

WILLOUGHBY'S INVESTMENTS (PRIVATE) LIMITED
versus
PERUKE INVESTMENTS (PRIVATE) LIMITED
and
THE HONOURABLE MR JUSTICE (Ret) A. R. GUBBAY SC

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 5 March 2013 & 16 April 2014

Opposed matter

L. Uriri, for the applicant
E.W.W. Morris, for the first respondent

ZHOU J: This is an application in terms of Article 34(2)(b)(ii) of the Arbitration Act [Cap7:15] for the setting aside of an arbitral award rendered by the second respondent in favour of the first respondent. The application is opposed by the first respondent. The background facts to the dispute which the second respondent was called upon to arbitrate are eminently summarised in the award. They are as follows:

The applicant and the first respondent purchased two adjoining pieces of land, known as Stands 895 and 894, respectively. They are both 892 square metres in extent. The two properties are held under separate deeds of transfer. On the two pieces of land stands a building known as Lonrho House. Prior to 6 September 1999 the two properties were owned by one company, Lonrho Properties Zimbabwe (Private) Limited. That is the company from which the applicant and respondent purchased the two adjacent properties. The greater portion of the building rests on Stand 894. It is common cause that what was advertised for sale was the building on the two pieces of land. The applicant paid for his property a figure which represented 30% of the purchase price while the first respondent paid 70% of the purchase price. Lonrho House was let to a third party as one unit despite the fact that it sits on the two contiguous stands. The expenses for the building were shared equally between the applicant and first respondent. The first respondent which received the rentals apportioned the net rentals on a ratio of 70% to itself and 30% to the applicant. The second respondent found, as a fact, that there was no agreement between the parties that the rentals would be shared in those proportions.

The issue which was referred to the arbitrator, the second respondent, was whether the net rental realised from the building should be shared equally by the parties or in the proportions of 70% to the first respondent and 30% to the applicant. The second respondent came to the conclusion that the relationship between the applicant and first respondent in acquiring the two contiguous stands “as a single entity, is one of co-ownership in proportion to the purchase price each paid. And, likewise, that in leasing the stands to the World Bank as a single unit the relationship of the parties became one of co-lessors, each being due only its pro-rata share of income derived from the payment of rental.” Based on that conclusion, he determined that ‘the share of the income derived from the leasing of the two stands as one indivisible unit, be in proportion to the specific contribution made by each party to the purchase price of the single entity.’ Accordingly, the claim by the applicant to be awarded 50% of the net rental was dismissed. In the award it is held that the same conclusion would be reached even if the relationship between the applicant and the first respondent was to be regarded as a partnership and the principles relating to partnerships were applied. That is the award which the applicant invites this Court to set aside on the ground that it is contrary to the public policy of Zimbabwe.

The applicant moved the court to strike out the opposing papers filed on behalf of the first respondent on the grounds, firstly, that the opposing affidavit is invalid and, secondly, that the deponent to the opposing affidavit has no authority to represent the first respondent. The issue of the invalidity of the opposing affidavit on the basis that it was not properly sworn to was not persisted with in the heads of argument and in oral argument. The applicant persisted with the contention that the deponent was not authorised to represent the respondent. That argument seems to be raised with amazing regularity these days. The applicant’s contention is not that the respondent has not sanctioned the opposition to the application but, rather, that the deponent is not authorised to represent the respondent in these proceedings. But the respondent is represented not by the deponent but by its legal practitioners. The rules are clear as to the qualification for a person to depose to an affidavit. Order 32 r 227(4) provides that an affidavit filed in written applications “shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein”. In other words, a person who has knowledge of the facts and can swear to those facts is the one qualified to depose to an affidavit in application proceedings. The applicant is not contesting the assertion that the deponent to the affidavit has knowledge of the facts stated in the affidavit. The cases cited by the applicant in its heads of argument

relate to authority to institute proceedings on behalf of a company or to take certain decisions on its behalf, and not to the competence of a witness to depose to an affidavit on behalf of a company. Compare *Madzivire & Others v Zvarivadza & Others* 2005 (2) ZLR 148(H); see also *Madzivire & Others v Zvarivadza & Ors* 2006 (1) ZLR 514(S). For that reason, the objection cannot be sustained.

The first respondent, on the other hand, objected *in limine* to the application on the basis that it was filed out of time. The first respondent contended that the arbitral award was ready for collection by the parties on 25 February 2011 when a letter was addressed to the applicant's legal practitioners by the Secretary to the Commercial Arbitration Centre advising them that the award was ready for collection upon payment of the fee stated in the letter. The applicant did not attend to collect the award as advised. The award was subsequently delivered to the applicant's legal practitioners on 14 March 2011 under cover of a letter dated on the same date.

Article 34(3) of the Arbitration Act [Cap 7:15] provides as follows:

“An application for setting aside may not be made after three months have elapsed from the date on which the party making the application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.”

The above provision shows that the period of three months is reckoned from the date that a party wishing to apply for the setting aside of an arbitral award received the award. Mr Morris for the first respondent submitted that the date on which the award was made available to the parties must be taken as the date on which the parties received the award. In this instance that date would be the 25th of February 2011 when the applicant was notified that the award had been completed and was available for collection.

According to the *Longman Dictionary of Contemporary English*, ‘receive’ means “to get (something given or sent to one)”. The *Oxford Advanced Learners’ Dictionary* explains the meaning of the word ‘receive’ as follows: “to get or accept sth that is sent or given to you”. The word ‘received’ to me means that the award must have been sent or delivered to the recipient. In this case there was an invitation to collect the award. Until the award was delivered to or collected by the applicant one cannot say that the applicant had received it. The letter of the 25th February 2011 does not amount to *traditio longa manu* as submitted by Mr Morris. That letter does not amount to a pointing out (with the long hand) of the item to be delivered. Further, the nature of the thing-the award- is such that the court would be most reluctant to extend that form of delivery to it as it could be easily handled and physically

given to the applicant, as what eventually happened on 14 March 2011. See *Groenewald v Van der Merwe* 1917 AD 233 at 239; *Mankowitz v Loewenthal* 1982 (3) SA 758(A) at 765. The award was, therefore, received by the applicant on 14 March 2011 and not on 25 February 2011. The application was, therefore, filed timeously. Compare *Mtewa & Anor v Mupamhadzi* 2007 (1) ZLR 253(S). On that account, the objection *in limine* fails.

Turning to the merits of the dispute, I need to consider, firstly, the true nature of the relationship between the parties and its implications on the sharing of the net rent, bearing in mind the fact that the parties paid different amounts as the purchase prices for their properties. Whatever conclusion I reach on that aspect, I will then need to consider whether the arbitral award rendered is impeachable on the ground of being in conflict with the public policy of Zimbabwe. The instant case indubitably presents an unusual scenario that defies the straitjacket of the ordinary principles relating to ownership of immovable property. It is a situation *sui generis*. The parties own their two properties individually, each in terms of a separate deed of transfer. The building is, however, a part of the two immovable properties having acceded to them by *inaedificatio* in accordance with the Roman maxims, which have been received in the Roman-Dutch law, *superficies solo cedit* and *omne quod inaedificatur solo cedit*: everything which is built on or attached to the soil forms part of the soil. C. G. van der Merwe & de Waal, *The Law of Things & Servitudes*, p. 126. The building, being immovable property, cannot be said to be 'owned' jointly by the parties in the ordinary sense of the word, as there is no title deed relating to it in which the applicant and the first respondent are stated as the owners. What can be said is that it is indivisible property which has acceded to two separately owned contiguous pieces of land. It is now an integral part of the two pieces of land.

There is no evidence that 70% of the usable rentable area of the building is on the land belonging to the respondent and 30% of it on the applicant's stand. For that reason, the parties' undivided shares in the building cannot be determined by reference to those proportions. I am not, therefore, persuaded that the conclusion by the second respondent that the relationship between the parties is one of co-ownership in proportion to the purchase price each paid and that as co-lessors the parties are entitled to a pro rata share of the net rent based on the proportions of their purchase prices in relation to the full purchase price for the two properties and the building is legally sound. My understanding is that the entire space covered by the two stands, including the area on which there is no building, is being leased in

terms of the same lease agreement. Put in other words, the two stands are being leased as one unit.

Mr *Morris* for the respondent urged the court to find, as did the arbitrator, that the relationship was one of partnership. I have no difficulty with the conclusion that the relationship is one of a partnership insofar as the building is concerned. The second respondent found that capital contributions of the parties to the partnership were 30% from the applicant and 70% from the respondent. I do not agree. The parties' contributions were their immovable properties, not the money which they paid as the purchase price for the properties. The purchase price was paid not into the partnership business but to a third party, the seller of the immovable properties. Although the parties paid different purchase prices for the properties, they own those properties separately. Each of those properties contributes to the housing of the building. But it is not just the building which is leased by the tenant hence an inquiry into the proportions of the building on the two contiguous stands is unnecessary. The parties have contributed equal pieces of land into the partnership. It is immaterial that a larger portion of the building is located on the stand belonging to the respondent. The building is indivisible. It has not been shown that if the portion of the building which rests on the applicant's stand is demolished the building can remain intact and still be leased at 70% of the rent or that it can be leased at all.

Article 34(2)(b)(ii) of the Arbitration Act [*Cap 7:15*] provides that an arbitral award may be set aside by this Court if it finds that "the award is in conflict with the public policy of Zimbabwe".

The test applied in determining whether an arbitral award is in conflict with the public policy of Zimbabwe is settled. In the case of *ZESA v Maposa* 1999 (2) ZLR 452(S) at 466E-G, the test is set out as follows:

"(T)he 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 outrageous in its defiance of logic or acceptable 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."

See also *Delta Operations (Pvt) Ltd v Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81(S) at 85C-E; *Muchaka v Zhanje & Anor* 2009 (2) ZLR 9(H) at 11D-12B.

Having found that the parties' contribution to their partnership is equal, in that they have each contributed a stand, it seems to me that unequal sharing of the net rentals constitutes a palpable inequity that affronts the conception of justice in an intolerable manner. It has not been shown that the value of the contribution of the respondent's property to the lease is 70% while that of the applicant's is 30%. Equally, it has not been shown that the applicant holds an undivided 30% share in the building. The notarial lease agreement with the International Bank for Reconstruction and Development recorded the applicant and respondent as joint lessors without reference to any shares. It is common cause that the expenses were shared equally between the parties. The mathematical calculation posited by the first respondent in its heads of argument does not accurately reflect the effect of the parties sharing expenses equally. In any event, the fact that the expenses were shared equally is not disputed by the first respondent in its opposing affidavit. The trite principle of the law is that what is not denied in affidavits must be taken to be admitted. See *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121(S) at 127F. At the arbitration proceedings the first respondent's witness, Mr Cranswick confirmed that the deductions for expenses from the gross rentals were paid by the parties in the proportion of 50/50. It would be a palpable inequity to require applicant to contribute 50% towards the expenses while receiving 30% of the net profit on the basis that it paid a lower purchase price for its stand than that paid by the first respondent. Such an approach amounts to blowing hot and cold; to approbate and reprobate. It places the award in conflict with the public policy of Zimbabwe.

In the draft order the applicant asks this Court to set aside the award and to remit the matter to the second respondent for the computation of the amount due to it under the notarial lease. The latter relief falls outside the mandate given to this Court in terms of article 34 of the Arbitration Act. The court is only empowered to set aside the award.

In the result, it is ordered as follows:

1. The arbitral award rendered by the second respondent dated 25th February 2011 be and is hereby set aside.
2. The costs of this application shall be paid by the first respondent.

Mutumbwa Mugabe & Partners, applicant's legal practitioners
Atherstone & Cook, first respondent's legal practitioners