RADCHART INVESTMENTS (PVT) LTD
Versus
SAFEGUARD SECURITY SERVICES & ANOTHER

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 29 June, 2017and 31 July, 2017

Opposed Matter

Advocate Magwaliba, for the applicant
Advocate Wood, for the respondent

MANGOTA J: On the night of 5th/6th July 2015, thieves broke into, and stole from, the applicant's shop. They stole some goods and money. Their loot amounted to $64 272 *in toto.*

One Nhamoinesu Shoniwa was the guard on duty at the applicant's shop when the burglary occurred. His employer, the first respondent, posted him at the shop for the purpose. It did so in terms of a security services contract which the applicant and it ("the parties") signed between them on 6 March 2013.

The security services contract ("the contract") related to the provision by the first respondent of security guard services at the applicant's shop. The shop is at Gazaland Shopping Centre, in Highfield, Harare.

Following the burglary, the applicant laid a claim with its insurance company. It did so in terms of clause 3.1 of the contract. The clause reads, in part, as follows:

> "The client (i.e. applicant) further undertakes in the event of its suffering a loss, to claim in the first instance from its own insurer and to send a copy of this to Safeguard" (i.e. the first respondent).

A portion of clause 3.1 of the contract enjoined the applicant to carry its own insurance

cover at all times that the contract remained in force. The cover was to extent to indemnify it against all insurable losses which might arise.

The applicant did not insure all its property. It insured only a portion of the same. It, because of the stated fact, recovered only $7245 from its insurance company. The recovered sum was commensurate with the insurance cover which it had taken.

The applicant sought to recover the difference from the first respondent. It, in the mentioned regard, addressed a letter to the first respondent on 11 July 2015. It claimed compensation for the cash that was stolen from its safe which was in the shop and equipment which the thieves made away with on the night of the burglary.

The first respondent denied liability. It submitted that its employees executed their duties diligently during, and after, the burglary. It relied on the limitation of liability clause which was in the contract as its second leg of denying liability. It, in short, refused to meet the applicant's claim.

Clause 4.4 of the contract spelt out the manner in which dispute (s) which arose between the parties would be resolved. It reads:

> "4.4. In the event of any dispute between the parties in regard to this contract or any claim arising therefrom, both parties agree to submit such dispute for determination by a single arbitrator to be agreed between them and agree to abide by such determination" (emphasis added)

It was by virtue of the cited provision of the contract that the second respondent came on board. He heard the parties' respective sides of the case and made a determination. His determination forms the basis of the present application.

The applicant disagreed with the conclusion which the second respondent reached. It stated that the arbitral award which he issued was so grossly wrong as to make a right thinking person lose confidence in the law of Zimbabwe. The award, it said, was against the public policy of Zimbabwe. It moved the court to set it aside in terms of Article 34 (2) (b) (ii) of the Model Law.

The first respondent opposed the application. It denied that the reasoning or conclusion of the arbitrator constituted a palpable inequity which was 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. It stated that the arbitrator's conclusion was based on clause 3.1 of the contract. It submitted that it

failed to appreciate the logic which related to the criticism of the second respondent's decision when the applicant failed to comply with a contractual obligation which was intended to protect it from loss even if the first respondent caused that loss. It disagreed with the second respondent's findings and agreed with his conclusion. It moved the court to dismiss the application with costs.

Article 34 (2) (b) (ii) of the Ancitral Model Law under which the applicant filed the present application reads:

"(2) An arbitral award may be set aside by the High Court only if–

a) -----

i) ------

ii) ------

iii) ------

iv) ------

or (b) the High Court finds that–

i) ----; or

ii) the award is in conflict with the public policy of Zimbabwe" (emphasis added)

Wikipedia, the free encyclopedia defines public policy as the principle guide to action taken by the administrative executive branches of the state with regard to a class of issues, in a manner consistent with law and institutional customs." The foundation of public policy, according to *Wikipedia*, is comprised of national constitutional law and regulations. Further substrates of the same include both judicial interpretations and regulations which are generally authorised by legislation. *Wikipedia* stresses that public policy is considered strong when it solves problems efficiently and effectively, serves justice and supports governmental institutions and policies [emphasis added].

Public policy as defined by *Wikipedia, the free encyclopedia* carries in it some elements of justice delivery. It is, if one may venture the statement, a tool of resolving disputes in an efficient and effective manner. Its aim and object are, in the parlance of the work of the courts, to serve the ends of justice and to ensure that real and substantial justice is attained in any given case.

Public policy, in my view, should not allow a judicial officer to arrive at an outrageous decision. It should allow the conclusion he reaches, on the facts of each case, to be in consonant with logic and good reason. It, in other words, should encourage the judicial officer to adhere to

the letter and spirit of the law in his interpretation of contractual obligations, subsidiary legislation, statute law as well as a country's constitution. Anything short of that can, at best, be described as being offensive to public policy and, at the worst, as being devoid of reason and/or logic.

In casu, the second respondent heard the parties. He found the first respondent liable. He, in the same breadth, concluded that the first respondent was, for reasons which he gave, not liable.

The critical portion of the second respondent's judgment reads:

> "My conclusion on that issue is that the acts or omissions of the respondent's employees were willful or grossly negligent. Therefore clause 3 of the contract does not exempt the claimant (sic) from liability…..
>
> However, I consider that there is a provision in clause 3 which does not protect the respondent (sic). Clause 3.I provides that the claimant undertakes to carry its own insurance cover at all times, which cover shall extend to indemnify it against all insurable losses which might arise, be they in consequence or otherwise of the guard or related services provided by the respondent. The claimant did have an insurance cover but that only related to losses of money amounting to $7 000 or less, whereas the contract required that the insurance cover should extend to indemnify it against all insurable losses. If the claimant entered into an agreement with an insurer to cover whatever amounts of money happened to be in the safe, the insurer would have paid an amount equal to the value of the money stolen from the safe. Then the claimant would not have sought payment from the respondent." (emphasis added).

In ruling as he did, the second respondent opened himself to serious criticism. He blew both hot and cold. He approbated and reprobated. He misinterpreted the parties' contract. He overlooked the principle of subrogation which lies at the centre of insurance law.

Subrogation means the substitution of one person for another so that the person substituted or subrogated succeeds to the rights of the person whose place he takes. It expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the latter's rights and remedies against third parties [see *Gordon and Gerts:* The *South African Law of Insurance*, 3 ed, Juta & Co. Ltd 1983 at p 243.]

The principle of subrogation finds eloquent expression in the case of *Ackerman* v *Loubster* 1918 OPD 31 the headnote of which reads:

> "a person insured against accident has the right to recover damages from a wrongdoer for any wrong done to him although he has already been compensated in respect of such wrong by the insurers, but, as the principle of subrogation is applicable in our law, the insured, if fully compensated by the insurer, becomes a trustee for any compensation paid him by the wrongdoer and is bound to hand over to the insurer whatever money he receives from the wrongdoer over

> and above the actual loss he has sustained after taking into account the amount he has received under the contract of insurance.
>
> Semble: An insured who has been fully compensated by the insurer may cede his right of action against the wrongdoer to the insurer and the insurer may then sue in the name of the insured."

The second respondent missed the point in a palpable manner when he concluded as he did. He overlooked the point that, although the contract enjoined the applicant to insure all its insurable goods, non-insurance of some of the goods did not absolve the first respondent. *A fortiori* when his findings were that it was liable. He should have realised that the moment that he found the first respondent liable, the applicant or the latter's insurance company would have proceeded against the first respondent on the basis of the principle of subrogation.

The logic of the matter would have been that the applicant would have laid a claim against its insurance company. The company would have indemnified the applicant in full, or in part, as *in casu*. The applicant would, where it was compensated in full, have ceded its rights and title in the claim to the insurance company. The insurance company would, standing in the shoes of the applicant, have sued the first respondent so that it is placed in the position it was prior to the loss which the latter caused. Alternatively, the applicant would have sued the first respondent, recovered from the latter the total value of the loss and passed the same to the insurance company.

It was on the basis of the principle of subrogation that the parties inserted the last portion of clause 3.1 in the contract. The clause which reads "the client further undertakes, in the event of its suffering loss, to claim in the first instance from its own insurer …." served no other purpose than to recognise that the applicant stood to be indemnified by its insurance company and that, where full indemnification was not forthcoming as *in casu*, it would have to proceed against the first respondent for the remainder of its claim.

The applicant breached the contract when it insured some, and not all, of its goods. That breach is, however, the subject of another matter between the parties. It does not allow the first respondent to hide behind it and shake off from itself the liability which the second respondent found against it.

The insurance clause was for the benefit of the applicant. It was meant to indemnify the applicant against any insurable losses which might arise. It indemnified it to the extent of the

insurance cover which it took. It must, therefore, recover the remainder of the loss from the first respondent whose liability the second respondent was pleased to find.

On the strength of the principle of subrogation, the insurance company would most likely stand in the shoes of the applicant. It would, in that regard, recover the sum which it paid to the applicant as compensation for part of its loss. The long and short of the matter is that the loss should, in terms of the law of insurance, lie where it falls. The applicant and the latter's insurers should, in other words, be placed in the position which they were prior to the loss which the first respondent caused to them.

I am, on the basis of the foregoing, satisfied that the conclusion which the second respondent reached, on the evidence which was placed before him, was unconscionable. It was offensive to the public policy of Zimbabwe. It cannot, therefore, stand.

What remains for me is to make a comment in regard to paragraph two of the applicant's draft order. The paragraph reads:

> "The cause between the applicant and the first respondent arising from the applicant's loss of property and money on 5 July 2015 shall be resolved by way of arbitration before a different arbitrator." [emphasis added]

The first respondent drew my attention to the case of *ZESA* v *Maposa*, 1999 (2) ZLR 452 (S) 467 wherein GUBBAY CJ, commented on the matter which was on all fours with the present one and stated as follows:

> "where a court sets aside an arbitral award it may not usurp this right of the parties by remitting to the arbitrator for re-determination. It must leave it to the parties to proceed as they deem fit. Therefore, in the present case, although the award is to be set aside it will be up to the appellant and the respondent to choose whether to re-approach the arbitrator and request him to decide the dispute or to arrange a fresh arbitration, or to take any other action they consider appropriate."

The learned Chief Justice's pertinent remarks remain in consonant with clause 4.4 of the parties' contract. They will, therefore, make a choice of how they intend to proceed towards a resolution of the dispute which exists between them.

I, in line with the remarks of GUBBAY CJ, strike out para 2 of the draft order and grant the application as prayed.

Madanhi, Mugadza & Co Attorneys, applicant's legal practitioners
Matizanadzo & Warhurst, 1st respondent's legal practitioners