PREMIUM LEAF ZIMBABWE (PVT) LTD
versus
KUARANDA FARMING (PVT) LTD
and
JOHANNES JURIE ERASMUS
and
NICKOLEAN HENRIETTA ERASMUS
and
KEVIN TERRY

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 3 June 2021 & 8 September, 2021

Opposed Matter

D Ochieng, for the applicant
R Stewart, for the respondent

MANGOTA J: The applicant, a legal entity which is registered in Zimbabwe, contracted the first respondent, a tobacco grower, to grow tobacco crop on its behalf for the 2018-2019 tobacco season. The second and third respondents bound themselves as sureties and co-principal debtors with the first respondent.

The contract of the applicant and the respondents obliged the latter to plant, grow and deliver to the applicant tobacco crop of agreed quantities which were sufficient to offset its liability of US$427 024.90. It failed to deliver tobacco to satisfy its financial obligation. Its surety and it therefore became jointly and severally liable for payment of the full amount of US$427 024. 90. It admitted liability to pay the sum. It, however, contended that its sureties and itc were liable to pay the sum denominated in Zimbabwe, and not in United States, dollars. It offered to pay the applicant the sum of ZWL427 024.90 which the applicant rejected insisting on payment in United States dollars.

The parties declared a dispute between them. The fourth respondent ("the arbitrator") was appointed to determine the same. He heard the parties' respective cases and decided in favour of the respondents. He based his decision on certain legislation which revalued United States dollar debts into debts which sound in Zimbabwe dollars at the rate of 1:1.

The decision of the arbitrator forms the *causa* of the current application. The applicant contends that the decision is contrary to the public policy of Zimbabwe. It moves that it be set aside in terms of Article 34(2)(b)(ii) of the Modern Law. It couched its draft order in the following terms:

"IT IS ORDERED THAT:

1. The award issued by 4^{the} respondent dated 4 May 2020 is declared to be contrary to public policy and is hereby set aside.

2. First, second and third respondent (sic) jointly and severally, are hereby ordered to pay applicant a sum of USD 421 767.

3. First, second and third respondent (sic) be and are hereby ordered to pay costs of suit on a legal practitioner and client scale."

The respondents oppose the application. They assert that the award was made in light of the prevailing legislation and it cannot, therefore, offend public policy or constitute a manifest injustice. They assert that the applicant is a domestic legal entity which advanced money and materials to them in Zimbabwe and purchased tobacco which they grew in Zimbabwe. They insist that there is no foreign obligation on their part to the applicant. They place reliance on Statutory Instrument number 33 of 2019 as read with Statutory Instrument number 142 of 2019 in their insistence on paying off the debt in the local currency. They state that Statutory Instrument 142 of 2019 made the Zimbabwe dollar the only legal currency in Zimbabwe. They move that the application be dismissed with costs.

In considering the case of the applicant, it is pertinent for me to mention that I am not reviewing the decision of the arbitrator. I mention further that I am not sitting as a court of appeal. All I am being invited to do is to consider the submissions which parties placed before the arbitrator and assess if the decision which he arrived at is indeed contrary to the public policy of Zimbabwe or if it constitutes a palpable injustice which cannot be countenanced. In this act of balancing the interests of the applicant as measured against those of the respondents, I should satisfy myself whether or not the arbitrator applied his mind properly to the issue(s) which the parties placed before him.

Precedent which offers sound guidance to me in an application of this nature is that of *Zesa* v *Maphosa* 199(2) ZLR 492(5). It is in that case more than in any other known case that the Supreme Court spoke with some degree of eloquency on what a court which is seized with an application to set aside an arbitral award on the grounds of it being in conflict with public policy should consider.

The words of Chief Justice Gubbay, as enunciated in the case, are relevant. He said:

> "An award will not be contrary to public policy merely because the reasoning or the conclusions of the arbitrator are wrong in fact or in law. 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 concept of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it". [emphasis added].

The question which begs the answer is did the reasoning of the arbitrator go beyond mere faultiness or incorrectness. Put in a different way, the question is, given the coming into existence of Statutory Instruments number 33 of 2019 and number 142 of 2019, can it be said that the faultiness or incorrectness of the arbitral award which the applicant seeks to impugn constitutes a palpable inequity which is so far reaching and outrageous in its defiance of logic that a sensible and fair-minded person would consider that the concept of justice in Zimbabwe is intolerably hurt by the award. I answer the question in the negative.

The applicant premises its application on the arbitrator's interpretation of Statutory Instruments 33 of 2019 and 142 of 2019 as read with the Exchange Control Directives which the parties placed before him during the arbitration proceedings. It states that the interpretation which he made is incorrect. It insists that the interpretation should have followed the reasoning which the Court made in *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Mushayakarara*, HH 220/20 which, it asserts, is on all ours with its case against the respondents.

The respondents, on their part, submit that Zimbabwe's financial regime changed with effect from 22 February, 2019 and more specifically in June, 2019. They insist that the abovementioned two instruments, the latter in particular, did away with the issue of payment of obligations in United States dollars, except in respect of certain categories of debts which fall under s 44C(2) of the principal Act. They assert that the contract which the applicant and them signed does not create a foreign, but a domestic, obligation. They state that it is not covered by the exemption clause. They place reliance on the following four matters which are that:

(a) the applicant is a Zimbabwean legal entity which operates in Zimbabwe; and

(b) the first respondent is a Zimbabwe legal entity which operates in Zimbabwe; and

(c) the contract was to grow a commodity in Zimbabwe for sale in Zimbabwe; and

(d) the money and inputs were advanced to them in Zimbabwe.

They, in support their argument, place reliance on *Zambezi Gas Zimbabwe (Pvt) Ltd* v *N.R. Barber (Pvt) Ltd & Anor*, SC 3 of 2020. They insist that they should liquidate their indebtness to the applicant in the local currency.

The interpretation which the arbitrator placed on the pieces of legislation which the parties placed before him at arbitration may, or may not, be correct. The question which one should answer is, can his decision which is premised on a misconstruction of the law be properly impugned. Can it be impugned when GUBBAY CJ stated in *ZESA* v *Maphosa* that "an award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law". The answer is definitely in the negative.

The learned Chief Justice states in the same case that:

> "…the same consequences apply 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."

The issue of whether or not the arbitrator applied his mind to what the parties placed before him is a factual one. It can easily be gleaned from the arbitrator's record of proceedings, the arbitral award in particular.

It is observed from the contents of the award that the arbitrator:

(i) correctly identified the issue which the parties called upon him to decide;

(ii) correctly captured the circumstances which gave rise to the dispute of the parties;

(iii) correctly defined the law which was/is applicable to the case of the parties. He stated the same in a clear and lucid manner;

(iv) quoted the law *in extenso* and applied the same to the circumstances of the parties' case;

(v) dealt with the Exchange Control Directive, r 28/19 which the Reserve Bank issued to persons who are in the class of the applicant;

(vi) attempted to define, for the convenience of the parties, the meaning and import of the phrase foreign obligation;

(vii) defined foreign loan to refer to a loan which involves one party which is not Zimbabwean;

(viii) opined that the definition would not apply to a loan which is executed in Zimbabwe by Zimbabweans;

(ix) insisted that a foreign loan referred to loans where there is territoriality between the parties with the result that there is the flow of funds between jurisdictions;

(x) maintained the view that the respondents' obligation fell outside the definition of a foreign obligation and should, therefore, be paid in the local currency at the rate of 1:1 to the United States dollar;

(xi) interpreted Exchange Control Directives 4, 5 and 7 of 2019 together with r 102 of 2019;

(xii) concluded that because the Exchange Control Directives mentioned in the foregoing paragraphs were issued after the coming into existence of Statutory Instrument 33 of 2019 they do not apply to the case of the applicant;

(xiii) gave as a reason for his view that the legislature did not intend to have the Directives operate in a retrospective manner;

(xiv) considered *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Mushayakarara* and agreed with the proposition that only the applicant had a foreign liability which, in his view, arose from the fact that it borrowed money which it advances to tobacco growers from outside Zimbabwe

(xv) considered the applicant's two further arguments which were to the effect that the respondents were estopped from refusing to extinguish their liability in United States dollars

(xvi) dismissed the applicant's submissions on the point with cogent reasons.

The matters which I chronicled in the foregoing paragraphs show that the arbitrator had his whole mind on the case which he was dealing with. He applied his mind well and the conclusions which he made in his process of reasoning cannot be faulted at all. He may, or may not, have misconstrued the law. That, however, cannot be used as a ground to impugn his decision which he reached after he had considered all the circumstances of the case.

That Statutory Instruments 33 of 2019 and 142 of 2019 are the law which heralded a change in the payment of obligations in Zimbabwe is a matter which requires little, if any, debate. Their incorporation into the Finance (No.2) Act of 2019 confirms the stated matter. That their interpretation has exercised, and continues to exercise, the minds of many judicial officers in Zimbabwe requires no debate. That their coming into existence brought about some unpalatable result to many litigants who fall into the category of the applicant is taken as given.

Law, it is trite, is what the legislature says it is. Until it is changed, a person who suffers the consequences of the law cannot successfully move the court to view his case in a manner

which is favourable to him where the circumstances of his case, as construed by the court *a quo*, are not favourable to him.

In construing the relevant pieces of legislation which were placed before him, the arbitrator found that the debt which was/is due to the applicant did not fall into the exemption clause which the legislature created under s 44C(2) of the principal Act. His findings cannot be impugned. *A fortiori* when the applicant seeks to impugn the same in a situation which is contrary to the *dictum* which the court enunciated in *ZESA* v *Maphosa* (*supra*).

I have considered the circumstances of this application. I am satisfied that the applicant failed to prove its case on a balance of probabilities. The application is, in the result, dismissed with costs.

Coghlan, Welsh & Guest, Applicant's legal practitioners
Matizanadzo & Warhurst, 1st-3rd respondents' legal practitioners