

REPORTABLE (47)

OK ZIMBABWE LIMITED
v
ARDMBARE PROPERTIES (PRIVATE) LIMITED
AND
DANIEL TIVADAR N.O.

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, PATEL JA & MAVANGIRA JA
HARARE, 2 MARCH & 12 SEPTEMBER, 2017

T. Mpofo, for the appellant

T. Magwaliba, for the first respondent

PATEL JA: This matter revolves around the not uncommon but alliterative conundrum of products purveyed by their producer from peregrine premises. In particular, it concerns an arbitral award, rendered by the second respondent on 2 March 2015, ordering the appellant to pay turnover rent in the sum of \$76,481.00 to the first respondent, in respect of pies produced by the former at the latter's premises. On 31 March 2015, the appellant filed an application to set aside the award. This was followed, on 2 April 2015, by an application lodged by the first respondent to register the award.

The High Court consolidated both matters by consent. It was agreed by the parties that the registration of the award was dependent upon the fate of the application

challenging the award. In the event, the court *a quo* found in favour of the first respondent. This appeal lies against that decision.

Background

On 30 December 2013, the parties concluded a lease agreement with a commencement date of 1 November 2010. In terms of the agreement, the monthly rental payable by the appellant was fixed at US\$2000 or 1.5% of its turnover, *i.e.* net sales after deduction of VAT, whichever was the greater. The use of the demised premises by the lessee was designated as being “*for purposes of conducting all or any retail business together with all businesses reasonably or necessarily incidental thereto*”.

At a certain stage after occupation, in addition to its retail business, the appellant started manufacturing pies at the premises for sale therefrom and for distribution to its other branches. This particular activity was not specifically approved by the first respondent. A dispute then arose as to the inclusion of proceeds from the pies distributed to the appellant’s branches in the calculation of the turnover rent.

The dispute was referred to the second respondent (the arbitrator) to, *inter alia*, interpret the lease agreement on the meaning of “turnover” and “net sales” and, if this issue was found in favour of the first respondent, to quantify the damages payable by the appellant. The arbitrator found that the manufacture of pies was business incidental to retail business and that the pies distributed to the appellant’s branches were for sale for the

appellant's benefit and were, therefore, part of its turnover for the purposes of computing the monthly rental payable.

Decision of the High Court

The court *a quo* agreed with the arbitrator that the manufacture of pies was incidental to the appellant's retail business and that there was no need to review the lease agreement in that regard. The court also noted that the branches in question belonged to the appellant and that the sales therefrom were for its benefit. Moreover, the quantities and values of the distributed pies were recorded and confirmed quantifiable sales to the branches. In effect, the appellant manufactured pies at the demised premises for its sales from within and from without through its branches. As regards the two-stage procedure adopted by the arbitrator, the court found that it was necessary for him to hold two sessions. The second hearing process was necessary to quantify damages as mandated by the parties.

The court concluded that the award did not offend public policy. There was therefore no basis for setting it aside and nothing to militate against its registration. Accordingly, the application to set the award aside was dismissed and the application for its registration was granted, with the appellant being ordered to pay the costs of both applications.

Grounds of Appeal

The grounds of appeal herein are essentially twofold. Firstly, the arbitrator erred procedurally in adopting a piecemeal approach, by directing the adduction of further

evidence for the purpose of quantifying damages, instead of entering the equivalent of absolution from the instance in favour of the appellant. Secondly, consequent upon the arbitrator having created a new contract for the parties by finding that the manufacture of pies was covered in the lease agreement, the court *a quo* erred and misdirected itself in upholding the finding that the sales of pies distributed to the branches formed part of the appellant's turnover rather than expenditure incurred by it.

Procedure Adopted by Arbitrator

Adv. *Mpofu*, for the appellant, attacks the two-stage procedure adopted by the arbitrator as not having been authorised by the parties. In the absence of any prescribed mandate or agreement between the parties, the arbitrator should have followed the procedure that is ordinarily adopted in a civil trial and not the dictates of equity. This requires that liability and quantum be determined together and not in two separate piecemeal processes. Adv. *Mpofu* further argues that the first respondent's failure to prove the quantum of liability at the first hearing should have resulted in the grant of absolution from the instance at the end of that hearing. The issues for determination by the arbitrator did not entail that there should be two separate hearings. The procedure adopted by the arbitrator prejudiced the appellant because it was required to present evidence against itself. It only complied with the requirement to produce additional evidence because it was directed to do so. Consequently, it was not estopped from challenging the procedure adopted by the arbitrator on the ground that his award of damages was based on the second irregular hearing.

Adv. Magwaliba, for the first respondent, counters that the parties are the masters of their own proceedings in the conduct of an arbitration. However, where there is no specific agreement, the arbitrator is at large to determine the conduct of proceedings as he deems appropriate. In the instant case, the parties did not agree on the procedure to be followed, leaving the matter in the hands of the arbitrator. The appellant did not raise any objection to the procedure adopted but actually co-operated with the arbitrator's directive. The conduct of the second hearing was expressly agreed by the parties and, therefore, it was not open to the appellant to challenge the procedure it had expressly agreed to.

The determination of rules of procedure in arbitration proceedings is governed by Article 19 of the Model Law scheduled to the Arbitration Act [*Chapter 7:15*]. Paragraphs (1) and (2) of Article 19 provide as follows:

“(1) Subject to the provisions of this Model Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Model Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

Also relevant for present purposes are paragraphs (1) and (2) of Article 24 pertaining to the conduct of hearings and written proceedings:

“(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.
(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.”

My reading of Articles 19 and 24, taken together, is that the primary determinants of arbitral procedure are the consensus and convenience of the parties themselves. However, where the parties are unable to agree or silent on the matter, the arbitrator or tribunal is at large, within the bounds of procedural and substantive fairness, to conduct the arbitration in such manner as he or it considers appropriate. Moreover, there is nothing in the provisions of the Model Law to preclude the arbitrator from holding separate hearings at appropriate stages of the proceedings, either if this is requested by one party or, quite obviously, where it is mutually agreed by both of the parties. In my view, the reasoning in *Pilime & Others v Midriver Enterprises (Pvt) Ltd* HH 367-14, relative to arbitration in labour matters, but which was relied upon by Adv. *Mpofu* in the present context, is starkly inconsistent with the clear and unambiguous language of the Model Law.

It is pertinent at this juncture to consider precisely what transpired in the course of the arbitration proceedings *in casu*. The first oral hearing was held on 11 December 2014. As appears from the first award (rendered on 15 December 2014), the parties and the arbitrator agreed on the issues to be determined, *viz.* jurisdiction, prescription, construction of the lease agreement and, lastly, quantum of damages “*if the Claimant is successful in its claim*”. The award then indicates that “*no discovery took place relating to the issue of quantum*” and that “*the Respondent alone is in a position to establish what turnover various parts of its business generated*”. The arbitrator therefore decided, “*with the parties’ consent*”, that he would “*first render a (partial) award on liability*”. Thereafter, “*if quantum remained relevant, further discovery and, possibly, a further hearing would be necessary*”.

Having found in favour of the claimant, the arbitrator then provided “*directions for the parties so that the issue of quantum can either be agreed or determined*”. At the end of the first award, the arbitrator noted that he was “*reassured by a representative of the Respondent present at the hearing that the necessary information is readily available*”. He then directed that there be disclosure on the issue of quantum and, in the event that the parties were “*unable to agree the relevant turnover rent*”, he would “*list the matter for a further hearing on the issue of quantum*”.

The minutes of the second hearing, held on 10 February 2015, indicate confirmation by the parties that “*discovery of the relevant documents had taken place in advance of the hearing and therefore both of them were content to proceed with the hearing*”. In his final award (handed down on 2 March 2015) the arbitrator observed that he had “*rendered a partial award on the issue of liability*” on 15 December 2014 and had “*then set out how the quantum of damages should be calculated*”. In the event, “*as the parties could not agree on the quantum of damages, a further hearing was listed and held on the 10th of February 2015*”. Thereafter, “*pursuant to the directions given at that hearing the Respondent was asked to supply the number of pies manufactured at Ardmbare but sold out in other branches*”. These directions were then duly complied with through a document e-mailed to the arbitrator on 19 February 2015, thereby enabling him to render his final award.

Having regard to the foregoing, it is abundantly clear that the procedure adopted by the arbitrator was at all times in keeping with the agreed mandate of first determining liability, if any, and then, if necessary, establishing the quantum payable to the claimant.

Moreover, he appears to have conducted the requisite two-stage hearing process not only with the active concurrence of both parties but also in a manner that would, in the circumstances of the case before him, most practicably enable him to fulfil his mandate to comprehensively adjudicate the issues agreed for determination. It follows, in my view, that there is no merit whatsoever in the appellant's attack against the procedural propriety of the arbitral proceedings *in casu*.

Creation of New Contract

It is trite that judicial tribunals cannot as a matter of public policy rewrite the terms of a given contract. The contract must be enforced even if the result would be harsh or oppressive. In this respect, it is submitted for the appellant that it is quite irrelevant that the demised premises were being used free of charge for the manufacture of pies. The contract in question did not contemplate the scenario *in situ* and should have been reviewed by the parties to take account of that omission. The arbitrator himself was obliged to apply the law, as opposed to notions *ex aequo et bono*, and enforce the express terms of the contract.

The use of the leased premises is governed by clause 7.1 of the lease agreement in the following terms:

“The Lessee shall be entitled to use the premises for purposes of conducting all or any retail business together with all businesses reasonably or necessarily incidental thereto and for no other purposes whatsoever save with the prior written consent of the Lessor, which consent shall not be unreasonably withheld.”

Arguably, the manufacture of pies would not ordinarily fall within the ambit of retail business. Nevertheless, such manufacture could certainly be regarded as falling within the broader coverage of “all businesses reasonably or necessarily incidental” to “all or any retail business”, particularly where, as in the present case, the pies manufactured in and sold from the leased premises were sold to the appellant’s customers as part and parcel of its retail trade. This would also apply to the sale of pies distributed to and sold from the appellant’s branches inasmuch as the branches in question belonged to the appellant and the sales therefrom were ultimately for the appellant’s own benefit. On this basis, neither the arbitrator nor the court *a quo* can be faulted for finding that the manufacture of pies was incidental to the appellant’s retail business and that there was no need to review the lease agreement in that regard.

Taking a broad conspectus of the matter, I am unable to accept the appellant’s argument that the arbitrator created a new contract for the parties or that the court *a quo* misdirected itself in endorsing the arbitrator’s approach in this regard.

Calculation of Turnover

Clause 3.1 of the lease agreement *in casu* regulates the calculation of rental as follows:

“The rental payable by the Lessee to the Lessor for the premises shall be the sum of US\$2,000.00 (two thousand United States dollars) (hereinafter referred to as ‘the base rent’) per month or 1.5% (one comma five per centum) of turnover (hereinafter referred to as ‘turnover rent’) (net sales after deduction of Value Added Tax) per month, whichever is greater.”

The appellant's position is that it is only retail business income that constitutes net sales and that, therefore, only the selling of pies at the Mbare branch constituted part of the appellant's turnover. It further argues that the deduction of value added tax presupposes that there is a sale of goods in exchange for money. Thus, in the appellant's books of account, the pies distributed to its branches would notionally equate to expenditure rather than income.

The first respondent counters that even the pies distributed to the other branches are effectively sold to those branches and form part of the appellant's turnover. This is because value added tax can be calculated on those sales. Moreover, the transfer of pies was treated as equating to the sale of stock and the values thereof were actually calculated for the purpose of determining the quantum payable to the first respondent. In effect, the appellant manufactured the pies at the Mbare branch free of any rental charge and then sold them at a profit from that branch and through its other branches.

The first point to note from clause 3.1 of the lease agreement is that the concept of turnover is not confined to sales from the appellant's Mbare branch only. Admittedly, given the possibility of wastage, not all of the pies distributed to the other branches would necessarily have been sold for human consumption. However, this is a risk that inheres in the retail trade of all edibles and would apply as well to the sale of pies from the Mbare branch itself. What the appellant's argument ignores is the critical fact that the income and profit that was derived from the sale of pies manufactured at the Mbare branch, whether sold at that branch or at any other branch and whatever the internal accounting process or

formula that might have been applied to those sales, eventually accrued to the benefit of the appellant's own coffers.

In my view, an analogous and apposite scenario would be that of the appellant manufacturing the pies within the leased premises and then selling them just outside those premises through a tuck-shop owned by itself or in the nearby vicinity through a mobile vendor under its direct employ and control. It seems inconceivable that such sales should not be treated as constituting part of the appellant's turnover.

For all of the foregoing reasons, I am satisfied that the arbitrator correctly found, as was properly affirmed by the court *a quo*, that the sale of pies manufactured at the appellant's Mbare branch and sold through its other branches formed part of the appellant's turnover for the purpose of calculating the monthly rentals payable to the first respondent in respect of the leased premises.

Violation of Public Policy

The relief sought by the appellant is that the arbitral award rendered by the arbitrator in the matter between the parties be set aside in its entirety on the basis that it was rendered contrary to the public policy of Zimbabwe. The limited grounds upon which an arbitral award may be set aside are delineated in Article 34(2) of the Model Law scheduled to the Arbitration Act [*Chapter 7:15*]. In terms of Article 34(2)(b)(ii), as read with and elaborated by Article 34(5), an award may be set aside if it is in conflict with the public policy of Zimbabwe.

It is now axiomatic that the concept of public policy as well as what might be perceived as being in conflict with that policy, within the meaning of Articles 34 and 36, must be construed narrowly so as to attain the objective of finality in commercial arbitration as contemplated by the Model Law. The *locus classicus* on the subject is the decision of this Court in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S), *per* GUBBAY CJ, at 466E-G. As was emphasised in that case, an award is not contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. The reviewing court does not exercise an appeal power by having regard to what it considers should have been the correct decision. It will only intervene to set aside an award on the ground of public policy where the reasoning or conclusion in the 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 [or] 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”.

See also the principles enunciated and applied more recently in *Willoughbys Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Another* 2014 (1) ZLR 501 (S) at 507F-508A.

In my view, the appellant has failed to satisfy the rigorous test articulated by this Court for interfering with any arbitral award. Arguably, the arbitrator *in casu* might have erred marginally in computing the exact turnover attributable to the pies distributed by the appellant beyond the leased premises. However, I am unable to discern any palpable

inequity, gross irrationality, moral turpitude or resultant grave injustice, either in the procedure adopted by the arbitrator or in his substantive findings on the merits of the matter, so as to warrant the setting aside of the impugned award. In the absence of any perverse conduct or outlandish aberration on the part of the arbitrator or in the affirmation of his award by the High Court, the appellant is not entitled to the relief that it craves.

In the result, the appeal is devoid of merit and cannot succeed. It is accordingly ordered that the appeal be and is hereby dismissed with costs.

GWAUNZA JA: I agree.

MAVANGIRA JA: I agree.

Wintertons, appellant's legal practitioners

IEG Musimbe & Partners, 1st respondent's legal practitioners