

GNK LABORATORIES (PVT) LTD
versus
MRS FLORRIE ADAMS
and
RETIRED JUSTICE GEORGE LESLIE SMITH N.O

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 16 March 2018 & 26 August 2020

Opposed Matter

Adv E. Muchabaiwa, for the applicant
R. Zimudzi, for the 1st respondent

CHIWESHE JP: This is an application made in terms of article 34 (2) (b) (ii) of the First Schedule to the Arbitration Act [*Chapter 7:15*] for the setting aside of the arbitral award made by the second respondent (the arbitrator) in a contractual dispute between the applicant and the first respondent (the respondent).

The background facts are largely common cause. The respondent owns a piece of land in Harare namely, the Remaining Extent of Stand Number 183 of Prospect, which measures 1,6604 hectares, registered under deed of transfer 02683/94 dated 26 January 1994. She sold this property to the applicant in terms of a written agreement. The price of the property was set at US\$180 000.00 payable by instalments into the account of an estate agent, Trevor Dollar. Clause 2.2. of the contract provides as follows:

“The purchase price shall be paid into the following account:

Name:	Trevor Dollar Trust Account
Bank:	CABS
Branch:	Westgate, Harare
Account Number:	9016589014”

It is common cause that the contract was prepared by the respondent who gave it to the applicant for signature. Clause 7.1 of the agreement provides as follows:

“TRANSFER

Transfer of the property to the purchasers shall, subject to due compliance by the purchasers with his obligations hereunder, be effected by Mr Tim Tanser of Tim Tanser Consultancy, who shall, within a reasonable period after notification of full payment of

the said purchase price by the purchasers, on behalf of the seller, tender transfer to the purchasers.”

The purchase price was duly paid to the estate agent but despite demand the respondent has not tendered transfer. In the proceedings before the Arbitrator, the applicant sought an award set out as follows:

- (a) Transfer of the property from respondent to the claimant within 21 days from the date of the award;
- (b) Alternatively, a refund of the purchase price (\$180 000.00) plus interest at the prescribed rate calculated from the date of demand, ie 27 July 2016.
- (c) Collection commission costs in terms of the Law Society of Zimbabwe By-Laws.
- (d) Costs of arbitration.
- (e) Its costs on a legal practitioner and client scale.

The arbitrator correctly observed that at the core of the dispute was the interpretation of clause 2.2 of the agreement which provides that the purchase price shall be paid into the account of Trevor Dollar Estate Agent. The applicant argued that Trevor Dollar was the respondent’s agent through whom the respondent would receive the purchase price in terms of the contract she herself had prepared without input from the claimant. The claimant argued that by so paying into that account, it had discharged all its obligations in terms of the agreement. On the other hand, the respondent argued that estate agents are not agents “in the strictest sense” and that therefore Trevor Dollar was neither the applicant’s nor the respondent’s agent. According to the respondent the estate agent was a mere middleman whose role was to hold the money on behalf of the applicant until transfer had been effected. For that reason, the money appropriated by the estate agent belonged to the applicant.

The Arbitrator found for the respondent and dismissed the applicant’s claim. The applicant seeks to have the Arbitrator’s decision set aside on the grounds that it is in conflict with the public policy of Zimbabwe. The application is premised on the following averments. Firstly, it is contended that the award contradicts itself in its findings. The issue before the arbitrator was at what stage would applicant be entitled to receive transfer of the property. The award on the one hand finds that the applicant should receive transfer once it has paid the purchase price to Trevor Dollar (before the respondent receives it). On the other hand, the award states that transfer shall be effected after the respondent has received the purchase price from Trevor Dollar. For this reason, it is contended that the award is illogical and susceptible

to being set aside. In support of that contention the applicant has cited the case of *Peruke Investments (Pvt) Ltd v Willoughby's Investment Pvt Ltd and Anor* SC 11/15 where it was ruled as follows:

“In terms of article 34 (2) (b) (ii) of the Model law an arbitral award is challengeable and may be set aside on the ground that it is conflict with the public policy of Zimbabwe. As a rule, the courts are generally loath to invoke this ground except on the most glaring instances of illogicality, injustice and moral turpitude.”

It is further argued that on award which contradicts itself in this manner is consistent with failure by the Arbitrator to apply his mind to the issue before him. The contract clearly provides that transfer shall be effected upon payment of the purchase price and no reasonable Arbitrator, properly applying his mind to that issue, would accept this position and in the same breath subsequently find to the contrary. It is contended that the illogicality of the award is “most glaring and intolerable”. In this regard the applicant cites the case of *Zimbabwe electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) where GUBBAY CJ had this to say:

“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.

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.”

It is contended further that by holding that transfer shall be effected after the respondent has received the purchase price, the arbitrator departs from the provisions of the contract which state, under clause 3 of the same, as follows:

“It is agreed that the net proceeds of the sale shall be released to the seller’s bank account upon confirmation from the conveyancer that transfer has been registered.”

The award is at variance with this clear and pivotal provision of the contract. The Arbitrator has therefore created a provision which was never contemplated nor agreed upon by the parties. It is contended that by so doing the award offends two fundamental tenets of our public policy – freedom of contract and the sanctity of contract. In *Delta Operations (Pvt) Ltd v Oregon Corporation Pvt Ltd* SC 86-06 it was held thus:

“In the circumstances, by granting the remedy of specific performance, and, alternatively, a measure of damages falling totally outside the ambit of the contract, the arbitrator completely disregarded the contractual terms agreed upon by the parties,

thereby in effect creating a new contract for them. By doing so he violated one of the most important tenets of public policy, ie the sanctity of contracts.”

The applicant further takes umbrage against the award on a third point, namely that the award does not hold the respondent to the concessions she made during arbitration. It was admitted in respondent’s pleadings that the purchase price had been paid to Trevor Dollar in terms of the contract. This admission, once made should automatically trigger the process provided under clause 7.1 of the agreement, which provides that transfer of the property be effected. The Arbitrator ought to have made an order compelling transfer. By not doing so, the Arbitrator released the respondent from the consequences of her admission. It is trite that parties are bound by their pleadings. The arbitrator, it is contended, departed from this fundamental principle of our law. That departure is a breach of public policy. See the *Delta Operations* case *supra* where it was held as follows:

‘The third reason why the award is in conflict with the public policy of Zimbabwe is that the arbitrator created an issue between the parties which did not arise from their submissions.’

The fourth point raised by the applicant is that the award allows the respondent to disown a position she imposed into the contract as the author of the same. The contract was prepared by Trevor Dollar acting under her instructions. She is bound by the *contra profentes* rule because she is the one who created the duty to transfer the property once payment of the purchase price had been made to Trevor Dollar. The applicant contends that the award fails to recognise this fundamental rule of our law and should be set aside for being in conflict with public policy.

The applicant scoffs at the allegation made by the respondent that Trevor Dollar squandered the price paid to it. No evidence has been led to prove this, and, according to the applicant, it was the respondent who should have led such evidence and if needs be, apply to join Trevor Dollar as a party to the proceedings. It disputes the respondent’s attempt to deny that Trevor Dollar was its agent for purposes of receiving the purchase price yet it is the respondent herself who put that provision in the agreement.

The applicant’s comments regarding the point *in limine* raised by the respondent, namely that the deponent to the founding affidavit lacks authority to represent the applicant are on point. There is no basis upon which this court can entertain the point *in limine* – it must be dismissed. I agree with the view expressed in *Willoughby’s Investments v Peruke Investments* HH 178/14 where it was held:

“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 respondent has vigorously opposed the application. She argues in the main that the contract was not yet perfecta when it was discovered that Trevor Dollar had misappropriated the purchase price. The risk and profit in the purchase price still lay with the purchaser pending transfer of the same to her after transfer of the property to the applicant. She contends that the Arbitrator properly interpreted the agreement in reaching the conclusion that he did. She further contends that the property could not have been transferred as the purchase price had been dissipated before she could receive it.

The Arbitrator ruled in favour of the respondent. In his ruling he correctly noted that transfer of the purchase price was to be effected after transfer of the property. In other words, if transfer did not take place, the purchase price would be returned to the applicant. More tellingly he notes as follows:

“If the parties considered that payment of the purchase price into the Trevor Dollar Trust Account was, in fact, payment to the respondent, then it would have been provided in the Agreement that upon such payment, transfer of the ownership of the property into the name of the claimant would be effected. However, that was not done. It is provided in the Agreement that transfer will only be effected when the purchase price is paid into her account. That is what was agreed by the parties. Therefore, ownership of the property cannot be transferred to the purchaser until the respondent is paid the purchase price. Payment into the Trevor Dollar Trust Account was not payment to her.”

The applicant correctly asserts that the Arbitrator’s interpretation of the contract is misplaced. The contract does not say that the property would be transferred after payment of the purchase price into the respondent’s account. Rather transfer was to occur first before the monies were deposited into the respondent’s account. The respondent would only receive the money after transfer. That is what is provided for under clause 3 of the agreement. I agree with the applicant that the Arbitrator erred in holding that view. And yet, earlier on, on the same page of his ruling, the Arbitrator had correctly observed that the purchase price would only be paid after transfer of the property. I agree with the applicant that in this way the Arbitrator contradicted himself. Are these errors on the part of the Arbitrator so palpable that they would constitute an affront to the public policy of Zimbabwe? I should think not. These errors do not negate

any fundamental principles of our law or morality nor do they offend any tenet of our public policy. The levels of incorrectness or faultiness do not satisfy the requirements for setting aside an Arbitral award as stated *ZESA v Maposa* case *supra*. It is important to bear in mind that in proceedings such as the present “.....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.” In any event these errors do not detract from the real contention between the parties, namely whether payment of the purchase price to Trevor Dollar should be regarded as payment to the respondent.

In *casu* the applicant’s contention that payment into the Trevor Dollar Trust Account discharges its obligations and therefore entitles it to receive transfer of the property was rightly or wrongly reflected by the Arbitrator. The Arbitrator’s reasoning that there is not provision in the agreement that payment to Trevor Dollar shall constitute payment to the respondent is beyond reproach. The applicant knew that Trevor Dollar were holding the money in trust pending transfer and that until after transfer, the respondent would not have received the purchase price. He failed to see the obvious risk that the money might be lost or misappropriated before it is paid out to the seller. It took no steps to safe guard its interest. It should have insisted that an appropriate provision be included in the Agreement to ensure that the risk in the purchase price passes to the respondent at the outset.

In this regard it matters not whether Trevor Dollar was its agent or that of the respondent. The fundamental of any contract of sale is that the purchase price has been paid and received by the seller. There cannot be a sale in the absence of the consideration to be paid. The arbitrator took a practical approach by recognising that the property could not be transferred to the applicant when it was clear that the purchase price was no longer available. It would have been unfair to the respondent to hold otherwise.

It has not been demonstrated that in coming to the conclusion that he did, the Arbitrator “created an issue between the parties which did not arise from their submissions”. Nor has it been demonstrated that the Arbitrator detracted from the provisions of the agreement in any material respect. His refusal to apply the *contra profentes* rule and find for the applicant is not outrageous. If his reasoning in this regard is faulty, the faultiness or incorrectness is not so palpable as to render the award an affront to the public policy of Zimbabwe.

For these reasons I am inclined to uphold the award and accordingly dismiss the application.

It has become the norm nowadays for legal practitioners to seek at every turn costs on the legal practitioner and client scale. The correct position is that such costs will only be granted under exceptional circumstances. They may be granted if the application is frivolous, malicious, vexatious, reckless and therefore an abuse of court process. I disagree with the respondent that the present application falls within the purview of applications deserving censure by way of costs on the higher scale. The applicant entered into the agreement of sale and paid the purchase price in terms thereof. Its belief that by paying Trevor Dollar it had fully performed its obligations was not unreasonable. It acted in good faith believing Trevor Dollar to be the seller's agent. No act of misconduct or misdemeanour is attributable to it. I find no basis therefore upon which it should be ordered to pay costs on the higher scale. See *Neil v Waterberg Landbouwers Ko-operative Vereeniging* 1946 AD 597.

In the result it is ordered as follows:

1. The application be and is hereby dismissed in its entirety.
2. The applicant shall pay the costs of suit.

V. Nyemba & Associates, applicant's legal practitioners
Zimudzi & Associates, 1st respondent's legal practitioners