

M. BHIKA BROTHERS (PRIVATE) LIMITED

versus

RAY MAKUVATSINE (PRIVATE BUSINESS CORP)

HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

MANZUNZU J

HARARE, 11 October 2022 & 30 October 2023

COURT APPLICATION

B Ngwenya, for the Applicant

G Chifamba, for the Respondent

MANZUNZU J

INTRODUCTION

This is a court application for the registration of an arbitral award in terms of Chapter viii, article 35 of the first schedule to the Arbitration Act, Chapter 7:15 as modified by SI 208/96. The application is opposed by the respondent.

ARTICLE 35

Article 35 of the Model Law provides that:

“(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in *the English language*, the party shall supply a duly certified translation into *the English language*.”

Registration of an arbitral award is more of an administrative process to facilitate the enforcement of the award. In *Matthews v Craster International (Private) Limited* HH 707/15 this court had occasion to comment about this process in the following words: “...*an application for the registration of an arbitral award is largely an administrative process. Whilst in such an application the court is not really being called upon to rubber stamp the decision of an arbitrator, nonetheless, it is largely giving that decision the badge of authority to enable it to be enforceable. If the court is satisfied that the award is regular on the face of it, and that it is not deficient in any of the ways contemplated by articles 34 and 36 of the Arbitration Act, then the court will register it.*”

BACKGROUND

The background is largely common cause. A dispute arose between the parties who had a lessor-lessee relationship. In terms of their lease agreement they went for arbitration before a retired Judge of this court Justice N T Mtshiya (may his soul rest in peace). The arbitrator issued an arbitral award in favour of the applicant on 20 June 2022. The applicant was the claimant in the arbitration proceedings. The following arbitral award was issued:

- “1. The effective date of the termination of the lease agreement is 31 January 2022.
2. The notice of non-renewal of the lease agreement issued to the respondent by the claimant on 25 August 2021 is valid and enforceable.
3. The respondent and all other persons claiming occupation through it at Shop 5, Silke House, No. 124 Robert Mugabe Road, Corner Robert Mugabe and 4th Street, Harare, shall vacate the premises forthwith.
4. The respondent shall pay arrear rentals in the sum of US\$2 519.00 owed as at 01 January 2022.
5. The respondent shall pay operating costs arrears in the sum of RTGS 15 753.58 owing as at 01 January 2022.
6. The respondent shall, with effect from 1 February 2022 to date on which the respondent shall vacate the premises, pay holding over damages to the claimant at the rate of US\$1 500.00 per month, being the last agreed rental.
7. The respondent’s notice on renewal of the lease agreement dated 4 November 2021 is invalid and unenforceable.
8. Each party shall bear its own costs.
9. The parties shall pay the arbitrators fees in equal shares.”

OPPOSITION

The basis upon which this application is opposed by the respondent is that the award is against public policy in many respects as outlined by the respondent in the opposing affidavit. I shall deal with the various complaints raised by the respondent after examination of the position of the law.

THE LAW

Article 36 (1) (b) states that:

“ARTICLE 36 *Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may

be refused only—

(b) if the 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 recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.”

Article 36 (3) lists some of the situations which are contrary to public policy. It states:

“(3) For the avoidance of doubt and without limiting the generality of paragraph (1) (b) (ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if—

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.”

This court does not exercise appeal powers in an application to register or set aside an arbitral award. The court can however refuse to register an arbitral award if the same is shown to be contrary to public policy. When then is an award said to be contrary to public policy? GUBBAY CJ in the case of *Zesa v Maposa* 1999 (2) ZLR 452 (S) at 466E said:

“An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside. 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.”

In *Alliance Insurance v Imperial Plastics (Private) Limited and Anor*, SC 30/17 the court had occasion to comment on the above stated legal position; “The import of these remarks is that the Court should not be inclined to set aside the arbitral award merely on the basis that it considers the decision of the arbitrator wrong in fact or in law. If the courts are given the power to review the decision of the arbitrator on the ground of error of law or of fact, then it would defeat the objectives of the Act. It would make arbitration the first step in a process which would lead to a series of appeals.”

In what may be considered as an exception to the general principle laid out in the *Zesa* case (supra), the learned CHIEF JUSTICE went on further to say, at p 466F–G:

“Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes 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 in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

The same 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.”

Guided by the same principles laid down in the Zesa case, in Botha v Gwanda Municipality HB 151/18 the court alluded to the high threshold for those who challenge the registration of the award. The court remarked; *“That this is a very high threshold is pretty obvious. It means that even where a decision is faulty or incorrect the court still will not interfere. The court will only interfere where the decision is outrageous in its defiance of logic and so offends against the public’s sense of justice. It is only then that the court will set it aside or decline to recognize or enforce it. That remedy is certainly not available to sore losers who simply are unhappy with the arbitral award because it has been made against them. Such a result happens all the time that a dispute is adjudicated upon because adjudication, by its very nature, means that one of the parties has to live with disappointment. Even where the court does not agree with the decision of the arbitrator it has no power to substitute its own decision.”*

This is the yardstick against which the grounds raised by the respondent shall be measured. The fault by the arbitrator, where it is proven, must constitute palpable inequity of a very high degree such that its effect is far reaching and outrageous in its defiance of logic or acceptable moral standards. The test is, what would a sensible and fair minded person say? If such person concludes that the proven errors intolerably hurts the conception of justice, then it would be contrary to public policy.

WHETHER THE ARBITRAL AWARD IS CONTRARY TO PUBLIC POLICY

The respondent says the arbitral award offends public policy in that:

- a) The arbitrator erred in finding that proper notice was given by the applicant on the non-renewal of the lease. Such a finding according to the respondent, had the effect of;
 - (i) irregularly excusing the applicant from complying with the terms of the agreement.
 - (ii) it allows the applicant to unilaterally vary the terms of the option granted to the respondent.
 - (iii) the award is a rewrite of the agreement between the parties.

Clauses 2.1 and 2.2 of the lease agreement are clear in their reading concerning the giving of notice by either party. I find no fault in the arbitrator’s finding that proper notice was given by the applicant for the non-renewal. This is more so because clause 2.1 does not prohibit the giving of a longer notice than the 3 months. If anything a notice longer than 3 months works in favour of the respondent. Unlike clause 2.1, clause 2.2 limits the time respondent could exercise its option to renew the lease. Even if the arbitrator was wrong in his interpretation, which I do not believe he was, such error cannot be contrary to public policy because it falls below the threshold set by case law. Nothing turns to the alleged rewriting of the contract.

- b) The respondent said the award goes against admissions by the applicant in the pleadings. This is in so far as it relates to the deed of settlement. The finding of the arbitrator was that the deed of settlement relates to different parties. I find no fault in such a factual finding.
- c) The respondent further attacked the arbitrator's findings in that he applied the law relating to rectification of agreement, something which applicant did not ask for. This was rectification by construction in the interpretation of clauses 2.1 and 2.2. I see no fault in this approach by the arbitrator. Paragraph 18 of the award, the arbitrator said, "*...it is clear to me that there was a correctable typographical error/mistake. I accept that the claimant has, without specifically using the word "rectification" actually asked for the correction of the mistake in clause 2.1. Admittedly, in correcting the error in clause 2.1 of the agreement principles of rectification can be used. The interpretation of clauses 2.1 and 2.2 was guided by the existing principles of rectification in order to correct the error in clause 2.1.*"
- d) The fourth issue by the respondent is that the arbitrator did not give reasons for his conclusion that the termination date was 31 January 2022. Paragraphs 19 to 25 of the award is self-explanatory and run contrary to this assertion by the respondent. I need not take this issue any further except to say that the ground has no merit.
- e) It has been alleged to be contrary to public policy for the award to find liability for arrear rentals and operating costs and more so with some awarded in foreign currency. Liability was a factual finding by the arbitrator, which even if proved to be wrong, cannot be said to be outrageous. Clause 3 of the lease agreement sets rentals in United States dollars. The applicant's response in respect of this point is that according to the evidence before the arbitrator, the respondent though charged in US dollars would pay in the local currency which was then converted to US dollars at the prevailing rate. This was the understanding and arrangement of the parties. The parties tend to revive the evidence which was led before the arbitrator for consideration by this court, which in my view is not proper. This amounts to asking for a second bite. The fact remains the arbitrator decided the matter on the basis of the agreement of lease and the evidence placed before him.

These are some of the multiple grounds relied upon by the respondent which seems to attack every line of reasoning of the learned arbitrator without clearly and concisely defining the issues which are to be determined by this Court. What the respondent has done is to literally take the court through the same dispute which was resolved by the arbitrator. In fact, the respondent argued as if it were before an appeal court against the decision of the arbitrator. That approach is misplaced and was discouraged in the case of Harare Sports Club and Anor v Zimbabwe Cricket, HH 398/19 where the court said; *“Fanciful defences against registration of arbitral awards and frivolous applications seeking to set aside an award by inviting the court to plough through the same dispute which has been resolved by an arbitrator in the forlorn hope of obtaining a different outcome will not be entertained.”*

The respondent’s argument throughout the opposition is that the arbitrator was wrong in one way or the other. Such opposition is similar to the observations made in TN Harequin Luxaire Limited and Anor v Quest Motors Manufacturing (Pvt) Ltd SC 30/18 where the court remarked; *“The essence of the appellant’s case against the arbitral award both before the court a quo and this Court is that the arbitrator erred in his reasoning. The appellants give the particulars of such alleged errors in detail.*

Even accepting that the arbitrator erred as alleged, such errors may have constituted valid grounds of appeal from one court of law to another but are completely ineffective in preventing the registration of an arbitral award made in terms of the Arbitration Act [Chapter 7:15], on the grounds that such an award is contrary to the public policy of Zimbabwe.

Applicants who seek to set aside an arbitral award and respondents who oppose the registration of an arbitral award should take heed of the words of wisdom expressed by Harms JA in *Tel Cordia Technologies INC v Telkom SA Ltd* 2007 (3) SA 266 at 302 D-E, where he stated as follows:

“Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of limits of his power. The power given to the arbitrator was to interpret the agreement rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.... To illustrate, an arbitrator in a ‘normal’ local arbitration has to apply South African law but if he errs, in his understanding or application of the local law the parties have to live with it.”

Only those who meet the threshold set out in the Zesa case (supra) and other authorities should expect the courts to grant orders in their favour.

In *casu*, the complaints raised by the respondent against the arbitral award do not come anywhere near the threshold for refusal to recognize and enforce an arbitral award. The respondent's concerns are the usual fulminations of a disappointed litigant. The respondent has not shown that which it says is contrary to the public policy of Zimbabwe in the arbitral award. The matter has been argued as if it were an appeal. I conclude that there is no basis for refusing to register the award.

DISPOSITION

It is ordered that:

1. The arbitral award handed down by the Honourable Arbitrator Mr N T Matshiya dated 20 June 2022 be and is hereby registered as an order of the High Court of Zimbabwe.
2. The respondent and all those claiming occupation through it be and are hereby evicted forthwith from the premises known as Shop 5, Silke House, situated at No. 124 Robert Mugabe Road, Corner Robert Mugabe and 4th Street, Harare.
3. The respondent be and is hereby ordered to pay arrear rentals in the sum of US\$2 519.00 owed as at 01 January 2022.
4. The respondent be and is hereby ordered to pay operational costs arrears in the sun of RTGS 15 753.58 owing as at 01 January 2022.
5. The respondent be and is hereby ordered to pay holding over damages of US\$1 500.00 per month with effect from 1 February 2022 until the respondent vacates or is evicted from the premises.
6. The respondent shall pay costs of suit.

B Ngwenya Legal Practice, applicant's legal practitioners
Mugomezwa and Mazhindu, respondent's legal practitioners