MICROPAL FINANCE (PVT) LTD
versus
ZIADA MICROFINANCE (PVT) LTD
and
L G SMITH

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 14 January 2016 and 18 May 2016

**Opposed Application**

*P S Jonhera*, for the applicant
*D Tivadar*, for the 1st respondent

MUREMBA J: The applicant and the first respondent are companies that are involved in money lending. On 23 November 2011 they entered into a Revenue Sharing and Joint Venture Agreement (JV Agreement). A dispute then arose between them and they went for arbitration before the second respondent who delivered his award on 8 December 2014. The applicant now challenges that award under Article 34 (2) (b) (ii) of the First Schedule to the Arbitration Act [*Chapter 7:15*] (the Model Law) saying that it is contrary to public policy and wants it set aside.

The Law

Article 34 (2) (b) (ii) of the Model Law provides that;

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

In terms of Article 34(5) of the said law it is stated that,

"*For the avoidance of doubt, and without limiting the generality of paragraph* (*2*) (*b*) (*ii*) *of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—*
(*a*) *the making of the award was induced or effected by fraud or corruption; or*
(*b*) *a breach of the rules of natural justice occurred in connection with the making of the award*."

In *Muchaka* v *Zhanje* & Anor HH 68-09 Patel J quoted with approval what Gubbay CJ said in *Zesa* v *Maphosa* 1999 (2) ZLR 452 (S) @ 465-466 when he considered the circumstances in which an award may be held to be in conflict with public policy. He said:

> "The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe. What has to be focused upon is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign forum would be prepared to recognise and enforce it. 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 recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.
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> ……
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> ……
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> An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator 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 and either uphold or set aside or decline to recognise 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 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, then it would be contrary to public policy to uphold it.
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> The same consequence applies 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."

In *Pamire & Ors* v *Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) it was stated that an award of damages for breach of contract is intended to put parties in the position they would have been had the contract between properly performed. Consequently, Makarau J held that to grant full damages to a party in spite of its own failure to meet its obligations under the contract would violate elementary notions of justice and would thus be contrary to public policy.

The Challenged Award

In terms of the JV Agreement the applicant and the first respondent collaborated in the provisions of micro-financing loans. The applicant would source the clients while the first respondent would provide funding for the loans. The parties would provide loans to employees of certain employers. The employers would make an undertaking to repay the loans by deducting the repayment instalments from the employees' salaries and pay over to either of the parties. The

parties would then account to each other. Following some payments which were made directly to the applicant, the applicant ended up owing the first respondent some money which constituted its share.

On 5 March 2012 and on 4 march 2013, Mr. Taruvinga, the Managing Director of the applicant executed on behalf of the applicant two Cessions of Agreements under which the applicant ceded to the first respondent all its rights to receivables from employees of Telone and employees of Premier Service medical Aid Society (PSMAS). The Cession Agreements were to service as continuing covering security for all amounts owed to the first respondent under the JV Agreement.

On 19 October 2013 the parties then entered into a Loan Agreement which was signed on behalf of the applicant by Mr. Taruvinga. The Loan Agreement recorded that the applicant was indebted to the first respondent in the sum of around US$2 million. The applicant undertook to repay this debt by way of 12 monthly instalments of US$170 000-00. The applicant initially complied with the Loan Agreement by paying some of the instalments. In 2014 Mr. Taruvinga executed on behalf of the applicant a third Cession Agreement pursuant to the Loan Agreement.

The applicant then failed to meet its payment obligations to the first respondent under both the JV Agreement and the Loan Agreement. As a result, the first respondent sought to enforce the Cession Agreements by requesting Telone and PSMAS to pay their debts to it. This resulted in a dispute between the applicant and the first respondent as the applicant was now challenging the validity of the three cession agreements and the loan agreement. This is what resulted in the parties appearing before the second respondent, the arbitrator. The first respondent was the claimant whilst the applicant was the respondent. The first respondent wanted the three Cession Agreements declared valid and enforceable. The applicant opposed the request on the ground that Mr. Taruvinga had executed the Cession Agreements without the authority of the applicant's board and that the first respondent had been aware of it. The applicant thus argued that the three cession agreements were not binding on it. The applicant also stated that the other additional ground which made the third cession agreement unenforceable was that the Loan Agreement on which it was based was invalid *ab initio*. It was submitted that it was invalid *ab initio* for the reason that it was stated or provided in the contract that it (the Loan Agreement) would come into force on the fulfillment of certain conditions precedent, one of them being the

provision of security by way of a pledge of shares by the applicant. The applicant submitted that this condition had not been met or fulfilled, and as such the loan agreement did not come into force. It was the applicant's argument that even assuming that the third cession agreement was properly authorised, it could not possibly be valid as the principal obligation (the loan agreement) on which it was founded was not yet in force. The applicant further submitted that the loan agreement itself was also not authorised by the applicant and the first respondent was aware of it.

The parties agreed that the arbitrator could also deal with the issue of the validity of the Loan Agreement in the same proceedings as it would save them both time, money and as it also avoided the risk of inconsistent arbitral awards.

On 9 October 2014, when arbitration proceedings were midway, the applicant filed a Consent to Award in respect of the three Cession Agreements. The consent was worded as follows:

> "Be pleased to take notice that that the Respondent hereby withdraws its defence to the Claimant's claim and accordingly consents to an award on the terms sought by the Claimant in the statement of claim".

The remaining issue therefore, that had to be decided by the arbitrator was whether the Loan Agreement came into force and was valid. After hearing the matter, the Arbitrator made a determination or declaration on 8 December 2014, that the Loan Agreement was valid. It is this determination that the applicant wants set aside on the ground that it is contrary to public policy. The arbitrator's reasoning for holding that the Loan Agreement had come into force and was valid was that the applicant, by having made a concession on 9 October 2014, that the third Cession Agreement was valid, it had also admitted that the Loan Agreement was valid since the third Cession Agreement was borne out of the Loan Agreement. He said:

> "Furthermore, Micropal in its response alleged that the third Cession Agreement was not valid because it was dependent on the Loan Agreement which was not valid. However, Micropal at the last minute accepted that the third Cession Agreement is valid. It is submitted that the third Cession Agreement was dependent on the validity of the Loan Agreement. Once it accepted that the third Cession Agreement is valid, it automatically follows that the Loan Agreement must be valid."

Submissions made before me

Mr. *Jonhera* for the applicant submitted that the evidence which was led before the Arbitrator clearly showed that the Loan Agreement could not have come into force by reason of the non-fulfilment of the conditions precedent. He submitted that it is contrary to the public policy of Zimbabwe to hold that an agreement which is clearly unenforceable is valid and enforceable. He said that it turns the conception of justice in Zimbabwe upside down and goes beyond more faultiness.

Mr. *Jonhera* further submitted that the Arbitrator did not deal with the other basis upon which the loan agreement is clearly not enforceable as the record reflects. The applicant did not care to highlight this other basis in his founding affidavit, and as such, I will not even consider it because it is not my business to go hunting or looking for things that have not been fully explained by the applicant in its founding affidavit.

It was also submitted that the interest rate in terms of the Loan Agreement was usurious and as such it was being challenged.

Mr *Tivadar* submitted that whilst the applicant had initially argued that the third cession agreement securing the Loan agreement was invalid due to the Loan Agreement not coming into force because of non-fulfilment of the condition precedent, the applicant had however, later conceded that that third cession agreement securing the Loan Agreement was valid. He submitted that this could only mean that the Loan Agreement was valid and enforceable. He said that it would have been logically untenable for the Arbitrator to reach any other conclusion. He submitted that the Arbitrator had every right and was compelled to take into account the applicant's concession. He said no issues of public policy arise in the case. He also submitted that the interest rate was never an issue before the Arbitrator, so it cannot be an issue now.

Disposition

As was stated in *Zesa* v *Maphosa* (*supra*), an award will not be contrary to public policy because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Under Article 34 or 36 of the Model Law this court does not exercise an appeal power by having regard to what it considers should have been the correct decision. It is only 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 it can be held to be contrary to public policy.

Given the background of the matter, I find it difficult to understand why the applicant insists that the Arbitrator was wrong in upholding the Loan Agreement as valid and enforceable. The third Cession Agreement was founded on the Loan Agreement. Were it not for the existence of the Loan Agreement, the third Cession Agreement would not have been executed by Mr. Taruvinga on behalf of the applicant. In the middle of the arbitration proceedings, the applicant in an about turn, made a concession that all 3 Cession Agreements which it had been heavily contesting were now being consented to. What is surprising is that the applicant chose to concede to the third Cession Agreement yet it was still disputing the Loan Agreement upon which it was or is founded. It is illogical to perceive a loan agreement which is invalid which bears a valid cession agreement. Once the Loan Agreement is invalid then it follows that the Cession Agreement which is founded on it is also invalid. The Arbitrator reasoned very well when he said that once the applicant accepted that the third Cession Agreement was valid, it automatically followed that the Loan Agreement was valid too. As was correctly submitted by Mr *Tivadar,* it would have been logically untenable for the Arbitrator to reach any other conclusion. The Arbitrator was correct in taking into account the applicant's concession that the third Cession Agreement was valid. As correctly argued by Mr *Tivadar* no issues of public policy arise here.

Even if the Arbitrator's reasoning and conclusion are wrong in fact or in law, the award cannot be held to be contrary to public policy. His reasoning is not so flawed as to violate some fundamental principle of the law, morality or justice. His reasoning and conclusion do not defy logic such that it can be said that it turns the conception of Justice in Zimbabwe upside down.

Lastly, the issue of the interest rate which the applicant sought to raise in the present case was not an issue before the Arbitrator. There is no basis for raising it now, so I will disregard it.

The applicant failed to justify its application. In the result, the application is dismissed with costs.

*Wintertons,* applicant's legal practitioners
*Gill, Godlonton & Gerrans,* 1st respondent's legal practitioners