PETER JOHN FORSYTH
versus
THE HONOURABLE A.R. GUBBAY S.C.
and
GORDON CRAWFORD

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 25 FEBRUARY AND 08 MAY 2013

T. Mpofu, for the applicant
D. Ochieng, for the 2nd respondent
No appearance for the 1st respondent

Opposed Application

MAKONI J: The applicant approached this court seeking the setting aside of an arbitral award granted by the first respondent and thereafter substitute the award with its own order on the terms suggested by the applicant in the draft order.

At the commencement of the hearing Mr Mpofu applied for the amendment of the draft order. He applied that everything that comes after set aside be struck out. Paragraph 5 becomes paragraph 2 with an amendment to effect that the second respondent pays costs on a legal practitioner scale.

The application was not opposed. This is mainly because it is trite that this court, in exercising its discretion, cannot substitute its own decision for that of an adjudicating authority.

The basis for seeking the setting aside of the award is that the award constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic and accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intorably hurt by the award. In addition, it was averred that the arbitrator did not apply his mind properly to a crucial issue brought before him.

The background in this matter is that the second respondent and his wife are shareholders and directors of *Alfs Auto Electric & Accessories (Pvt) Ltd (Alf's)*. Certain negotiations took place between the applicant and the second respondent culminating in the signing of an agreement (the agreement) between the applicant and Alf's in August 2004. The material terms of the agreement were that the applicant would make available an interest free loan to Alf's in the maximum amount of Z$100 000 000.00 and that in turn the company would issue to him or his nominee 50 ordinary shares which would be equivalent to 25% of the issued share capital of Alf's. The amount so paid was to be shown in the books of Alf's as a credit to the applicant's loan account. The applicant would be appointed a non-executive director of Alf's. He would be paid a retainer fee in the amount and in such frequency as shall be decided by the board of Alf's by special majority.

Subsequent to the signing of the agreement, the applicant deposited ZWD100 million dollars equivalent to USD15 000.00 into the second respondent's account on 23 August 2004. In October 2004 he transferred an amount of US100 000.00 to Central Globe Trading in the United Kingdom. On 10 February 2005 and 2 March 2005 he made further payments of USD10 000 and USD15 000, respectively, to two South African companies.

The applicant later received information that the money he thought he had invested in Alf's had been used by the second respondent to purchase an immovable property in Borrowdale Broke. Alleging that he was induced to enter into this contract by a fraudulent misrepresentation by the second respondent alternatively that the second respondent had been unjustily enriched at the expense of the applicant, the applicant instituted arbitration proceedings against the second respondent. The first respondent found in favour of the second respondent and dismissed the applicant's claim. The applicant then instituted the present proceedings.

Under Article 34(2)(b)(ii) of the Model Law this court can set aside an award if it finds that the award conflicts with the public policy of Zimbabwe. Public policy

requirements have been debated in a number of cases in our jurisdiction. The most quoted case is Zesa v Maposa 1999 (2) ZLR 452 (sc). At 466EG 467 Gubbay J said:-

> "Under article 34 and 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. Where, however the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance 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 then it would be contrary to public policy to uphold it. The same consequence applies were the arbitrator has not applied his mind to the question or has totally misunderstood the issues, and the resultant injustice reaches the point mentioned above."

The approach to adopt when dealing with the defence of public policy was laid down in Isdore Husaiwevhu and 2 others vs USF Collaborative Research Programme HH237/10 where GOWORA J (as she then was) made the following remarks:_

> " The courts in this country have construed the defence of public policy very restrictively so that the objective of finality to arbitration is achieved. It follows therefore that the grounds upon which an award may be set aside or those on which a court may refuse to register the award are very narrow. Whether or not the arbitrator erred is not an issue that should concern this court……."

The applicant complains that the award is against public policy on six grounds.

1)<u>Award lends itself to an illegality</u>

It was argued that the award countenances an illegality in that the first respondent make a finding in favour of the second respondent when the second respondent and his witness had led evidence that the agreement was purely a sham and "window dressing" designed to avoid the second respondent in the legitimate payment of capital gains tax on the sale of the 25% shareholdings. The

first respondent upheld a view which supports an illegality.

My view is that the first respondent did not make a pronouncement that the scheme was illegitimate and unlawful. He commented that the conduct of Mr Wisdom, the second respondent accountant and witness, and Mr Cooper, the legal practitioner who drafted the agreement was unethical and unprofessional. I agree with the submission of the second respondent that the first respondent found it to be a scheme of avoiding to pay tax and expressed his personal disapproval of the scheme. The claim that the award is steeped in illegality is therefore not supported by the record.

2)Finds for a party he disbelieved

It was submitted that the first respondent disbelieved the second respondent and yet he found for him. It is sufficient to understand as the second respondent had the onus to establish an entitlement to the money paid by the applicant. He had failed to discharge the onus on what basis then would a finding be made in his favour.

I agree in Mr Ochieng that the fact that the first respondent found the second respondent unreliable is of no consequence. The totality of the evidence including that of the applicant did not sustain the applicant's case. The first respondent also had difficulties with the evidence of the applicant. He commented as follows at page 34 of the record:-

> "The claimant stuck to his version of the dispute. I gained the impression from listening to him that despite Mr Wisdom's contrary account, he had convinced of himself of the truth of his own. And this notwithstanding, that several material improbabilities were pointed out to him."

After this comment, the first respondent then went on to analyse the probabilities and found against the applicant.

3)Issue ignored

It was submitted that the issue of the $25 000-00 which settled Alf's debts was totally ignored. If the agreement was for the purchase of the second respondent's shares, why would the purchase price meet by obligations of the company. As will become clear when dealing with the issue of rectification the confusion must have started with the nature of the claim filed by the applicant. He chose to sue the second respondent instead

of Alf's or sue them jointly. The applicant does not explain what happened between 2004 and 2009. He however received from Alf's retainers and cash payments.

4)Rectification issue

It was submitted that there was a written agreement between the parties. The parol evidence rule precludes the second respondent from setting a different dimension to the agreement in the absence of a claim for rectification.

The need for rectification is stated in Christie's. The law of South Africa third edition at 371:-

> " The reason why rectification is necessary before the true version of the contract can be enforced is that, while the written contract stands unrectified, it excludes the evidence to prove the true version, by the combined effect of the parol evidence rule and the rule that no evidence may be given to alter the clear and unambiguous meaning of a written contract."

In *casu* it appears the applicant excluded the agreement. He sued the second respondent and yet he claims that he entered into an agreement with Alfs. The panol evidence rule did not, therefore, apply.

5)Failure to apply mind to a crucial issue

It was submitted that the import of the award reflects the first respondent's failure to apply his mind to crucial issue. The second respondent's case was that he sold his own shares to the applicant and he was free to deal with the proceeds from the sale as he pleaded. The first respondent chose to believe the evidence of Mr Wisdom which was to the effect that the applicant had sold unissued shares and that the proceeds would have belonged to the company. The first respondent seemed to be alive to this position going by the admitted exchanges during the hearing. The conclusion that he then reached that the second respondent was entitled to the proceeds of the sale could only arise from the first respondent missing the issue completely.

The first respondent was alive to the issue of shares during the hearing and in his determination. He dealt with the issue in the award of page 32 and 34 when he made the final decision. He gave his reasons as to why he arrived at the decision that he did. The

fact that he had earlier on during the proceedings made a statement contrary to his final decision is my view neither here nor there. He must have later considered the issue carefully and arrived at a different view to the prima facie view expressed earlier during the hearing.

6)Unjust enrichment

It was argued the alternative claim for unjust was not determined. The first respondent did not give reasons why he refused to grant the alternative relief. The award should therefore be set aside.

From the first respondent's reasoning on page 34, it is clear that the claim based on unjust enrichment was not sustainable. The first respondent made a finding that the applicant acquired 25% of the shareholdings in Alfs. The allegation that the applicant received nothing in return for his outlay would not be sustained. The first respondent might not have made specific pronouncements regarding the alternative claim but he determined it by the determination of the main claim. The facts in *casu* can be distinguished from those in *Delta Operation (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2002 (2) ZLR 81 (S) referred to by the applicant. In that case the arbitrator made an award for the alternative relief but did not give reasons. The court made a finding that this was in conflict with the public policy of Zimbabwe and would invalidate the alternative award. It is trite that you must give reasons for making an award.

From the above analysis of the issues raised by the applicant, it seems to me that the applicant is concerned with the correctness of the reasoning of the arbitrator. But as has stated in Usaiwevhu supra at page 7 of the cyclistled judgment;-

> "This court is not in this instance sitting as a court of appeal to adjudicate the correctness or erroneous nature of the reasoning of the arbitrator".

My view is that the award in this case is not contrary to public policy. The applicant has failed to establish that 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: per GUBBAY CJ in Maphosa supra.

Costs

The applicant sought an amendment to paragraph 5 which is now paragraph 2 of the draft order that the second respondent pays costs on a higher scale for two major reasons. Firstly the applicant took issue with the intemperate and out of place language employed in the opposing papers. Secondly the applicant complains that the second respondent unnecessarily took the court through the curriculum vitae of the first respondent, the object being to make him, as opposed to his award, untouchable.

Since I have made a finding against the applicant it will not be necessary to determine the above points. However I would also add my voice to the use of invective language. Mr Ochieng who appeared for the second respondent graciously conceded and advised the court that he will not defend intemperate language. The concession made is proper. The second respondent used as against the applicant such terms as a "dump and dense", and "schizophrenic oscillation".

The Supreme court in *Moyo & others v Zvoma* No. sc 28/11 at 59-60, recently dealt with the issue of such language in court proceedings and how it undermines and impairs the dignity of the judicial process. MALABA J stated:-

> " The respondents used language in their affidavits which was insultive of the first applicant and added nothing to the determination of the questions before the courts. It offended its sense of fairness and justice for the court to be put in a position in which it had to read through all the papers containing some of the impolite and discourteous language. One wonders, for example, what point the first respondent intended to make if not to offend when he said the application by the first applicant was "the result of a contrived afterthought; the manifestation of a mischievous and dissentious character". Paurina Mpariwa's use of words like "foolish", "sell-out" and "turncoat"against another litigant in an application to be placed before a court of law reveals serious lack of respect for judicial proceedings. There is need to discourage the use of such invective language in court proceedings".

I agree with the above sentiments as such language does not add anything towards the determination of the issues before the court and legal practitioners should not settle papers in which such language is used.

In the result I will make the following order:-

1. The application is dismissed
2. The applicant to pay the second respondent's costs.

Linda Chipato, applicant's legal practitioners

Costa & Madzonga, 2nd respondent's legal practitioners