

REPORTABLE (9)

AUGUR INVESTMENTS OU
v
(1) FAIRCLOT INVESTMENTS (PRIVATE) LIMITED t/a T & C
CONSTRUCTION (2) D.L. CRUTTENDEN

SUPREME COURT OF ZIMBABWE
GWAUNZA JA; MAVANGIRA JA; BHUNU JA
HARARE, OCTOBER 16, 2017 & FEBRUARY 11, 2019

T. Zhuwarara with N. Chamisa, for the appellant

D.Ochieng, for the respondents

GWAUNZA JA

[1] This is an appeal against the whole judgment of the High Court dismissing the appellant's application for the setting aside of an arbitral award in terms of Article 34(2) of the UNCITRAL Model Law as set out in the Arbitration Act [*Chapter 7:15*].

FACTUAL BACKGROUND

[2] The appellant is a company incorporated in terms of the laws of Mauritius and it carries on the business of property finance and development in Zimbabwe. The first respondent is a duly registered company in terms of the laws of Zimbabwe and is in the business of performing civil contracting services. The second respondent is an arbitrator. In June 2008, the appellant was contracted by the City of Harare to manage the upgrading and extension of the Airport Road. By agreement dated 25 and 26 March 2013, the appellant subcontracted the first respondent to carry out civil engineering works on the

Airport Road. At the time of entering into the agreement, the appellant acknowledged indebtedness to the first respondent in the sum of US\$ 3 340 500 for previous work done and equipment hire charges.

[3] In terms of clauses 1.3 and 3.1 of the agreement, payment to the first respondent for its services was to be by way of land and should the land option fall away, payment was to be made in cash within a limited time period. It was also a term of the agreement that the consideration due to the first respondent was to be payable when the land pledged as security was sold or the appellant was in the position to make a cash payment. It was recorded that the appellant had commenced the rezoning of the land and would use its best endeavours to rezone, subdivide and develop it. It is common cause that the land pledged as security was not registered in the name of the appellant, nor was it sold to realise the amount owed to the first respondent, as envisaged by the parties. Pursuant to the agreement, the first respondent carried out works on the Airport Road at the cost of US\$ 4 800 000. Despite demand, the appellant refused, failed or neglected to pay the debt due to the first respondent for a period of almost two years then. It is now close to 5 years.

[4] Aggrieved, the first respondent purported to cancel the agreement between the parties by way of a letter dated 14 April 2014 and thereafter a dispute arose. In terms of the contract, the matter was referred to arbitration before the second respondent. Before the arbitrator, the first respondent sought an award for payment of the US\$ 4 800 000 debt or alternatively an order of *quantum meruit* for work carried out on behalf of the appellant. The first respondent demanded that it be paid in cash and in its statement of claim, gave the reason that the land option had fallen away as evidenced by the

appellant's failure to pay its dues by way of cash, transfer of land or a combination of the two. Further, that the appellant did not in any event, own the land it had tendered as security for the payment of the debt in question. In response, the appellant did not contest the debt but challenged the method of repayment as well as the timing of it.

[5] It would appear that in view of the above, the main issue placed before the arbitrator for determination was whether or not the land option had fallen away and if so whether payment was to be made by way of cash. The arbitrator found for the first respondent and issued the following award:

1. That the respondent shall pay the Claimant US\$ 3 340 500,00 (three million five hundred and forty thousand and five hundred United States dollars) not later than Friday 4 April 2015.
2. That the respondent shall pay the Claimant US\$ 1 459 500,00 (one million four hundred and fifty-nine thousand and five hundred United States dollars) not later than Thursday 4 June 2015. This payment may be made in land of equivalent value but, whether in cash or land, the payment must be made not later than Thursday 4 June 2015.
3. That the costs of the Arbitration being the Arbitrator's fee and the costs of the hearing be paid in equal shares by the parties.
4. That the parties shall bear their own legal costs.
5. That the application for an order of *quantum meruit* fails.

[6] Dissatisfied with the award, the appellant approached the court *a quo* with an application to set it aside in terms of Article 34(2)(b)(ii) of the Arbitration Act, on the basis that the award was contrary to public policy as the arbitrator had decided on matters which were not placed before him. This related to the issue of the effect of the cancellation of a contract relating to the land pledged by the appellant *in casu*, entered into between the appellant and the City of Harare. The court *a quo* dismissed the application and reasoned that the arbitrator did not deal with issues outside those referred to him and consequently that the award did not offend against public policy. In support of this finding the court *a quo* held that it was, in fact, the appellant who had

introduced the issue of the contract with the City of Harare. The court *a quo* further found that the second respondent's decision to award payment in cash was not outrageous since the land used as security did not belong to the appellant.

[7] Aggrieved by this order, the appellant noted an appeal to this Court on grounds that in my view raise two questions for determination, and these are:

1. Whether or not the arbitrator decided on issues that were not placed before him;
and
2. Whether or not the arbitral award was contrary to public policy.

THE APPELLANT'S ARGUMENTS ON APPEAL

[8] It was argued for the appellant that it was common cause that payment due to the first respondent was to be made in land rather than in cash. It was also argued that the statement of claim by the first respondent set out the case that the agreement had been terminated and since the land used as security was not registered in the appellant's name, the land option had fallen away. The appellant claims that this is the case it was supposed to meet and answer at the arbitration proceedings but however the second respondent found for the first respondent by making out a case that had neither been pleaded nor argued. In particular, the appellant took issue with the fact that the second respondent found that as the main contract between the appellant and the City of Harare had been terminated, the agreement between the parties effectively came to an end. That was never the case that was pleaded or argued by the first respondent. It was therefore alleged that the second respondent made out a case for the first respondent and substituted the first respondent's cause of action with his own, resulting in fundamental injustice which was also an affront to the public policy of Zimbabwe.

THE RESPONDENTS` ARGUMENTS ON APPEAL

[9] The first respondent argued that the appellant is not disputing the debt owed to it which has been outstanding for a number of years. It was also argued that the appellant exhibited dishonourable conduct by offering land which did not belong to it as “security” for the repayment of the debt. This was because the land could not be sold and was thus never at any point, security for the debt. The first respondent also denies that the award is contrary to public policy and stresses that the appellant undertook to pay the debt by June or July 2014 through a transfer of land but this has not been done. As a result, the US\$ 4 800 000 remains owing. As regards the argument that the arbitrator dealt with issues not before him, the first respondent argued that the arbitrator correctly identified the issues for determination and one of these was whether or not the land option had fallen away.

WHETHER OR NOT THE ARBITRATOR DECIDED ON ISSUES THAT WERE NOT BEFORE HIM

[10] It is the appellant`s argument that the second respondent went outside his terms of reference and raised *mero motu* the issue of the cancellation of the contract between the appellant and the City of Harare. The argument is that this issue was neither raised nor argued by the parties thus the second respondent ought not to have made a pronouncement on it or premised his arbitral award thereon.

[11] The arbitrator did indeed find that the agreement between the parties was terminated by virtue of the termination of the main contract between the appellant and the City of Harare. However, in his award, the arbitrator pointed out that there was on the record before him minutes of a meeting between the appellant and a third party, which

recorded the fact of such termination. Further, that the document had been prepared by the appellant, and was introduced at the hearing before the arbitrator, with no objections being raised. The court *a quo* also noted that a copy of the agreement in question, between the appellant and the City of Harare, was part of the record before that court. Thus, far from finding that the arbitrator had dealt with issues falling outside his terms of reference, the court *a quo* stated as follows in its judgment:

“I have perused the statement of claim and response. It is the applicant (appellant *in casu*) in its response which introduced the issue of its contract with the City of Harare

On page 299 of the record is an agreement between City of Harare and the applicant.

I therefore fail to understand the complaint by the applicant. It is my view that the arbitrator did not deal with issues outside referral.”

Against this background, it is in my view correctly argued for the first respondent that the arbitrator pronounced on, and premised his finding as to, the termination of the agreement between the parties, based on evidence and submissions that were clearly placed before him.

[12] The first respondent argues that in any case whether or not the agreement was alive was irrelevant to the question of whether payment in cash was due. In terms of clause 3.1 of the agreement, so the argument goes, the ‘cash settlement’ was to come into effect only upon the land option falling away, a conclusion that the arbitrator duly pronounced. I am persuaded by this argument, not least because the appellant itself indicated that it understood the ‘land falling away’ option, as an alternative basis for the claim filed against it. This much is made clear on a reading of para 9 of the appellant’s founding affidavit *a quo*:

“First respondent claimed payment in the sum of US\$4.8 million based on a written agreement. As appears from the statement of claim, it was alleged that

the agreement had been cancelled or alternatively, the land option envisaged by the parties had fallen away...” (*my emphasis*)

[13] A perusal of the first respondent’s statement of claim confirms the appellant’s assessment of the first respondent’s claim. The point was clearly made in its statement of claim, that the land which had been used as security for the debt did not belong to the appellant and thus did not constitute valid security. Further that as a result, the land option had fallen away. The relevant part of the statement of claim reads as follows:

- “25. In an email dated 11 September 2014 (enclosed as Annexure 14) T&C offered to settle the outstanding debt with Augur by way of (a) cash payment, or (b) by way of transfer of ownership of land to T&C or (c) a combination of the two. Augur failed to respond to this proposal.
26. In the circumstances, the “land option” has fallen away as Augur does not own the land it secured and, further, Augur has not consented to the transfer of land to T&C. In fact, T&C is unaware whether Augur owns any land.
27. Pursuant to clauses 3.1, 6.1B and 6.3 the admitted debt of US\$ 4.8 million is due and owing.” (*my emphasis*)

[14] That the issue of the land option was uppermost in the arbitrator’s mind is confirmed in the following concise statement contained in his award:

“The particular issues are whether or not the ‘land option’ has fallen away and what is the duration of the ‘limited time period’ both as identified in clause 3.1. In my view these are inextricably linked.”

Thus, while the second respondent opined that the termination of the main contract between the City of Harare and the appellant had the effect of terminating the agreement between the appellant and the first respondent, he also considered the land issue, including the timing of the cash payment. He found that the land option in respect of ‘the old debt,’ unlike the ‘new debt,’ had indeed fallen away. His conclusions are clearly premised on this finding as stated in para 5.5 and 5.5(*sic*) of the arbitral award:

- 5.5 As set out in 4.21 above, I consider the respondent has had more than adequate time to demonstrate progress towards settling this debt.

Accordingly, I conclude that the land option has fallen away in respect of the old debt and that the time has come for a cash payment.

5.5 So far as the new debt is concerned I consider that sufficient time has not yet elapsed to enable me to consider that the land option has fallen away and I shall make allowance for this in the award.

[15] It would appear from his award though, that the arbitrator used the estimated date of the termination of the contract between the parties, as an aid in assessing whether or not adequate time to demonstrate progress towards settling the debt in terms of para 3.1 of the agreement, had elapsed. I do not find anything amiss in this approach, given that the evidence was there before him and that he could, in any case have made the same assessment of time without reference to the supposed date of the termination of the parties' agreement. The arbitrator was not called upon to determine the date from which the land option could be considered as having fallen away. All he had to do was determine whether 'a limited time period' had elapsed from the time events on the ground suggested to the first respondent that the land option had fallen away. The first respondent's statement of claim in my view was instructive in that respect.

[16] It is accepted that an arbitrator, unlike a court of law, is not allowed to venture outside their terms of reference when making a determination, as highlighted as follows by FOURIE J, in *Bidoli v Bidoli* [2010] ZAWCHC 39 at 30:

"An arbitrator, unlike a court, has no inherent power to decide issues or make orders that go beyond the issues which have been referred to arbitration and the pleadings filed pursuant thereto. In *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pvt) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA), LEWIS JA put it as follows at para 30:

"In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to

the matters pleaded. Thus the arbitrator... had no jurisdiction to decide a matter not pleaded."

(See also *Inter Agric (Pvt) Ltd v Mudavanhu & Ors* SC 09/15)

[17] The appellant itself acknowledges that the issue of mode of payment to the first respondent was key to a resolution of the dispute and stated the following in its Answering Affidavit to the application in the court *a quo*:

"A genuine dispute existed between the parties. The central issue was whether or not the First Respondent was entitled to payment in a form other than land, and if so, when such payment was to be made."

In view of the foregoing, I find that the appellant's submission that the second respondent made a case for the parties and premised his findings on issues that were not before him, to be without any basis. The point must be made that even if the arbitrator had indeed premised his award also on the finding that the contract between the City Council and the appellant automatically terminated the parties' contract, the validity of the conclusion would still stand. It is at law not uncommon for a single determination to be premised on more than one finding in the same dispute.

This issue is accordingly determined against the appellant.

WHETHER OR NOT THE AWARD IS AGAINST PUBLIC POLICY

[18] In terms of the law, an arbitral award can be set aside in terms Article 34(2) of the UNCITRAL Model Law as set out in the First Schedule to the Arbitration Act [*Chapter 7:15*]. It reads as follows in relevant part:

- "(2) An arbitral award may be set aside by the High Court only if;
- (a) the party making the application furnishes proof that —
 - ...
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from

those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

...

- (b) the High Court finds that—
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or
 - (ii) the award is in conflict with the public policy of Zimbabwe.” (*my emphasis*)

[19] The test to be applied in determining whether an award is in conflict with public policy was set out by this Court in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 466 E-G where GUBBAY CJ said:

“Under article 34 or 36, 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. 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.”

[20] The gravamen of the appellant`s attack on the arbitral award is that the second respondent made a case for the first respondent by considering an alternative and completely unfounded basis upon which the appellant`s liability was premised, that is the termination of its contract with City of Harare.

[21] I have already determined, as did the court *a quo*, that there is no basis to the above allegation. On the evidence before the court, the arbitrator`s determination clearly did not turn on the issue concerning the effect that the cancellation of the agreement

between the appellant and Harare City Council might have had on the parties' agreement. This was notwithstanding the fact that the matter had been placed before the arbitrator by the appellant itself. Rather, and as demonstrated above, the determination properly turned on the issue of whether or not the land option had fallen away. That being the case, I find that the applicant failed to furnish proof, as required in terms of Article 34(2) of the Model Law, that the award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, nor that it contained decisions on matters beyond the scope of the submission to arbitration.

[22] To the extent that the appellant may be questioning the correctness of the conclusions that were reached by the second respondent, it is settled that in setting aside an award, the court is not concerned with its correctness. Rather the concern of the court is whether or not the award goes beyond mere faultiness to constitute a palpable inequity. In *Peruke Investments (Pvt) Ltd v Willoughby's Investments (Pvt) Ltd & Anor* 2015 (2) ZLR 491 (S) at 499H-500F PATEL JA held as follows:

“As a rule, the courts are generally loath to invoke this ground except in the most glaring instances of illogicality, injustice or moral turpitude. In the words of GUBBAY CJ in the *locus classicus* on the subject, *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 465D-E:

“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.”

In that case the learned judge went on to state that he could not find anything outrageously illogical or immoral in the reasoning or conclusions reached by the arbitrator, to warrant a different conclusion.

[23] I respectfully associate myself with the sentiments of the learned judge in this case and find that they may properly be applied to the circumstances of this case. There is no indication in *casu*, and based on the circumstances, that the second respondent's award is irrational or outrageously immoral or illogical. (See also *Zesa v Maposa* 1992(2) ZLR 452(S)).

[24] It is pertinent to reiterate that from the time that the dispute arose right up to the appeal before this Court, the appellant has not disputed that it owes the first respondent money for work done, in the amount of US\$ 4 800 000. Nor can the appellant deny that payment of this amount to the first respondent, in cash, was within the contemplation of the parties. This is put beyond doubt if regard is had to para 3.1 of their agreement, which reads as follows:

“Should the land option fall away then a limited time period will apply for the cash settlement to come into effect. T & C Construction will have the option to opt out of the land security if so required” (*my emphasis*)

[25] In the premises and given that in terms of the arbitrator's award, the appellant was ordered to pay a sum of money that it admitted to owing, the argument that such an award is contrary to public policy, is clearly not sustainable. The award is not one to be characterised as having far reaching public consequences that would hurt the conception of justice in Zimbabwe. Nor can it be said to have violated a fundamental principle of the law, morality or justice. The contrary could be said to be true, given that the first respondent performed its part of the contract and in the process, incurred expenses running into millions of dollars. These expenses have still not been paid close to 5 years after the contract was entered into.

DISPOSITION

[26] The court *a quo* cannot be faulted in its finding that no case had been proved for the setting aside of the arbitral award of the second respondent. As demonstrated above, the award is not in conflict with the public policy of Zimbabwe. The appeal has no merit and ought to fail.

[27] Accordingly, it is ordered as follows:

“The appeal be and is hereby dismissed with costs.”

MAVANGIRA JA: I agree

BHUNU JA: I agree

Costa & Madzonga, appellant`s legal practitioners

Gill, Godlonton & Gerrans, respondents` legal practitioners