HC 2055/14

TENDAI G. KARONGA
versus
ZIMBABWE LEAF TOBACCO COMPANY (PVT) LTD
and
RETIRED JUSTICE M.H. CHINHENGO

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 18 June 2015 and 20 January 2016

Opposed application

T Hungwe, for the applicant
Ms *D Ndawana*, for the respondent

MAKONI J: The application before me is an application to have an arbitral award made in favour of the first respondent set aside. The first respondent made a counter application to have the same arbitral award registered with this Honourable Court. The facts of the case have been covered in detail in the pleadings and what appears below is a brief summary of the relevant facts.

In 2007 the applicant entered into a Tobacco Grower Contract Agreement with the first respondent. The general terms of this agreement were that the first respondent was to assist the applicant in growing tobacco during the 2007 – 2008 tobacco farming season and in return the applicant would deliver said crop to the first respondent.

A dispute between the two parties arose after a loss was suffered during said farming season. The applicant became indebted to the first respondent and there was disagreement as to the extent of the applicant's indebtness. Furthermore, the parties were in disagreement as to the how blame for the losses was to be apportioned between them. The dispute resulted in arbitration and the second respondent was the arbitrator.

During arbitration the applicant argued that the loss suffered was in part due to the fact that the first respondent had failed to supply the applicant with a generator and as a result

persistent power cuts affected the applicant's yield. The first respondent argued that the applicant never requested for a generator from them and therefore the first respondent was not at fault and had performed in terms of their agreement. The applicant also argued that the first respondent failed to deliver coal to the applicant as per their agreement. This, accordingly, affected his operations. The first respondent denied this and stated that they had indeed supplied the applicant with the requisite coal. Lastly, the applicant was opposed to the first respondent claiming money in United States dollars, USD, when some of the transactions between the parties had been in Zimbabwe dollars and interest being charged at the rate of 11% per annum.

The second respondent succinctly summarised the issues before him in arbitration as follows in para 10 of the arbitral award:

> "(a) whether the claimant breached the terms of the conditions of the agreement by failing to supply the respondent with a generator;
> (b) whether the respondent is indebted to the claimant in the sum of US $ 34 499.14 together with interest thereon at a rate of 11% per annum from 13 March 2008 to date of payment;
> (c) whether claimant can claim payment of the amount due in United States Dollars; and
> (d) who should pay the costs of the arbitration."

The applicant's son, Tapuwa Karonga, and the first respondent administrator, Leshi Ngulube, gave evidence at the arbitral proceedings. Based on the evidence put before him, the second respondent found that the applicant had failed to prove that they did in fact request a generator from the first respondent. This is because documentation like the Annual Production Schedules did not have a generator listed on them. Furthermore, the applicant's son's evidence was to the effect that he told his father that they needed a generator but he could not prove whether or not his father had in fact requested one. The first respondent's witness on the other hand stated that all requests to the first respondent had to be in writing thus if the applicant had indeed requested a generator the same would have had to be in writing and no oral request were accepted.

With regards to the issue of the delivery of the coal, the second respondent found in favour of the first respondent as they produced a Tax Invoice signed by Tapuwa Karonga. This Tax Invoice identified inputs disbursed to the applicant and coal was list on this invoice. The

second respondent did note, however, that the first respondent could have produced more concrete evidence but that the Tax Invoice as it stood was sufficient.

Despite finding for the first respondent the second respondent was of the view that the first respondent could have done more to assist the applicant. In light of this, the first respondent was apportioned responsibility for 20% of the loss suffered while the applicant was apportioned 80% of the responsibility. The second respondent found that the parties agreed to an interest rate of 11% per annum and that the interest of justice required that the amount due be paid in USD as that was now the operational currency. The applicant was thus ordered to pay USD 30 827.14 and 75% of the costs of arbitration.

It is worth noting at this point that the parties, more particularly the applicant, did not produce a record of the proceedings at the arbitration and as such I must rely on the arbitral award itself when looking at what evidence was led at the trial. This is unfortunate as the applicant ought to have attached a record of the proceedings. This will become more apparent as the judgment continues.

The applicant now challenges the arbitral award. The applicant cites art 34 of the Model Law contained in the First Schedule to the Arbitration Act [*Chapter 7:15*]. The applicant the goes on to allege that the arbitral award was against public policy because the second respondent:

I. failed to take note of the fact that the claim had, according to the qpplicant, prescribed. This averment is made despite the fact that prescription was not raised at the arbitration proceedings;
II. gave undue weight to the first applicant *vis a vis* the evidence given with regards to the request for a generator;
III. erred in finding that the coal was delivered in "the absence of any signed document";
IV. found that the award must be in USD to properly provide a remedy for the first respondent; and
V. And because interest at 11% was illegal and punitive.

The applicant was also opposed to the order made as to costs.

The first respondent raised a point *in limine*, namely that the applicant has not relied on any of the grounds spelt out in art 34 of the Arbitration Act therefore the application must fail.

On the merits the first respondent argued that prescription was not raised at the arbitration proceedings and that in any event prescription had been interrupted by summons, and by the initial arbitration proceedings which were initiated in 2012. The first respondent also argues that the second respondent's finding as to the generator was based on the sound evidence of Leshi Ngulube which evidence the applicant failed to refute. The first respondent rubbished the applicant's claim that witnesses he had mentioned with regards to the request for a generator were not called to give evidence and this prejudiced him. The first respondent argues that his son Tapuwa Karonga was in fact the one who gave evidence. The applicant could thus not have mentioned any witnesses nor did he call anyone other than his son.

In addition to this the first respondent maintained that the findings as to the delivery of the coal were sound as the Tax Invoice was proof enough of the coal's delivery. As to the issue of the interest the first respondent maintained that interest at 11% per annum was legal as the parties had agreed to the same. Here reference was made to s 4 of the Money Lending and Rates of Interest Act [*Chapter 14:14*]. The first respondent also argued that the award was correctly granted in USD as the Applicant himself agreed that he received USD 10 088.70 and he admitted owing USD 556.78. As such the second respondent was entitled to make the award in USD.

The first respondent also made a counter application for the registration of the arbitral award. The applicant opposed the counter application for the registration of an arbitral award stating that the applicant had challenged the arbitral award in its entirety; as such, registering the arbitral award would render the challenge to the arbitral award an academic exercise.

THE ISSUE

The issue before me is the following, has the applicant managed to show that the arbitral award ought to be set aside in terms of art 34 of the Arbitration Act. Ancillary issues include the issue of whether or not the claim had prescribed and whether or not it is competent for the Applicant to raise prescription at this stage of the proceedings.

I will now proceed to deal with the 1st Respondent's point *in limine* first.

POINT *IN LIMINE*

Article 34 (2) (b) (ii) of the Arbitration Act states that an arbitral award may be set aside if the award is in conflict with the public policy of Zimbabwe – also see art 34 (5). In *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (SC) the following was said by GUBBAY CJ:

> "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."

This principle is trite law. This court will be loath to interfere with the findings of arbitrator unless there is a very good reason to do so. As such, unless a party can show good cause an arbitral award will not be set aside. The same sentiment is shared and expounded on in *Pilime & Ors* v *Midriver Entprs (Pvt)* Ltd HH-367-14 where ZHOU J had this to say:

> "Not every fault or mistake of an arbitrator, be it of law or fact, would fall within the ambit of the expression "contrary to the public policy of Zimbabwe", justifying the setting aside of the award. For it to qualify to fall within the meaning of that expression, the arbitrator's reasoning or conclusion must go beyond mere faultiness or incorrectness, and must constitute a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice would be intolerably hurt if the award was upheld or enforced."

An example of an arbitral award that constitutes a "palpable inequity" that is outrageous is an award that goes against the laws in Zimbabwe.

From the above it is clear that it is not enough for a litigant to simply disagree with the award. For an arbitral award to be set aside there must be more than a mere difference in opinion. In the present matter the applicant is of the view that the award was unfair as it failed to take note of the fact that the claim had prescribed and because the second respondent found in favour of the first respondent on the issue of the generator and the delivery of the coal. As stated above the applicant did not put the record of proceedings from the arbitration before this Honourable Court. As such the applicant could not illustrate that the evidence led at the arbitration, and the conclusion reached by the second respondent are worlds apart thus making the decision palpably wrong and contrary to public policy. As the record stands all this Honourable Court has to go by

is the arbitral award and the second respondent's reasons for finding in favour of the first respondent. The reasons put forth by the second respondent in support of his findings are, in my opinion, sufficient to warrant the conclusion reached and there is nothing supporting the applicant's application to show the contrary.

Assuming I am wrong I will proceed to deal with the issue on the merits.

THE MERITS

Prescription

The issue of prescription was never put before the second respondent. As such it is incorrect for the applicant to hold that because the second respondent did not make a finding on prescription the award was unfair and against public policy. Indeed s 20 of the Prescription Act [*Chapter 8:11*] states the following:

> "(1) No court shall of its own motion take notice of prescription.
> (2) A party to litigation who invokes prescription shall do so in the relevant documents filed of record in the proceedings:
> Provided that a court may allow prescription to be raised at any stage of the proceedings."

The second respondent could not, at law, have raised the issue of prescription *mere moto,* see *Angelique Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (HC) it is thus beyond logic to say that he was wrong in not so doing. The applicant also tried to argue that being a point of law the issue of prescription can be raised at any stage during the proceedings. This is true, however, the court must, before allowing this to happen, assess the possibility of any harm and or prejudice being suffered by the Respondents should the issue of prescription be allowed at such a late stage, see *Muskwe* v *Nyajina SC-17-12, Mhandu* v *Scotifin Ltd* 2003 (1) ZLR (H).

It goes without saying that if the applicant were allowed to raise the issue of prescription at this late stage it would cause prejudice to the respondents. The first respondent was not given an opportunity to present evidence on the issue of prescription during arbitration where they

would have had the chance to also cross examine the applicant's witness and to test their evidence on important evidence relating to admissions of liability and the interruption of prescription. Making such submission on paper is simply not the same; especially when one considers the fact that the people whose evidence that the arbitral award's finding is based, namely Tapuwa Karonga and Leshi Ngulube, are not party to these proceedings. See *Angelique Enterprises (Pvt) Ltd* v *Albco (Pvt) Ltd* 1990 (1) ZLR 6 (HC).

Considering the fact that the Applicant could have easily raised the issue of prescription at the arbitration and considering the prejudicial effect that leading such evidence at this point would have I am of the view that the issue of prescription should not be allowed at this late stage.

Findings as to the Generator and the Delivery of Coal

As stated earlier, the Applicant, who bears the onus in this matter, did not show that the second respondent's decision was so unreasonable so as to warrant the setting aside of the award. Pthe second respondent made his finding based on the evidence put before him. He did not show bias or favour. He merely stated the facts as they appeared based on the evidence before him. Of note is Tapuwa Karonga's failure to prove that his father had requested the generator. In the circumstances, it was reasonable to believe that a company as big as the first respondent would require written requests before allowing a requests such as the present to be processed. The applicant failed to show why the second respondent should have held otherwise.

Furthermore, the applicant failed to provide a satisfactory explanation for his signing a Tax Invoice if he had in fact not received the coal. The second respondent's comments that the witness was educated and could have not have been expected to make such a mistake are reasonable in the circumstances.

USD Award and Interest

With regards to the issue of the award being in USD the arbitrator acted well within the confines of the law and he exercised his discretion in that regard. There was nothing palpably bias or so unreasonable as to suggest something untoward on the part of the arbitrator. Again the Applicant has failed to show that the award amounts to an illegality or something so unconscionable so as to render it contrary to public policy.

In reaching this finding I am guided by cases such as *Watergate (Pvt) Ltd and Commercial Bank of Zimbabwe* (SC 78/05) and *Makwindi Oil Procurement (Pvt) Ltd* v *National Oil of Zimbabwe* 1988(Z) ZLR 482 (SC). I am also mindful of the comments by Smith J in *Leighton* v *Eagle Insurance Company Limited & Others*, HH 193/02. The case dealt with the effect of inflation but the reasoning is still applicable herein:

> "It would be grossly inequitable to fix blindly in every case, that the date for assessing damages is the date of the delict. The court can take judicial notice of the rampant inflation in the country… It would be most unfair to the plaintiff to award him damages assessed at the costs prevailing in 1996 with interest at the prescribed rate from that date. It would be much fairer, and more realistic, to fix damages at today's costs".

Also see *Primac Enterprises (Private) Limited t/a Primac Telecomms* v *National Handicraft Centre (Private) Limited and Another* [2011] ZWHHC 30. It is perfectly acceptable to grant an award in instances such as the present in USD.

As regards interest, s 4 of the Money Lending and Rates of Interest Act allows parties to agree upon their own interest rate. In this case the parties agreed to an interest rate of 11% per annum. **[The first respondent is not a money lender as per s 20 of the Money Lending and Rates of Interest Act and they could thus charge an interest rate as agreed upon by the parties.]** There was thus nothing untoward about the second respondent's findings and the arguments raised by the Applicant in this regard most certainly do not warrant the setting aside of the award.

COUNTER APPLICATION FOR REGISTRATION OF THE ARBITRAL AWARD

Article 36 of the Arbitration Act states the grounds upon which an application for the registration of an arbitral award may be set aside. The applicant did not raise a valid ground for opposing this registration as outlined in art 36 (1) (a) (v) of the Arbitration Act and I see no reason why the award should not be registered.

Costs

The Applicant's did not have a strong case and for the most part they were grasping at straws. I see no reason why, in the circumstances, the Respondents should have to bear the cost of suite.

In light of the above I make the following order with regards to the main application:

1. The application must fail and the Arbitral Award handed down on 14 November 2013 is hereby registered.
2. The applicant pay costs of suit.

I make the following with regards to the counter application for the registration of the arbitral award:

1. The arbitration award granted by the Honourable Justice M. H. Chinhengo dated 14 November 2013 a copy of which is annexed hereto marked "A" be and is hereby registered as an order of the High Court.
2. The first respondent pay the Applicant's costs of suite.

Venturas & Samkange, applicant's legal practitioners
Gill, Godlonton & Gerrans, respondent's legal practitioners