CLOVGATE ELEVATOR COMPANY (PVT) LTD

versus

JUSTICE N. MTSHIYA (Rtd) N.O

and

ZIMBABWE POWER CORPORATION (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 27 July & 20 November 2023

COURT APPLICATION

S M Hashiti, for the Applicant
N Munyuru, for the Respondent

INTRODUCTION

MANZUNZU J : This is a court application for setting aside an arbitral award in terms of article 34 (2)(b)(ii) of the Model Law of the first schedule to the Arbitration Act, [*Chapter 7:15]* which provides that;

> "(2) An arbitral award may be set aside by the *High Court* only if—
> (*b*) the *High Court* finds, that—
> (i) …
> (ii) the award is in conflict with the public policy of *Zimbabwe*."

The application is opposed by the respondent.

BACKGROUND

The factual background is largely common cause. Sometime in June 2013 the applicant (Clovgate) and second respondent (ZPC) entered into a contract to carry out lift shaft structural refurbishment of the Kariba Power Station. They agreed on a contract price. Clovgate claimed the contract was varied resulting in it incurring extra expenses used in the refurbishment works. ZPC disputed this position which resulted in a dispute between the parties. The parties then appeared before the 1st respondent for arbitration. The issues for determination presented before the arbitrator were:

a) Whether or not the parties entered into a variation agreement.
b) Whether or not there was a variation of scope of work and supplies.

c) Whether or not Clovgate was entitled to any payment in terms of the variation, if so the quantum thereof.
d) Whether or not Clovgate is entitled to specific performance or damages in the alternative.
e) Whether or not Clovgate is entitled to the alternative claim for unjust enrichment.

At the conclusion of the proceedings before the arbitrator, the following award was issued on 27 May 2022:

1. *"All variations claimed by claimant in respect of the Kariba Power Station contract are null and void and as a result the respondent is not obliged to make any payments as prayed for by the claimant.*
2. *The claims for specific performance and unjust enrichment are dismissed.*
3. *Each party shall bear its own legal costs.*
4. *The parties shall pay the arbitrator's fees in equal shares.*
5. *This award replaces the composite award issued on 28 February 2022 in respect of the same matter."*

THE APPLICATION

The nature of this application is that the arbitral award issued on 27 May 2022 is in direct conflict with the public policy of Zimbabwe in that;

a) it creates a palpable inequity between the parties
b) it fails to deal with the issues submitted for arbitration
c) it is self-defeating and contradictory in its rendering as to amount to a failure to conduct arbitral proceedings
d) it is rendered contra evidence established and presented before the arbitrator.

I shall deal with the various complaints raised by the applicant 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) …
(ii) the recognition or enforcement of the award would be contrary to the public policy of

Zimbabwe." (emphasis is mine).

In short, this article says an arbitral award which is contrary to public policy can neither be recognized nor enforced at law.

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 set aside 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 in these words;

> "*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 sounds more of an exception to the general principle laid down 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 seek to set aside an arbitral 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 applicant 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 applicant says the arbitral award offends public policy particularized as follows:

1. the arbitrator failed to determine all the issues presented before him, particularized as the failure to deal with the issue of damages and unjust enrichment.
2. the arbitrator failed to give reasons for his ruling
3. the arbitrator failed to consider certain evidence
4. the arbitrator failed to apply his mind properly

WHETHER THE ARBITRATOR FAILED TO DETERMINE AND GIVE REASONS TO ALL THE ISSUES PRESENTED BEFORE HIM

The applicant's contention is that the issue of damages, as an alternative to specific performance and unjust enrichment were not dealt with. Such failure, it was argued, is a palpable failure of function which vitiates the proceedings and is contrary to public policy. The court was referred to authorities of *GMB v Erenel (Pvt) Ltd; Erenel (Pvt) Ltd v GMB HB 156/20; Longman Zimbabwe v Midzi & Ors 2008 (1) ZLR 198 and Chartpril Enterprises (Pvt) Ltd and 2 Ors v Elnour United Engineering Group Pvt Ltd HH 602/21*.

Advocate Hashiti stood on a firm ground that nowhere in the award did the arbitrator deal with the issue of damages and unjust enrichment. While he acknowledged the presence of the dispositive part of the award on unjust enrichment, he still argued that no findings were made. It was submitted that the claim for unjust enrichment was not dependent upon the existence of a valid contract.

On the other hand Mr Munyuru argued that the arbitrator adequately dealt with both the issue of damages and unjust enrichment. Reference was made to specific paragraphs of the award.

Whether or not the arbitrator dealt with the issue of damages and unjust enrichment is something which can be gleaned from the award itself. The fact that the arbitrator was alive to the issues before him, damages and unjust enrichment included, cannot be doubted. This is because at page 4 of the award such issues as agreed to by the parties are identified.

In casu, the issue is whether a determination was made of the issues relating to damages and unjust enrichment. The question is not whether a right determination was made or not. This is because an arbitrator as a matter of law can make a wrong decision of fact or law without the intervention of this court save where such error is contrary to public policy.

It must be noted that the issue of damages came as an alternative to specific performance. Specific performance is a contractual remedy where a party seeks to compel another party to a contract to perform its part. Where the breach of the contract is such that specific performance is no longer an appropriate remedy, then the court can then resort to the issue of damages arising from the breach of such contract. These two flow from one source.

Given the manner in which the issue of specific performance was dealt with, I disagree with the applicant that the issue of damages was not dealt with. The arbitrator's findings were that there was no variation agreement and secondly that the applicant was not an innocent party. With this observation and finding, it disposes the issue of damages. The applicant was found to be the defaulting party having breached the terms of the contract.

In respect to the unjust enrichment claim, paragraph 25 of the award reads in part;

"... Having failed to prove variation, the claimant, in casu, cannot lay claim to any payment

relating to unsanctioned works. Without proof of variations effected in terms of the contract any claims based on non-exixtent variations must fail."

The legal correctness of this finding is not what this court is there to deal with. But the fact remains that a finding was made and reasons given on the issue of unjust enrichment contrary to what the applicant says. Whether the applicant agrees or not with the reasoning of the arbitrator, its neither here nor there.

WHETHER THE ARBITRATOR'S REASONING OR CONCLUSION IS OUTRAGEOUS IN DEFIANCE OF LOGIC:

The applicant alleges the arbitrator did not only fail to consider the evidence placed before him but failed to apply his mind properly and made a rendering contra the submitted evidence. It is argued, the arbitrator attempted to hinge the claim for unjust enrichment to the existence of a valid contract. Secondly, he misinterpreted the no-variation clause in the contract by failing to recognize that the minutes dated 1 August 2014 had the effect of varying the agreement. Subsequent meetings on 16 January 2015 and 3 November 2015 reaffirmed a variation to the agreement. Further evidence was also pointed out as having been ignored by the arbitrator.

A reading of the award shows the ingenuity of the applicant's submissions. I say so because paragraph 16 of the award reads,

"For this case, the claimant has largely relied on minutes exchanged between the parties. The existence of such minutes cannot be denied. However, in relying on the existence of minutes, the claimant also admits that the minutes recorded constituted "first steps towards the variation of the contract." Unfortunately, the discussions did not lead to the signing of addendums (valid variations)."

The applicant has argued this matter as if it were an appeal 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 applicant's argument throughout the application is that the arbitrator was wrong in one way or the other. Such an approach 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 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 applicant against the arbitral award do not come anywhere near the threshold for refusal to recognize and enforce an arbitral award, later alone to set it aside. The applicant's concerns are the usual fulminations of a disappointed litigant. The applicant has not shown that which it says is contrary to the public policy of Zimbabwe in the arbitral award and accordingly has failed to discharge the onus upon it. I conclude that there is no basis to set aside the arbitral award. While the respondent has asked for costs on a higher scale, I do not think such is justified in the present case.

DISPOSITION

The application for setting aside the arbitral award issued by the 1st respondent on 27 May 2022 be and is hereby dismissed with costs on the ordinary scale.

Chivore Dzingirai, Applicant's Legal Practitioners
Muvingi & Mugadza, Respondent's Legal Practitioners