GLADYS SVOSVE
versus
KHALED KASSIM JOOSAB
and
JUSTICE N T MTSHIYA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 January and 10 March 2023

Opposed Matter

Mr *E Mukwewa*, for the applicant
Mr *G R J Sithole*,for respondent

MANGOTA J:

On 6 March, 2008 Khaled Kassim Joosab ("Joosab"), the first respondent herein, leased his property, Number 4, 19 Robert Mugabe Street, Rusape ("the property") to the applicant, one Gladys Svosve ("Gladys"). The lease which Joosab and Gladys signed was to endure for one full year. Gladys was to pay a monthly rental of ZWL$2 200 000 000 for her occupation and use of the property.

On the date that they signed the lease, Joosab and Gladys ("the parties") entered into an option agreement. They agreed between them to swap properties. Joosab was to swap the property which was/is the subject of the lease with Gladys's property which was/is in South Africa.

Following a dispute which arose between the parties, Joosab invoked clause 14.1 of the lease agreement. He referred the same to the arbitrator who is the second respondent herein. After hearing the parties, the arbitrator entered judgment for Joosab. He dismissed Gladys's counter-claim.

Not being satisfied with the decision of the arbitrator, Gladys filed this application to set aside the arbitral award. She applied in terms of Article 34 of the Arbitration Act *[Chapter 7:15]*. She claims that the arbitral award is not in consonant with the public policy of Zimbabwe. She insists that it was/is against the rules of natural justice for the arbitrator to have ignored submissions which she made in support of her counter-claim.

In his opposition to the application, Joosab raises two preliminary issues in addition to his response to the merits of Gladys's case. The preliminary matters are that:

i) The award which Gladys seeks to set aside has already been registered for purposes of enforcement- and
ii) Gladys did not attach to the application the entire record of proceedings which the arbitrator dealt with.

Because Joosab made reference to HC 66/22 in terms of which he alleged that the award had been registered, I had no difficulty in taking refuge in *Nhengu* v *Mtindi*, 1986(2) ZLR 71 (SC) as well as in *Netone* v *Econet*, SC 47/18 which case authorities allow me to refer to proceedings and decisions of the court. I, in the process, called for HC 66/22 which I had the occasion to read with a view to ascertaining the veracity or otherwise of Joosab's assertions. My reading of HC 66/22 showed that:

a) on 2 March, 2022 Joosab applied for registration of the arbitral award which the learned arbitrator entered for him on 26 November, 2021.
b) on 1 April, 2022 Gladys filed her notice of opposition to the application;
c) on 6 April, 2022 Joosab filed his answering affidavit to the same.
d) Joosab and Gladys filed their Heads on 30 May, 2022 and 6 September, 2022 respectively.
e) the Heads which the parties –Joosab and Gladys- filed are the last documents which are filed of record under HC 66/22 which , as is evident from a reading of the same, has not yet been set down for hearing let alone heard by the court.

Joosab was therefore being economic with the truth when he alleged, as he did, that the arbitral award has been registered for enforcement purposes. The reality of the matter is that the award has not yet been registered. There is, in fact, no evidence which shows that it has been registered. It is still to be registered with the court.

The *in limine* matter which Joosab raised with the court on this aspect of the case is without merit. It is dismissed.

Joosab's second preliminary issue would appear to be not without merit. Gladys moves me to set aside the arbitral award which the arbitrator entered against her. The arbitrator, it is my view, did not pluck the award from thin air, so to speak. He rested it on papers which the parties placed before him. Every document which contributed to the birth of the arbitral award should, therefore,

be made part of the record of this application. It is pertinent for me to read such evidence to enable me to ascertain if the arbitrator acted in violation of the public policy of Zimbabwe. Gladys cannot, in short, move me to decide the issue in question on excerpts of the arbitrator's record to the exclusion of other excerpts of the same. She cannot persuade me to decide in her favour when I do not have a complete picture of what persuaded the arbitrator to, for instance, dismiss Gladys's counter-claim which, as is evident from the papers which are filed of record, is her bone of contention with the ruling of the arbitrator.

Gladys does not advance any reason as to why she left out of the record of the arbitrator's proceedings the following matters which the parties placed before the arbitrator:

i) Joosab's statement of claim;
ii) Gladys's statement of defence to the same
iii) Joosab's statement of defence, if any, to Gladys's counter-claim which she made part of this application;
iv) Joosab's written/oral submissions, if any;
v) Gladys's written/oral submissions, if any
vi) transcript of the record of criminal proceedings which took place at the court of the magistrate in Rusape- and/or
vii) valuations reports which Joosab and she produced as evidence in the arbitration proceedings.

Gladys cannot have me work on evidence which, to all intents and purposes, supports her application to set aside the arbitral award to the total exclusion of evidence which, it would appear, militates against the grant of her application.

A party who genuinely criticizes the proceedings or decision of the lower court should be prepared to lay before the court all the evidence which contributed to the coming into existence of the decision which he is impugning. He should lay before the court all the evidence including that which is unfavourable to his own side of the case. He cannot rest his criticism on some aspects of the lower court's proceedings and be regarded as having levelled the playing field. He should place before the court all the evidence and show, from the same, that the decision which the arbitrator reached, on the evidence, remains without any justification and is, therefore, impeachable.

Full disclosure is the hallmark of any litigant's case. A litigant who moves the court to consider his case from a specific perspective must satisfy the court that he has made full disclosure of all the matters which took place before the court *a quo* whose decision he seeks to impugne. The principle which relates to the issue of full disclosure of all material facts of a case was aptly stated in *NASSA* v *Capital Bank Corporation Limited*, HH 6/19 wherein it was remarked that:

> "Courts frown upon litigants or legal practitioners who desire to derive the sympathy of the court by deliberately withholding vital information which has a bearing on the very matter that the court is called upon to decide".

The sentiments of the court can hardly be over-emphasized. They apply to this application without any qualification. Gladys, it is evident, wants to derive my sympathy from me by withholding vital information which is necessary for my determination of her application. I can only but frown upon her attitude of withholding information which, in her view, may not be favourable to her application. She is exhorted to make full disclosure of all information which is relevant to her application in order for me to render a clear decision to her criticism of the arbitrator's decision.

An incomplete record of the arbitration proceedings which Gladys placed before me disenables me from ascertaining if the arbitral award is contrary to the public policy of Zimbabwe. The application is, to the observed extent, fatally defective. It is, accordingly, struck off the roll with costs.

Mukwewa Law Chambers, applicant's legal practitioners
Mugadza, Chinzamba & Partners, respondent's legal practitioners