OASIS MEDICAL CENTRE PRIVATE LIMITED
versus
ROSEMARY A.M. BECK
and
PATRICK GRAHAM RIDGWAY

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE,17 November 2015 & 27 January 2016

Opposed matter

B Mahuni, for the applicant
F Girach, for the 1st respondent

MATANDA-MOYO J: These two applications were consolidated and heard before me at the same time. The first application is for the setting aside of the arbitral award on the following basis;

1) That clause 27 of the lease agreement which provided for referral of the matter for arbitration without outlining the procedure to followed is *contra bonos mores* and offends the principle of natural justice-*nemo in iudex propia causa*, and as such is unenforceable.
2) The subsequent appointment of an arbitrator in terms of the above clause is therefore null and void. The matter should have been dealt with in accordance with clause 28 of the Lease Agreement.
3) The first respondent, unilaterally appointed and paid for the arbitrator without consultations with the applicant, resulting in the arbitrator showing bias in favour of the first respondent.
4) Despite a clear case of recusal having been made out by the applicant, the second respondent proceeded to enter judgement for the first respondent.

The second application is an application by the first respondent for registration of an arbitral award. For easier reference the parties shall be referred to as in the main.

The brief facts are that the first respondent is an owner of certain property being 18 Argyle Road, Avondale, which property was leased to the applicant in terms of a Lease Agreement entered into between the parties on 4 April 2014. The agreement covered the period 1 April 2014 to 31 March 2015.

In terms of clause 10 of the lease agreement, the applicant had an obligation to pay rent and all owners charges levied by council, water, electricity and telephone bills. On 29 January 2015 the applicant signed an acknowledgement of debt for the city of Harare to the tune of $9 128.64. A payment plan was agreed upon where by applicant would liquidate the arrears by 30 July 2015.

The first respondent wrote, a letter to the applicant on 19 December 2014 notifying the applicant of its intention not to renew the lease agreement upon its termination on 31 March 2015. The first respondent instituted proceedings in the Magistrates Court for eviction of applicant from 18 Argyle Road and for payment of rental due and arrear rates in the sum of $8 164.94. After filing of plea and counter claim by the applicant, the matter was withdrawn on 14 April 2015. However whilst the claim for eviction was still pending in the Magistrates Court the first respondent referred the matter for arbitration.

The arbitrator found in favour of the first respondent and ordered the applicant to pay all arrears in terms of clause 10 of the Lease Agreement. The arbitrator found that the first respondent was entitled to cancel the lease agreement and evict the applicants from the property. The applicants were also ordered to pay the first respondent's costs on a legal scale and to also pay the arbitration fees.

The first respondent opposed the setting aside of the arbitral award on the following;

a) That in terms of the Lease Agreement the first respondent had a right to nominate an Arbitrator whose qualifications are set out in the agreement. The first respondent caused the chairman of the Real Estate Institute of Zimbabwe to select a person appropriately qualified. First respondent did not appoint the arbitrator.
b) That the applicant failed to establish a case for the second respondent's recusal.
c) That there was no bias exhibited by the second respondent.
d) That the proceedings in the Magistrate's Court were withdrawn after the first respondent elected to proceed by way of arbitration.
e) That these proceedings are only meant to delay the inevitable and should be dismissed with costs.

The first respondent raised a preliminary point that the present application is defective in that it does not comply with r 257 of the High Court Rules. The applicant has also failed to attach a copy of the Arbitrator's decision it wishes set aside. Rule 257 of the High Court Rules, 1971, provides;

> "The court application shall state shortly and clearly the grounds upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for"

It is true that on the face of the application the applicant failed to state shortly and clearly the grounds upon which it seeks to have the proceedings set aside. In *Denton & Others* v *White and Others* (2014) EWCA CIV 906 the court advocated a two pronged approach for deciding whether a party should be granted relief from sanctions for non-compliance with rules:

(a) Can the non-compliance be regarded as trivial? If so, relief from sanctions would be appropriate
(b) If the non-compliance is grave, then the burden is on the defaulting party to persuade the court that there are good reasons to grant the relief.

The failure to comply with r 257 is a fatal flaw see *Public Service Commission & Anor* v *Marumahoko* 1992 (1) ZLR 304 (S). However the court has a discretion to condone departure from the rules in terms of r 4C of the High Court Rules where the breach is not significant and not prejudicial to the other party. I am persuaded that in order to condone such departure I should follow the test adopted in *Denton & Ors* v *White and Ors supra*.

I have taken note that the applicant has in its founding affidavit spelt out the grounds for review relied upon. The application is accompanied by a founding affidavit and it is trite that a case rises or falls on its founding affidavit. I am of the opinion that the failure to comply with the rules is not serious or significant and has not adversely affected the litigation process. The respondents have understood the matter before the court, so did the court from the onset. It is clear from the founding affidavit what the grounds for review are. I am of the opinion that the breach is not serious and I therefore exercise my discretion in favour of condoning the non-observance of the rules by the applicant.

Firstly the applicant challenges the validity of clause 27 of the lease agreement as contrary to good morals and offending the principle against one judging his own case and therefore illegal. It is trite that our courts will invalidate and refuse to enforce agreements that

are contrary to public policy. The applicant complaints that clause 27 of the lease agreement gives the first respondent powers to appoint an arbitrator without consulting the applicant. Clause 27 reads:

> "27 DISPUTES
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> In the event that a dispute arises between the parties regarding the rental or any other matter relating to this Agreement of Lease the dispute shall be referred to a member of the Real Estate institute of Zimbabwe who is an acknowledged expert on the interpretation of Lease Agreement and who shall be nominated by the Lessor and who shall consult both parties and whose decision as to the matter in dispute and the allocation of costs shall be final and binding on both parties". (my own underlining)

The applicant submitted that the provisions of the above clause offends against the principle of *nemo in iudex propria causa*. By giving the first respondent powers to appoint on arbitrator effectively the first respondent became judge in its own case.

The first respondent on the other hand submitted that applicant had not sought to particularise the allegation and that such allegation lacks merit. I was referred to the case of *ZESA* v *Maphosa* 1999 (2) ZLR 452 (S) at 464D where Gubbay as he then was said:

> "Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions."

At p 465 he proceeded as follows:

> "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…"

See also *Amalgamated Clothing and Textile Wokers Union of SA* v *Telcordia Technologies Inc* v *Telkom SA Ltd* 2007 (3) SA 266 (SCA) *Lufuno Mpaphuli & Associates (Pty) Ltd* v *Andrews and Anor* 2009 (4) SA 529 (CC).

Clause 27 of the Lease Agreement indeed gave the first respondent powers to appoint an arbitrator without recourse to the applicant. However the applicant voluntarily signed the agreement which took away his powers. That signature brings into operation the caveat *subscriptor* rule which was expressed at p 67 of RH Christe in *Business Law in Zimbabwe* as follows:

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes

> known as the caveat *subscriptor* rule is therefore that a party to a contract is bound by his signature whether or not he has read and understood the contract…."

The signer must beware. Once a person appends his or her signature to a document, it must be known that they are liable for the ensuing consequences and obligations. It was the applicant's responsibility to read the information about what the document entails before entering into the agreement. I do not believe it is proper for the applicant to try and challenge clause 27 of the lease agreement at this moment in time. It remains bound by its signature.

Having found so, I move to consider whether indeed the arbitrator was biased. The applicant in trying to prove the arbitrator's bias relies on the correspondence to it by the arbitrator of 11 April 2015. Such e-mail was in response to one sent from the applicant's lawyers of the 10th. Indeed in that communication of the 10th the applicant's lawyers had indicated they had instructions to accept the notice of withdrawal on condition wasted costs were tendered. I see no reason then for the applicant to condemn a later correspondence reiterating same. The communication of 11 April by the arbitrator cannot be a basis for an allegation of bias. Such correspondence and exchanges "fell far short of trigger Art 12 (2)'s operation … and were even further removed from demonstrating justifiable doubts to the arbitrator's impartiality." Having reviewed the contents of the exchanges between the parties I am of the opinion that they do not qualify as grounds for challenge falling within Art 12 (2) of the Model Law which provides;

> "Article 12: Grounds of challenge
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> (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

The matters complained of in my opinion fell within the ambit of case management powers of the tribunal and were within the discretion of the arbitrator to make. To me such directions do not amount to any objective lack of impartiality in the conduct of the arbitral proceedings.

No bias can be proved where the facts are stubborn. The applicant was indeed in breach of Clause 10 of the lease agreement. There is ample evidence buttressed by the acknowledgement of debt signed between the applicant and City of Harare that such debt was owing. An adverse award in itself can never be proof of bias. There must be some evidence of improper conduct. Within the frame work of Art 34 (2) (a) (iv) a party applying to set

aside for procedural irregularity needs to establish that the procedural irregularity materially affected the award.

It has become a trend that parties who are unhappy with the outcome of arbitral proceedings use the breach of natural justice principle to "dress up and massage their unhappiness with the substantive outcome into an established ground for challenging an award."

The applicant has also failed to counter the submission that the arbitrator was actually appointed by the Chairman of the Real Estate Institute. No evidence has been proffered by the applicant that the arbitrator was known to the first respondent. See cases of *Leopard Rock Hotel* v *Walenn Construction* 1994 (1) ZLR 255 (S), *Book* v *Danson* 1988 (1) ZLR 365 (S) and *Associated Newspapers of Zimbabwe (Pvt) Ltd and Anor* v *Diamonds Insurance Co (Pvt) Ltd* 2001 (1) ZLR 266.

The courts are very reluctant in general to interfere with arbitral awards save in limited instances in which the award is against public policy. Such standard is high. See *Zimbabwe Educational, Scientific and Cultural Workers Union* v *Welfare Educational Employees Institutions Association* SC 11/2013, *Zesa* v *Maposa* 1999 (2) ZLR (S).

I am not of the view that the award is contrary to public policy. Equally by the time the matter went for arbitration the proceedings before the magistrates court had been withdrawn. As indicated above such withdrawal was accepted by the applicant and at law applicant is barred to challenge the withdrawal presently.

The application is therefore without merit and is dismissed with costs.

Having concluded as above I am of the view that there is nothing which stands in the way of registration of the award.

In the result I order as follows;

1) The application for setting aside the arbitral award fails and is hereby dismissed.
2) The arbitral award given in favour of first respondent on 8 May 2015 be and is hereby registered as an order of this court.
3) The applicant be and is hereby ordered to vacate certain premises known as 18 Argyle Road Forthwith, failing which the Deputy Sheriff be and is hereby authorised to evict them from the said premises.
4) The applicant is ordered to pay costs of suit.

Scanlen & Holderness, applicant's legal practitioners
C.D.A. Finlason & Associates, 1st respondent's legal practitioners