AUGUR INVESTMENTS OU
versus
FAIRCLOT INVESTMENTS (PVT) LTD T/A T& C CONSTRUCTION
and
D.L. CRUTTENDEN

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 29 October 2015 & 9 March 2016

Opposed matter

F Girach, for the applicant
D Tivadar, for the 1st respondent

MATANDA-MOYO J: This is an application for setting aside of an arbitral award in terms of Article 34 (2) of the Model Law as set out in the Arbitration Act [*Chapter 7:15*]. The applicant bases his application on the following grounds;

1) That the Arbitrator made decisions on matters not placed before him;
2) That once the Arbitrator made a finding that the contract had not been cancelled, that should have been the end of the matter; and
3) That the arbitral award offends against the public policy of Zimbabwe.

The first respondent opposed the setting aside of the arbitral award on the basis that the award is not contrary to the public policy of Zimbabwe. It argued that the debt is due and owing and a decision that such a debt be paid can never be said to be contrary to the public policy of Zimbabwe. The first respondent denies that the Arbitrator decided on issues not placed before him. All issues determined by the Arbitrator were properly placed before him for his determination.

The brief facts are that the applicant is a company incorporated according to the laws of Mauritius. The applicant is carrying on a business of property finance and property development in Zimbabwe. In that regard the applicant was contracted to manage the upgrading and extension of the Airport Road by the City of Harare. In turn the applicant sub contracted the first respondent to carry out civil engineering works on the Airport Road. An agreement to that effect was entered into between the two parties on 25-26 March 2013.

Subsequent to that agreement the first respondent carried out works on the Airport Road to the tune of $4.8 million. A dispute arose as payment had not been made for almost two years culminating in the first respondent referring such dispute for arbitration. The applicant admitted owing the amount. The parties' bone of contention was whether payment should be by way of cash or by way of land transfer. After hearing the parties the Arbitrator made the following award;

1) That the applicant pay the first respondent the sum of $3 340 500.00 (three million three hundred and forty thousand and five hundred dollars) not later than Friday 4 April 2015.
2) That the applicant pay to the respondent the sum of $1 459 500.00 (one million four hundred and fifty nine thousand and five hundred dollars) not later than Thursday 4 June 2015. This payment may be made by way of transferring land to the first respondent but not later than 4 June 2015.

The above is the award which the applicant seeks its setting aside on the basis that it offends against the public policy of Zimbabwe.

Firstly the applicant complained that the Arbitrator made a determination on issues not placed before it. The applicant submitted the only issues referred for determination were;

1) Whether the agreement between the parties had been terminated and
2) That the land was not registered in the applicant's name and hence the applicant could not settle the sums due by way of transferring such land.

Instead of dealing with the above issues the applicant contended that the Arbitrator found that the main contract between City of Harare and the applicant had been terminated and such termination had the effect of bringing to an end the agreement between the applicant and the first respondent. The applicant submitted that it was never heard on the aspect of its contract with City of Harare.

I have perused the statement of claim and response. It is the applicant in its response which introduced the issue of its contract with City of Harare, in particular para 6 of its response where is said:

> "6……..
> 6.2. At all material times claimant was aware that the title deeds in the custody of C.W& G had been made available to the respondent by the City of Harare in consequence of the contract entered into it with the City of Harare for the construction of the Airport Road;
>
> 6.3……..

6.4 Accordingly respondent could not be the registered owner of the land held as security."

On p 299 of the record is an agreement between City of Harare and the applicant, entered on 30 May and 9 June 2008.

I therefore fail to understand the complaint by the applicant. It is my view that the Arbitrator did not deal with issues outside referral.

Let me now proceed to deal with the real issue, that is, whether the award is contrary to public policy. The issue of setting aside of an arbitral award on the basis that it is against the public policy of Zimbabwe is now settled. Article 34 (2) (b) (ii) provides:

"2 An arbitral award may be set aside by the High Court only if –
(a) …..
(b) The High Court finds that
(i) …….
(ii) The award is in conflict with the public policy of Zimbabwe"

For this court to set aside the arbitral award on the basis that it is contrary to public policy, the applicant must show that some fundamental principle of the law, morality or justice was offended. In *ZESA* v *Maposa* 1992 (2) ZLR 452 (S) at 466 E –G 466E-G Gubbay CJ made this now most used remark about public policy:

> "Where, however, the reasoning or conclusion in an award goes beyond mere faultiness on incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standard 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".

An arbitral award is not said to be contrary to public policy for the reason that it is wrong in law or fact. An arbitral award still stands despite its being erroneous in law and in fact. For it to be set aside on the basis that the conclusion reached is wrong, such conclusion should constitute an injustice between the parties. Can the same be said of the current award, is the question to be answered by this court.

As I have noted above, that the figures are outstanding and due is common cause. The applicant's complain is that as per their agreement with the first respondent payment was only to be effected by way of transfer of land. I didn't hear the applicant complaining that the facts before the Arbitrator were false. Whilst accepting the facts as correct the applicant submitted that their agreement with the first respondent provided for payment by way of "transfer of land" and not cash. The Arbitrator went on to order payment of cash after making a finding that the land used as security did not belong to the applicant. That finding by the arbitrator cannot be said to be outrageous. From the evidence placed before the Arbitrator, (in

the form of the title deed) it is common cause stand 654 Pomona Township is registered in the name of "The President of Zimbabwe its Successors or Assigns". In terms of the agreement between the parties in particular para 6 thereof, the above property was used as security by the applicant. In terms of the first respondent's case before the Arbitrator, the first respondent challenged the applicant's authority to use land not owned by itself as security. I do not therefore agree with the applicant's submission that, that particular issue was not before the Arbitrator.

The applicant purportedly ceded its rights in the Pomona Property. To date it is not clear that the applicant had or has any rights in that piece of land. No agreement was produced ceding any rights of that property to the applicant. The decision by the Arbitrator that the applicant could not cede rights not vested into it cannot therefore be said to be contrary to public policy of Zimbabwe.

As was enunciated in *Maposa* case *supra* this court does not sit as an appeal court. It is not concerned with the correctness of the decision unless if such incorrectness constitutes a grave inequity. See also *Muchaka* v *Zhanje and Anor* 2009 (2) ZLR 9 (H) at 11D-12B.

I am of the view that the Arbitrator's award cannot be said to be contrary to public policy.

Accordingly the application for setting aside the arbitral award be and is hereby dismissed with costs.

Costa Madzonga, applicant's legal practitioners
Gill, Godlonton & Gerrans, 1st respondent's legal practitioners