VICEMAST SERVICES (PVT) LTD
versus
PICKGLOW TRADING (PVT) LTD t/a GLOW PETROLEUM

HIGH COURT OF ZIMBABWE
MAKOMO J
HARARE, 24, 26 November 2021 & 31 August 2022

Registration of Arbitral Award

E Jera, for the applicant
T Goro, for the respondent

MAKOMO J:

[1] The applicant seeks recognition and registration of an arbitral award granted in its favour by an arbitrator. The parties entered into an agreement whereby the respondent would lease the applicant's service station in Rusape for purposes of selling its fuel and petroleum products. The respondent operates several such service stations countrywide.

[2] A dispute arose between the parties as to when the lease agreement was set to expire. This was after the applicant wrote to respondent advising it of its intention to repossess the premises. Whether the respondent ought to have vacated the premises on the date that applicant argues the lease expired is not the gist of this matter. This is for the reason that the parties agreed to arbitration in the event of any dispute arising between them in relation to the lease agreement. The parties duly took their dispute before the arbitrator for adjudication. It is the award that the arbitrator made that the applicant now seeks the court to recognize and register in terms of the law. The application is opposed on the usual ground that the award is against the public policy of Zimbabwe.

[3] In deciding for the applicant, the arbitrator made findings on the date of commencement and termination of the lease agreement and also on his jurisdiction to hear the respondent's counter-claim for compensation. These are the findings which respondent contends were wrongly made and base its opposition to the registration of the award arguing it is against public policy in terms of Article 36(1) (b) of the Model Law, which is a Schedule to the Arbitration Act [*Chapter 7:15*].

THE LAW

[4] The status of arbitration as an effective alternative dispute resolution mechanism has been firmly underscored by the courts. To that end, courts now adopt a less interventionist approach to arbitral awards made in terms of the relevant law. This is to ensure that disputes dealt with in the arbitration process are not unnecessarily prolonged by fresh litigation in courts. To give effect to this, the choice by parties to choose arbitration is respected by the courts in that they often decline the invitation by a disgruntled belligerents to set aside the arbitral award under the guise of public policy. This was clearly enunciated in *ZESA* v *Maphosa* 1999 (2) ZLR 452 (S) in the following words:

> *"*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 recognize the basic objective of finality in all arbitrations; to hold such defence applicable only if some fundamental principle of the law or morality is violated."

[5] And in *Ropa* v *Reosmart Investments (Pvt) Ltd & Anor* 2006 (2) ZLR 283 (S) *at 286B* the Supreme Court echoed the same sentiment of finality when it held that:

> "The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end; the arbitrator's decision is final and there is no appeal to courts. For better or worse, the parties must live with the award unless, the arbitration agreement provides for a right of appeal to another arbitral tribunal. The issue determined by the arbitrator becomes *res judicata* and neither party may reopen those issues in a fresh arbitration or court action."

[6] As a result, the law has set the bar very high which a party resisting registration of an arbitral award must meet. The arbitrator is even given leeway to be wrong both at law and fact yet that on its own does not constitute an award contrary to public policy. What this means is that apart from the award being based on wrong interpretation or application of the law or facts, it is still required that such award be shown to be against public policy of Zimbabwe. GUBBAY CJ in the *ZESA* v *Maphosa* case (*supra*) at p 466 stated:

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

[7] The applicant is required to meet only three requirements for the award to be registered, namely:

i. Make an application for registration to the High Court;
ii. Present the original copy of arbitral award or certified copy thereof;
iii. Attach original arbitration agreement; and

iv. If the award is in any language other than English, he/she must present a duly certified translation to English.[1]

Once the above have been met the onus shifts to the respondent who opposes registration to prove that the effect of the award is against public policy of Zimbabwe. The test that he/she must satisfy is that set out in the case of *Zesa* v *Maphosa* (*supra*). In that case the court lucidly formulated the test as follows:

> "An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact and in law. Where, however, the reasoning or conclusions in an award goes beyond mere faultiness or incorrectness and constitute 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 would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply 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."

[8] An arbitral award will also be set aside where it "shocks the conscience" or "violate the forum's most basic notions of morality";[2] on the ground of glaring instances of illogicality, injustice and moral turpitude;[3] and where the arbitrator has failed to make a ruling on a challenge to his jurisdiction or other preliminary points raised.[4]

[9] It must be pointed out that courts restrictively construe and sparingly make findings that public policy has been violated and this is reserved only for very exceptional cases, examples of which include awards that uphold illegal contracts, endorses the breakup of a marriage or some criminal act or where a fundamental principle of law such as the *audi alteram* rule has been breached resulting in an unfair hearing.

APPLICATION TO THE FACTS

[10] The respondent bases its opposition to registration on three grounds, as already stated above i.e. (1) that the arbitrator erred in fact by finding that the lease agreement terminated on 30 April 2021; (2) that the arbitrator ought to have held that the lease agreement commenced on 1 December 2018; and (3) that the arbitrator erred at law by declining jurisdiction on respondent's counter-claim when actually he had.

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[1] *Gwanda Rural District Council v Botha* SC 174/20.
[2] *Chatpril Enterprises (Pvt) Ltd & Ors v Elnour United Engineering Group (pvt) ltd & Anor* HH602/21.
[3] *Peruke Investments (Pvt) Ltd v Willoughby's Investment Pvt Ltd and Anor* SC 11/15.
[4] *Chinhoyi Municipality v Mangwana & Partners Legal Practitioners* HH 403/16.

[11] In my view, the first two grounds are one in that once the arbitrator had determined the date of commencement, then by interpretation of the lease, the date of termination would automatically be three years from that date. The gripe of the respondent in this regard is that it was common to the parties that the premises required some work to be done in order to make it fit for the purpose of selling fuel and compliance with regulatory requirements of the industry. As a result, respondent was engaged with those improvements from May 2018 until November of the same year. It is argued that the arbitrator should have taken this fact into account when determining the date of commencement which must have been 1 December 2018 notwithstanding the date of 1 May 2018 which is stated in the written agreement.

[12] The issue of the improvements to the premises to comply with regulatory requirements is not contained in the agreement of lease signed by the parties. It is alleged that the issue was only discussed in correspondences between the parties dated 26th and 28th April 2018. In other words, the issue was not a term of the agreement. The written contract contains an entirety clause, Clause 21, which stipulates that the lease constituted the entire agreement and any variation to its terms must be reduced to writing and signed by the parties. Thus, the issue of the necessary improvements relied upon by the respondent could not have been found by the arbitrator to have altered the dates of commencement and termination. To hold the contrary would have put the arbitrator on a collision course with the established principle of law, the sanctity of contracts, as this would have been tantamount to foisting upon the parties a term not agreed between them. He correctly noted on p 8 of his award that:

> "It is not for the Arbitral Tribunal to negotiate or foist contracts on litigating parties. Where parties have failed to negotiate terms and conditions of their commercial agreements, the role of the Arbitral Tribunal is simply to interpret the existing contract before it."

[13] I agree with the finding of the arbitrator in his interpretation of the duration of the contract and its commencement and termination dates. The interpretation accords with the parole evidence rule. The agreement must be taken as the exclusive memorial of what was agreed between the parties. Clause 4, which is only subject to Clause 8, provide as follows:

> " 4. Duration
>
> Subject to the provisions of Clause 8 below, notwithstanding the date of signature, this lease shall come into operation on the 1st day of May 2018 and shall subsist for a period of three (3) years terminating on the 30th of April 2021 unless terminated earlier in terms of this agreement."

There is therefore no fault that can be placed at the door step of the arbitrator in this regard. Because there were certainly no grounds to sustain its argument in light of the above

unassailable provisions of the contract, the respondent has had to rely on implications and inferential reasoning that once the arbitrator accepted that the issue was discussed in correspondences, the implication was that the date of commencement would be delayed until such a time when it had what it termed 'beneficial use' of the premises. The argument is clearly untenable and not supported by evidence.

[14] I should hasten to mention that in endorsing the findings by the arbitrator in the preceding paragraphs, it is not meant to review or sit in appeal over the award and its reasons. It is only meant to demonstrate that the argument by respondent falls far short of the duty upon it to show that the award has the effect that is against the public policy of Zimbabwe. The arbitrator was not even wrong in his conclusions on the findings of fact. The first two grounds are therefore unstainable.

[15] It has also been argued that the arbitrator erred by declining to exercise jurisdiction over the respondent's counter-claim for compensation for the necessary improvements made to the premises. As such it is contended that the refusal to entertain the claim was against public policy. This argument must be distinguished from cases where the arbitrator totally fails to make a ruling on his jurisdiction where different considerations apply. In such cases, it has been held that failure to make a ruling by the arbitrator when his jurisdiction has been challenged is fatal and the subsequent award would be set aside. In that scenario the award will be against public policy because it violates the other party's right to be heard – the *audi alteram partem* rule which is a fundamental principle of our law. In the instant case he made a ruling which respondent views as wrongly made.

[16] It is argued by Mr *Goro* for the respondent that declining to exercise jurisdiction where the arbitrator has jurisdiction renders the award liable to be set aside on the ground of public policy. For this proposition he cited an English case of *GPF GP Sarl* v *The Republic of Poland* [2018] EWHC 409 [Comm]. That case if no relevance at all to the matter before me as it is clearly distinguishable. In that case the parties approached the court in terms of s 67 of the Arbitration Act of England. In terms of that section the application was held to be a re-hearing of the legal issues before the tribunal with parties allowed to lead more evidence and produce exhibits where necessary. On the nature of the hearing Mr BRAYN J said on para 7 of his judgment:

> "7. An issue has arisen between the parties as to the nature of a section 67 hearing, and what arguments may be advanced, and evidence adduced by the applicant on such a hearing

> which I address at Section F below. Suffice it to say at this point that I am satisfied that it is well established that the hearing is in the nature of a rehearing, and to that extent that Griffin advances any particular arguments not argued before the tribunal or adduces any new evidence, I am satisfied that Griffin may do so"

The procedure adopted as shown in the preceding paragraph demonstrates the authority's inapplicability to the present case in that in our law, this court does not sit to rehear the matter argued at the Tribunal neither do parties present new evidence. Further, the learned Judge in that case proceeded to decide the case on the basis of international law and not whether the refusal by the Tribunal to assume jurisdiction was against public policy. Different considerations were applied and critically, the judgment did not hold that declining jurisdiction in arbitral proceedings constitute a breach of public policy.

[17] Notwithstanding the above, in my reading of the arbitral award before me I do not see where the arbitrator declined jurisdiction to hear the counter-claim. His finding, which in my view is correct, was that on a proper construction of Clause 17 of the arbitral agreement, that claim would only be heard after the conditions set therein were fulfilled. In any event, that right to compensation did not arise from the agreement. The respondent negotiated itself out of compensation. Clause 17:3 provides:

> "17.3 Save for any addition or improvement which is removed from the premises as required by the Lessor in terms of clause 16.2, all additions and improvements made to the premises shall belong to the Lessor and may not be removed from the premises at any time. The Lessee shall not, whatever the circumstances, have any claim against the Lessor for compensation for any addition or improvement to the premises, including such improvements as were made with the Lessor's prior written consent nor shall the Lessee have a right of retention in respect of any improvements."

[18] Realizing the predicament it was in, the respondent based its claim for compensation on three heads under common law namely; an undertaking made by the applicant outside the agreement to compensate; right to claim compensation for necessary improvements and unjust enrichment. I express no view in this judgment whether these claims where within the purview of the arbitrator.

[19] In conclusion, apart from the arbitrator being correct in his findings, even if I am wrong in so concluding, the arguments put forward by the respondent do not at all establish that a sensible and fair-minded person would consider that the conception of justice is intolerably hurt by the award, for it to be contrary to public policy for this court to uphold it. To the contrary, the arbitrator correctly applied his mind to the questions before him which he totally

understood, to an extent that the alleged injustice does not even arise, let alone reaching the level of intolerability required.

[20] The applicant has asked for costs on the higher scale arguing that the respondent should not even have opposed the application, thus it must be penalized with higher costs. It appears it is fashionable in this jurisdiction for lawyers to seek costs at that level for that reason. I do not see the logic in this argument; it appears as if it is based on the notion that a party must be punished for exercising its rights to be heard and access to courts and to have their disputes determined fairly by impartial courts or tribunals. I am of the view that the values espoused in those rights override the granting of attorney and client costs and care must be taken to avoid passively curtailing these rights through inappropriate orders for costs on that scale. Thus, the award of costs on a higher scale must only be made in exceptional circumstances justifiable in the context of the above-stated rights, otherwise applicants/plaintiffs and respondents/defendants alike would be dissuaded to vindicate or defend their interests in court for fear of being mulcted with high bills of costs should they go on to lose their cases. That is against the spirit of the Constitution of Zimbabwe.

[21] **In the result, it is ordered as follows**:

1. The arbitral award made by Honourable ABC Chinake between the parties dated 3 August 2021 be and is hereby registered as an order of this Court.
2. The respondent shall pay costs.

Moyo & Jera Legal Practitioners, applicant's legal practitioners
Mbidzo Muchadehama & Makoni Legal Practitioners, respondent's legal practitioners