership, possession and use rights over the premises, in other words any real rights thereupon; and
4. Whether or not the applicant's notice to vacate was challenged within the thirty days period provided for in the lease agreement."

The arbitrator found in the affirmative on the first three issues and that the notice to vacate was not challenged within the prescribed thirty day period and gave the following operative order;

i. "The validity of the notices given by the Claimant (applicant) to the 1st, 2nd and 3rd respondents is confirmed
ii. An order for termination of the lease agreements of the 1st, 2nd and 3rd respondents in terms of the claimant's notices is confirmed;
iii. 1st, 2nd and 3rd respondents and all those occupying through them are required to vacate the leased premises within fourteen days from the date of this award;
iv. 1st, 2nd and 3rd respondents are ordered to pay holding over damages as claimed by claimant for so long as they remain in occupation of the leased premises.
v. Claimant's claim against the 4th respondent is dismissed.
vi. The costs of the arbitration shall be paid by the claimant and 1st, 2nd and 3rd respondents in equal proportions and in addition these respondents shall pay the claimant's party and party costs. In respect of the 4th respondent, it is ordered that claimant shall pay 4th respondent's party and party costs."

The applicant applies for registration of this award for purposes of enforcement. The second respondent opposes registration on the basis that the award offends against public policy and ought to be set aside. The point taken is that on the issue of *locus standii*, it was the applicant which had the burden of proof to show the existence of BK Investments as a trade name and not second respondent. It was argued that the burden of proof was reversed by the arbitrator without any submissions by the parties on this issue and that such offends against public policy. It was

further submitted that there was a violation of section 56(1) of the Constitution of Zimbabwe which provides for equal protection and benefit of the law as the fourth respondent who also occupies the ground floor was allowed to continue in occupation yet the parties are similarly situated. It was argued that the finding made that the fourth respondent could remain in occupation of the ground floor whilst the renovations were ongoing, should have been applied to the second respondent too as it is also in occupation of the ground floor. This argument was also taken up by the third respondent.

Mr *Chifamba* further submitted that the arbitrator did not apply his mind to the question of the proposed renovations which would only be effected to the second floor as evident from the quotation from AM Machado (Private) Limited which allegedly related to the second floor only. It was contended that the award constitutes a palpable inequity that is far reaching and outrageous in its defiance of logic and accepted moral standards and could not have been reached by a fair minded person.

The third respondent also opposes registration on the basis that the award offends against the public policy of Zimbabwe. It was submitted that the arbitrator erred in finding that proper notice had been given as the letters relied on, of 23 July 2020, the confirmation of 31 July 2020 and the reminder of 31 August 2020 did not make it clear that they were relying on clause 8(a) of the lease in giving the notice as the lease only expires on 1 January 2025. It was argued by Advocate *Girach* that such failure to state the basis for the notice was fatal.

Furthermore, it was submitted that the arbitrator erred in finding that the failure to respond to the notice amounted to acceptance of cancellation, particularly as the basis of the notice had not been specified. It was argued that there is no basis at law for concluding that silence amounts to acceptance. The clause in the lease agreement, providing for this was said to amount to a violation of public policy as it takes away the third respondent's constitutional right to be heard.

Advocate *Girach* submitted that the quotation from AM Machado was insufficient to meet the requirements of "extensive renovations to the whole premises" envisaged in the lease agreement as there is no evidence that the intended renovations preclude the occupation of the premises by the tenants. It was averred that the quotation shows that the works to be carried out

are on the second floor and that as the third respondent occupies the ground floor, it is unaffected by such renovations. It was contended that the arbitrator erred in failing to apply his mind to this fact.

Mr *Ngwenya* cautioned the Court to remember that it is not sitting as an appeal court and is therefore not assessing the correctness of the arbitrator's findings. It was argued that the arbitrator did not make a contract for the parties but merely interpreted the terms of the lease agreement and enforced same in relation to clause 8 regarding three months' notice of termination. The issue raised by the third respondent that the notice to terminate did not cite clause 8 as the one relied on was said to be raised for the first time before me. It was argued that it is improper to do so in such an application on the strength of the case of *M. Botha V Gwanda Municipality* HB 151/18.

It was further submitted that the respondents were not denied the right to be heard and there was no breach of the rules of natural justice so there is no violation of principles of public policy. Mr *Ngwenya* contended that what would in fact contrary to public policy would be the failure to uphold the sanctity of contracts where parties voluntarily enter into a contract. See *Book v Davidson* 1988 (1) ZLR 365(S)

On the issue of onus raised by the second respondent, Mr *Ngwenya* stated that this does not qualify as a ground on public policy particularly as the law is clear that he who alleges must prove, and that is what the arbitrator followed.

On the alleged need to have treated first, second and third respondents similarly to the fourth respondent, it was pointed out that the distinguishing factor is the similarly worded lease agreements except that of the fourth respondent which did not provide for three months' notice of termination for renovations. Furthermore, Mr *Ngwenya* argued that the parties should be treated equally for the hearing and not on the findings particularly as the same counsel who represented all respondents agreed that the fourth respondent's lease agreement was different.

The correct position of the law in a case of this nature is set out in the case of *OK Zimbabwe Ltd* v *Admbare Properties Ltd & Anor* SC 55/17. PATEL JA, as he then was set out the following;

> "It is now axiomatic that the concept of public policy as well as what might be perceived as being in conflict with that policy, within the meaning of Articles 34 and 36, must be construed narrowly so as to attain the objective of finality in commercial arbitration as contemplated by the Model Law. The *locus classicus* on the subject is the decision of this Court in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S), *per* GUBBAY CJ, at 466E-G. As was emphasised in that case, an award is not contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. The reviewing court does not exercise an appeal power by having regard to what it considers should have been the correct decision. It will only intervene to set aside an award on the ground of public policy where the reasoning or conclusion in the 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 [or] 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."

It appears to me that the second respondent wishes to draw this court into the realm of an appellate court in its argument on the onus of proof. The court is being asked to assess the correctness of the finding that the second respondent, as the one alleging that there was in existence, a legal entity known as BK Investments (Pvt) Ltd, had the onus to prove this and not the applicant which alleged that this was a mere trade name. Though this does not fall within my remit I will just point out the fallacy of the second respondent's argument. The applicant attached to its papers documents to prove ownership of the premises and alleged that as BK Investments (Pvt) Ltd was just a trade name, there was no legal entity answering to that name. It was in fact the second respondent which insisted that there was such a legal entity. It therefore held the onus to prove what it alleged. See *Astra Industries Ltd* v *Peter Chamburuka* SC 27/12 wherein it was held that the position is now settled in our law that in civil proceedings a party who makes a positive allegation bears the burden to prove such allegation.

The argument raised that the arbitrator did not apply his mind to the fact that the renovations were only for the second floor and would not affect the ground floor, is another one which is enticing the court to venture into an appellate role by looking at the quotation from AM Machado and assessing the arbitrator's findings. That would be an improper exercise of my role herein. In any event, that quotation specifies the works that would apply to the second floor only and the rest would apply to the rest of the premises. See record pp 409 and 410.

The novelty of the argument about the failure to cite clause 8 of the lease agreement in the notice of termination without having raised this before the arbitrator, makes the third respondent's

argument of no moment before me. I rely on the case of *Lourens M. Botha* v *Gwanda Municipality supra* which sets out the law clearly;

> "Unfortunately in an application of this nature, even if it were an application for the setting aside of the arbitral award made in terms of article 34, this court does not exercise an appeal power. More importantly the respondent cannot import into this court arguments that were never placed before the arbitrator and then request this court to entertain a new case which was not made before the arbitrator."

The respondents seek to have this court revisit the lease agreements they voluntarily entered into and hold that the provisions of clause 8 are contrary to public policy. I wish to reproduce the relevant clauses below.

> "8.a.In the event of the landlord deciding to rebuild and/or extensively modernize, alter or refurbish the leased premises then the landlord shall have the right, on giving three months' written notice to the tenant, to cancel the lease without compensation.
>
> b.----------
>
> c. In the event that the landlord should give notice of cancellation of the lease in terms of this clause, the tenant shall, within thirty days following the date of hand delivery or posting of such notice to him, give written advice to the landlord of:
>
> c.1 his/her acceptance of the notice and his undertaking to vacate the leased premises on the applicable date; or
>
> c.2 his/her rejection of the notice and the grounds of his/her objection
>
> And in the event that the tenant rejects the landlord's notice the landlord shall be entitled to refer the dispute for arbitration and/or to institute proceedings in terms of clause 9 hereof.
>
> d. In the event that the tenant fails to give notice required by sub-clause (8.c) above, he shall automatically be deemed to have irrevocably accepted the landlord's notice of cancellation and to have irrevocably undertaken to vacate the leased premises on the applicable date."

In *Magodora & Ors* V *Care International Zimbabwe* SC 24/14, it was held as follows;

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H."

In emphasizing on the sanctity of contracts under public policy, in *Book v Davidson* 1988 (1) ZLR 365 (S) it was also held as follows on pages 378G-380A

> "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.
> Jessel MR made the point in Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462 by saying at p 465:
> '(1) 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."

In *casu* the respondents seek to argue, in essence that the court should not enforce the contracts which they freely and voluntarily entered into because doing so is onerous and against public policy. Case law authorities cited above however show the contrary. What would be against public policy is to refuse to enforce the contracts' express terms because suddenly respondents believe the terms are against public policy. This court will not rewrite the contracts for the parties nor excuse the respondents from the very clear terms set out above. They cannot say their failure to respond to the notice within thirty days takes away their right to be heard.

The respondents argued too that they are similarly situated to the fourth respondent. Nothing can be further from the truth. The fourth respondent's lease agreement did not have a similar clause 8 as quoted above and which was the subject of interpretation by the arbitrator. All respondents were given an opportunity to be heard. It is not surprising that the factual and legal findings for first, second and third respondent were different from those for fourth respondent. The agreements to be interpreted were different. This argument does not take the respondents' cases anywhere.

The applicant did not justify its claim for costs on a higher scale and costs will therefore be awarded on an ordinary scale.

In the circumstances the application for registration of the arbitral award succeeds and I make the following consolidated order:

1. The application for registration of the arbitral award filed under case HC 1338/21 is hereby granted and the Arbitral award handed down by Honorable Arbitrator Mr M. P Mahlangu dated the 23rd of March 2021 and annexed to this order be and is hereby registered as an order of the High Court of Zimbabwe.

2. The application for the setting aside of the arbitral award filed under case no HC 3281/21 be and is hereby dismissed.
3. The application for the setting aside of the arbitral award under case HC 2366/21 be and is hereby dismissed.
4. The first, second and third respondents and all those claiming occupation through them be and are hereby ordered to give vacant possession to the applicant, of the premises known as Silke House situated at No. 124 Robert Mugabe Road, Corner Robert Mugabe and Fourth Street, Harare, forthwith.
5. The first, second and third respondents be and are hereby ordered to pay holding over damages with effect from the 1st of November 2020, to the date on which they shall vacate the premises, being the last agreed rentals as follows;
   5.1. First respondent, US$800.00 per month or its equivalent in local currency at the prevailing bank rate.
   5.2. Second respondent, US$1 500.00 per month or its equivalent in local currency at the prevailing bank rate.
   5.3. Third respondent, US$950.00 per month or its equivalent in local currency at the prevailing bank rate.
6. The first, second and third respondents be and are hereby ordered to pay applicant's costs of arbitration on a party to party scale.
7. The first, second and third respondents shall pay costs of suit on an ordinary scale.

B Ngwenya Legal Practice, applicant's legal practitioners
Mugomeza & Mazhindu, first and second respondent's legal practitioners
Honey & Blanckenberg, third respondent's legal practitioners