

DISTRIBUTABLE (23)

ZIMBABWE CRICKET

v

(1) HARARE SPORTS CLUB

(2) ADVOCATE DANIEL TIVADAR (ARBITRATOR)

**SUPREME COURT OF ZIMBABWE
MALABA CJ, GUVAVA JA & MAVANGIRA JA
HARARE, 24 MARCH, 2020**

B Diza, for the appellant

N Mugandiwa, for the first respondent

No appearance for the second respondent

MALABA CJ: This is an appeal against the judgment of the High Court (“the court *a quo*”) handed down on 5 June 2019 wherein the appellant’s application to set aside an arbitral award was dismissed for lack of merit. After hearing argument from both parties and considering the submissions made, the court dismissed the appeal. The court indicated that reasons for the decision would follow in due course. These are the reasons.

The background of the dispute is that the first respondent was the registered owner of a sporting complex known as Harare Sports Club, which it leased to the appellant, then known as Zimbabwe Cricket Union, through a Notarial Agreement of Lease (“the lease”) signed on 16 July 1999. At the time, the Zimbabwe dollar was the official currency in the country. The rental payable was fixed in that currency at \$40000 per month. In terms of clause 3(c) of the lease, the rent was to be escalated on an annual basis, at a rate to be agreed between the parties. In terms of clause 20 of the lease, in the event that the parties failed to agree on the rent, the rental was to be determined and set by an independent arbitrator appointed by mutual agreement between the parties. The decision of the arbitrator was to be final and binding on the parties.

When the multi-currency system was introduced at the beginning of 2009, the parties failed to agree on the rent chargeable in foreign currency. The matter was referred to arbitration in terms of clause 3(c) of the lease.

The parties could not agree on the appointment of the arbitrator. The first respondent made an application to the court *a quo* seeking an order authorising the Commercial Arbitration Centre to appoint the second respondent as the arbitrator.

The application was made in terms of Article 11(4) of the United Nations Commission on International Trade Law (“the UNCITRAL Model Law”), as set out in the First Schedule to the Arbitration Act [*Chapter 7.15*] (“the Arbitration Act”). Article 11(4) recognises the right of the parties to agree on a procedure of appointing an arbitrator but provides that, should they fail to agree on the procedure to be followed, the arbitrator may be appointed by the High Court upon request of either party.

The appellant opposed the application, arguing that Article 11(4) of the UNCITRAL Model Law empowers the High Court to appoint an arbitrator of its own accord. The contention was that the High Court had no power to delegate the authority to appoint an arbitrator to another body, such as the Commercial Arbitration Centre. The appellant also argued that the dispute over the appropriate rental for the property was governed by the Commercial Premises (Rent) Regulations, Statutory Instrument No. 176 of 1983 (the Rent Regulations”) and as such should be determined by the Commercial Rent Board. The appellant further argued that clause 3(c) of the lease was invalid by virtue of s 29 of the Rent Regulations. Section 29 of the Rent Regulations provides that any agreement by which any party purports to limit his or her or its right to proceed under the Rent Regulations for the determination of a fair rent or the variation thereof is void.

The court *a quo* was not persuaded by the argument. It was also not persuaded by the argument that it had no authority to delegate the power to appoint an arbitrator to the Commercial Arbitration Centre. It held that the parties were bound by the procedure for the resolution of the dispute arising from the contract they had agreed upon. The court *a quo* made the order directing the Commercial Arbitration Centre to appoint the second respondent as the arbitrator in the dispute between the parties.

As a result of the order of the court *a quo*, the second respondent was appointed the arbitrator in the dispute regarding the rentals. Having heard the matter, he issued the arbitral award which is the subject of the appeal.

Two applications were made to the court *a quo*. They were consolidated for purposes of hearing and the determination of the issues raised. In the first application the appellant sought the setting aside of the arbitral award in terms of Article 34 of the UNCITRAL Model Law. In the

second application the first respondent sought the registration of the award in terms of Article 35 of the UNCITRAL Model Law.

The court *a quo* was of the view that a party to arbitration cannot approach it for review of the arbitral award on the ground that the arbitrator made an incorrect decision. It held that the courts only interfere with an arbitral award where the reasoning or conclusion goes beyond mere faultiness or incorrectness. The courts only interfere with an arbitral award which can be regarded as constituting a palpable inequity, so far-reaching and so outrageous in its defiance of logic or acceptable moral standards as to cause a fair-minded person to regard it as unbearably hurting all sense of justice and fairness. The court *a quo* further expressed the view that the decision that had been reached by the second respondent was supported by facts. It held that the second respondent applied his mind to the matter and came to a conclusion which was not contrary to public policy of Zimbabwe. The application for setting aside the arbitral award was found to be meritless and dismissed. Consequently, the application for the registration of the arbitral award was granted.

Dissatisfied with the decision of the court *a quo*, the appellant noted the appeal. The main argument on appeal was that the court *a quo* misdirected itself in finding that the second respondent's award on the rentals payable was not susceptible to being set aside. It was also argued that the court *a quo* misdirected itself when it endorsed a formula by the second respondent for rent variation other than the one contemplated by the parties in terms of the lease. The contention was that the second respondent had no authority to determine the issue of rent variation in terms of a formula other than the one contemplated by the parties.

The first respondent argued that the decision of the court *a quo* was unimpeachable because the appellant had not challenged the second respondent's ruling on whether he had jurisdiction to

hear the matter. It was also argued that the appellant had failed to meet the required standard for proving that the arbitral award was in conflict with public policy of Zimbabwe.

The issue for determination was whether the appellant met the requirements of Article 34 of the UNCITRAL Model Law. Article 34 provides as follows:

“Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the High Court only if —

(a) the party making the application furnishes proof that —

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator of the arbitral proceedings or was otherwise unable to present his case; or

(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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law; 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.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with 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.”

The court *a quo* held that the arbitral award could not be found to be in conflict with public policy of Zimbabwe because the second respondent did not escalate the rent in terms of the parties' agreement.

In *ZESA v Maphosa* 1999 (2) ZLR 452 (S) at 465D-E it was stated that:

“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.”

The position is settled that a party to arbitration cannot come to court because the arbitrator was wrong.

The allegation in the court *a quo* was that the second respondent's decision to enforce a clause in the agreement requiring the parties' dispute over the escalation of rent to be submitted to the arbitration procedure was a breach of s 29 of the Rent Regulations. Section 29 of the Rent Regulations provides:

“Any agreement by which any person purports to limit his right to proceed under these regulations for the determination of a fair rent or the variation of such a determination, or to limit or affect any other rights to which he would be entitled under these regulations, shall be void.”

The court *a quo* held that the Rent Regulations were not applicable because cricket activities did not relate to commercial enterprises. The order of the court *a quo* was not appealed against. The second respondent was therefore bound to perform his duties. The second respondent had the power to act in the manner he did. The award by the second respondent could not have been a violation of public interest or policy of Zimbabwe.

Article 16 of the UNCITRAL Model Law allows a party to challenge the jurisdiction of the arbitrator. The arbitrator can make a determination on the challenge. Article 16 reads as follows:

“Competence of arbitral tribunal to rule on its jurisdiction

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, a second respondent. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the High Court to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.”

The appellant raised the issue of the arbitrator’s jurisdiction. The second respondent gave a ruling on the matter, holding that he had jurisdiction to hear and determine the dispute between the parties. The appellant did not seek to have the decision reviewed by the High Court. The exercise of jurisdiction by the second respondent could not therefore have been in breach of public policy of Zimbabwe.

The question whether the second respondent decided the matter of a fair monthly rental when in fact it should have been an escalation of fair rental was the issue agreed upon by the parties. This was the issue determined by the court *a quo*.

The lease between the parties was entered into in July 1999 and the rent agreed upon at that time was in Zimbabwe dollars. The lease was in writing and any alteration to the rent ought to have been in writing.

In 2009 the Zimbabwe dollar lost its value as legal tender and was substituted by a multi-currency regime. There is no record of a written agreement on the payment of US\$170 per month as rent. There was an arrangement based on an oral agreement for the rent to be paid at the rate of US\$170 per month as a temporary measure, pending negotiations on the agreed fair rent. This arrangement was not consistent with the lease. The first respondent was losing out on value for its property.

The parties subsequently entered into yet another oral agreement, whereby the appellant would pay US\$3000 per month as rent. The appellant denied the existence of the second oral agreement, despite the evidence placed before the court *a quo* that it paid the amount pending the ascertainment of a fair rental. The first respondent argued that in terms of clause 3c of the lease there was nothing to escalate, given that a fair rental could only be escalated if there was a fixed fair rental payable. Due to the demise of the Zimbabwe dollar, there was no fixed fair rental in place. He accepted that the issue for determination was - "What was a fair rental payable?". The court *a quo* decided that the determination by the second respondent could not be said to be in conflict with public policy of Zimbabwe. What was before the second respondent was a question of fact and he applied his mind to it.

The complaint that the second respondent sided with the first respondent in admitting expert evidence to determine the fair rental payable had no legal basis. The evidence was necessary because the second respondent needed expert evidence to assist him to determine a fair rental. He gave both parties an opportunity to present expert evidence on the matter. He explained to the parties that expert evidence would enable him to decide the dispute fairly. The UNCITRAL Model Law gave the second respondent the discretion to adopt a procedure for the determination of the issues that would produce just and equitable results.

For the above reasons the Court dismissed the appeal.

GUVAVA JA: I concur

MAVANGIRA JA: I concur

Mhishi Nkomo Legal Practice, appellant's legal practitioners

Kantor & Immerman, first respondent's legal practitioners