ARISTON MANAGEMENT SERVICES (PRIVATE) LIMITED
versus
ECONET WIRELESS ZIMBABWE LIMITED
and
PETER CARNEGIE LLOYD N.O.

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE 27 May 2022 & 20 July 2023

Opposed application

Advocate *T. Magwaliba*, for the applicant
Advocate *T.R.Mafukidze*, for the 1st respondent

MANYANGADZE J:

INTRODUCTION

This is an application for the review of an arbitral award handed down on 10 September 2021, in which the applicant seeks the following order:

> "1. The arbitral award issued by the second respondent on 10 September 2021 be and is hereby set aside in terms of Article 34(2)(b)(ii) of the Ancitral Model Law annexed to the Arbitration Act[*Chapter 7: 15*].
> 2. The first respondent shall pay the costs of this suit on attorney and client scale."

FACTUAL BACKGROUND

The facts forming the background to this matter are largely common cause.
The applicant is a company duly incorporated under the laws of Zimbabwe. It is a diversified agro – industrial business that produces a variety of agricultural products for both the domestic and export markets.

The first respondent is a company duly established under the laws of Zimbabwe. It is mainly in the business of providing telecommunication services.
The second respondent is a Harare based legal practitioner and a partner in the law firm Gill, Godlonton and Gerrans. He is cited in his official capacity as the arbitrator who presided over

the dispute between the applicant and the first respondent. He rendered the arbitral award which is the subject of this application.

On 21 January 2019, the applicant and the first respondent concluded what they styled an "Export Finance Facility Agreement ("the Agreement"). In terms of the Agreement, the first respondent advanced to the applicant the sum of RTGS 5 100 000,00. The applicant was required to repay the loan facility in the sum of US$ 2 217 291.00. This amount would be realised from export sales of crops grown by the applicant. These are described in the Agreement as "exportables". The repayment period was 5 years, running from 4 January 2019 to 31 January 2024.

The Agreement provided for the deposit of export proceeds ("receivables") into a Nostro FCA account maintained by Steward Bank, described as the "collection account".

As at 31 May 2021, the applicant made some payments which reduced the amount owed to US$ 886 956,40. This is the amount claimed by the first respondent at arbitration, plus interest in the sum of US$ 148 666.01. The first respondent also claimed interest *tempore morae* on the said outstanding amount.

The parties' submissions before the second respondent show that there was a dispute as to what motivated conclusion of the Agreement. The first respondent averred that it was the applicant who approached it for financial assistance. The applicant wanted to retire a debt it owed to Zimbabwe Asset Management Company Limited, and ramp up its production of export crops.

The applicant, on the other hand, asserted that it was in fact the first respondent who approached it, through a firm of financial advisors known as Mangwana Capital (Pvt) Ltd. The fist respondent wanted to enter into an arrangement whereby it would offload its RTGS United States dollars in exchange for Nostro United States dollars. The applicant, in its papers before the second respondent, referred to this arrangement as "a back to back deal".

I do not think that I should be bogged down on the intricacies of this alleged back to back deal. Suffice it to state that the applicant and the first respondent concluded an Export Finance Facility Agreement on 21 January 2019. Their dispute arose out of that particular Agreement, which dispute they took to the second respondent. My remit is to determine whether the second respondent's resolution of the dispute ("the arbitral award") should stand or be set aside.

THE ARBITRAL AWARD

In upholding the first respondent's claim, the second respondent, in the main, found that the parties concerned had freely entered into a contract. He simply was giving effect to the terms of that contract. This is reflected in paragraph 28 of the arbitral award (page 32 of the record).

The second respondent goes further to point out what he views as peculiar features applicable to the Agreement. He outlines these in paragraph 31 of the arbitral award:-

> "31.1. they record that the facility "**can only be serviced through the supply of exportables** unless if an event of default occurs" [my emphasis];
> 31.2. to recap, "exportables" meant export crops grown by Ariston;
> 31.3. they provide that Ariston shall be responsible for marketing, selling and distribution of the exportables "**on behalf of the Lender**" [again my emphasis];
> 31.4. the receipts from the sale of exportables are to be deposited into a NOSTRO FCA collection account in Ariston's name, with Econet then receiving the scheduled payments in United States dollars out of that collection account."

Given these features, reasoned the second respondent, it was clearly intended by both parties that the debt be repaid in United States dollars. This rendered statutory instrument 33 of 2019 inapplicable. The second respondent held that proceeds from the exportables, which were deposited into the Steward Bank Nostro FCA, were due for collection by the first respondent in United States dollars.

According to the second respondent, this was not a simple and straightforward loan agreement. The parties went out of their way to draw up an agreement which was meant to withstand the vicissitudes of currency fluctuations.

THE ISSUES

This matter involves the interpretation of and application of Statutory Instrument 33 of 2019 (SI 33/19). From the submissions made by the parties, both written and oral, the following pertinent issues arise:

(1) Whether or not the second respondent was correct in excluding the liability of the applicant to the first respondent from the provisions of SI 33/19.
(2) Whether or not such exclusion provides a basis for setting aside the arbitral award.

THE LAW

Interpretation of Statutory Instrument 33 of 2019

SI 33/19 was promulgated on 22 February 2019 ("the effective date") under the Presidential Powers (Temporary Measures) Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019. The relevant provisions are under section 4 (1), which provides as follows:

> " 4 (1) For the purposes of section 44C of the principal Act as inserted by these regulations, the Minister shall be deemed to have prescribed the following with effect from the date of promulgation of these regulations ("the effective date")—
>
> (a) that the Reserve Bank has, with effect from the effective date, issued an electronic currency called the RTGS Dollar;
>
> (b) that Real Time Gross Settlement system balances expressed in the United States dollar (other than those referred to in section 44C(2) of the principal Act), immediately before the effective date, shall from the effective date be deemed to be opening balances in RTGS dollars at par with the United States dollar; and
>
> (c) that such currency shall be legal tender within Zimbabwe from the effective date; and
>
> (d) <u>that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C(2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar</u>; and
>
> (e) that after the effective date any variance from the opening parity rate shall be determined from time to time by the rate at which authorised dealers under the Exchange Control Act exchange the RTGS Dollar for the United States dollar on a willing-seller willing-buyer basis; and
>
> (f) that every enactment in which an amount is expressed in United States dollars shall, on the and after effective date, be construed as reference to the RTGS dollar, at parity with the United States dollar, that is to say, at a one-to-one rate." (Underlining added)

Section 4(1)(d) is the pertinent provision. The interpretation of this provision was extensively dealt with by the Supreme Court in the case of *Zambezi Gas Zimbabwe (Private) Limited* v *N.R. Barber (Private) Limited & Anor* SC 3/20. The question before the Supreme Court was whether a judgment debt for the sum of US$ 4 136 806, 54, incurred prior to the effective date, was fully discharged by the payment of an equivalent amount in RTGS dollars. The court held that the debt was fully paid, having regard to the law as expressed in SI 33/19. On pages 1 -2 of the cyclostyled judgment, MALABA CJ stated the position of the court as follows:

> "The Court holds that the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act & Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) ("SI 33/19") expressly provides that assets and liabilities, including judgments debts, denominated in United States dollars immediately before the effective date of 22 February 2019 shall on or after the aforementioned date be valued in RTGS dollars on a one – to – one rate. The order in terms of which the appellant was obliged to pay the judgment debt owed to the first respondent, denominated in United States dollars, was made before the effective date. The judgment debt and its equivalent fell within the ambit of the provisions of s 4(1)(d) of SI 33/19.

> The payment made by the appellant in fulfilment of the judgment debt is a full and final settlement of the liability owed by the appellant."

The court invoked the principles of the interpretation of statutes, and found that s 4(1)(d) of SI 33/19 was clear and unambiguous. In this regard, MALABA CJ stated, at p7:

> "It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning. There is enough authority for this rule of interpretation."

The court went on to highlight the fact that it matters not what the source of the debt was. As long as it was incurred before the effective date, and it was expressed in United States dollars, it is covered by SI 33/19.

The law is therefore clear. All assets and liabilities, except those that fall within the ambit of s44 C(2) of the Reserve Bank of Zimbabwe Act [Chapter 22:15], are covered by s 4(1)(d) of SI 33/19.

As already pointed out, this is one aspect of the matter. The other aspect is the law on the review of arbitral awards.

<u>Interference with arbitral awards</u>

The setting aside of an arbitral award is governed by Article 34 of the Ancitral Model Law, which is a Schedule annexed to the Arbitration Act [*Chapter 7:15*] ("the Model Law"). It sets out the grounds on which an arbitral award may be set aside. It reads:

> "(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
> or 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
> [Subparagraph amended by Act 14/2002]
> (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
[Subparagraph amended by Act 14/2002]
(*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."
(underlining added)

The applicant has founded its application on Article 34(2)(b)(ii), which specifically provides for the setting aside of the award if it is in conflict with the public policy of Zimbabwe.

Article 34(5) elaborates on what should be considered in determining whether or not an award is in conflict with public policy. Thus, Article 34(2)(b)(ii) should be read with article 34(5),which I have underlined in the above – cited provisions.

It will be readily appreciated, from a reading of these provisions, that the basis for setting aside an arbitral award is very narrow. The rationale underlying such a restriction is finality in litigation. When contracting parties opt for arbitration, they should abide by the decision arising therefrom. It is only in the most compelling and exceptional circumstances that the award is set aside.

This approach was underscored by the Supreme Court in the case of *ZESA* v *Maposa* 1999 (2) ZLR 452. GUBBAY CJ stated, at p465 D - E, and 466 E-H:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations ; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.
> 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. 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. Where however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitute 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."

Three pertinent points are emphasised in the above – cited remarks, which are that:-

(i) The court must be wary not to exercise appellate power over the decision of the arbitrator.

(ii) An award is not contrary to public policy merely because of faultiness or incorrectness in the reasoning and conclusions of the arbitrator in fact or in law.

(iii) The reasoning or conclusion of the arbitrator must constitute palpable inequity so far reaching and outrageous in its defiance of logic or acceptable moral standards for it to be held to be contrary to public policy.

MWAYERA JA highlighted the same principle in *Legacy Hospitality Management Services Limited* v *African Sun Limited & Anor* SC 43/22. The learned judge of appeal stated, at p 13 of the cyclostyled judgment:

> "From the cases cited above, it appears settled that an arbitral award will not be lightly set aside on the basis that a party considers that the decision of the arbitrator is wrong. The court will not interfere with an award unless the reasoning of the arbitrator constitutes a palpable inequity so outrageous and far reaching in its defiance of logic or acceptable moral standards as to cause a fair-minded person to regard it as hurting all sense of justice and fairness. Article 34 is certainly not intended for the court to reassess a dispute on the basis that the appellant views the arbitrator's decision as wrong."

APPLICATION OF THE AW

Obviously, the legal principles enunciated in the cited cases are applied in the context of the case under consideration. Each case turns on its own facts. As already indicated *in casu,* the respondent found that SI 33/19 is inapplicable to the transactions entered into by the applicant and the first respondent. First and foremost, it must be determined whether he was correct in reaching that conclusion.

If it is held that the second respondent was correct in excluding s 4(1)(d) of SI 33/19 from the transactions in question, then the matter is, on that basis, resolved in favour of the first respondent. In other words, the application for review would be dismissed and the arbitral award would be registered.

If it is held that the second respondent erred in excluding the said provisions of SI 33/19, the matter does not end there. There must be a further enquiry as to whether such a misdirection is so gross that it warrants the setting aside of the arbitral award.

Whether exclusion of SI 33/19 was correct

There is a creditor - debtor relationship between the applicant and the first respondent. This much is common cause. In terms of the Agreement the parties concluded, the debt owed to the first respondent by the applicant was in the amount of USD 2 217 391, 00. This liability or obligation was created on 21 January 2019, when the two parties entered into the said Agreement. As a result of payments made by the applicant, the debt now stands at USD 886 956, 40, which is the subject of the instant lawsuit.

Fundamentally, the applicant contends that what the first respondent sued for is a sum of money and not exportables. The debt was incurred prior to 22 February 2019. This position is reflected in paragraphs 8.7 and 8.9 of the applicant's heads of argument, wherein is stated:

> "8.7 It is important to underline that notwithstanding clause 7.1.1 in the Export Finance Facility Agreement, the first Respondent did not sue for the ***"exportable."*** It sued for a sum of money arising from a causa which accrued prior to 22 February 2022. Equally, notwithstanding clause 7.2 of the Export Finance Facility Agreement, first respondent did not sue or (*sic*) *"**the supply of exportables.**"*
>
> "8.9 The first respondent acknowledged that what it was owed was a sum of money and not exportables. In a letter dated 7 January 2019 quoted in the arbitral award, the first respondent assured the Applicant that:-
> " ***For the avoidance of doubt, this shall not exceed US$ 2 217 391. 00 plus interest over the export finance agreement, which is in compliance with the Reserve Bank approval."***

The gist of the applicant's contention is that the money owed is basically a debt, and is constituted in United States dollars. It was incurred prior to the effective date. As such, it is a liability or obligation denominated in United States dollars. It matters not that the dollars were earned through the supply of exportables. That arrangement does not change the nature of the liability. It is a debt denominated in United States dollars. Consequently, it does not escape the provisions of S.I. 33/19. It was therefore a gross misdirection for the second respondent to exclude the debt from these provisions.

The first respondent, on the other hand, contends that the second respondent correctly excluded the debt from SI 33/19. It argues that what the applicant and the first respondent entered into is a contract, which an arbitrator or a court is not at liberty to amend. In this regard, the first respondent has referred the court to numerous cases, where the courts emphasised the freedom and sanctity of contracts. These include *Kundai Magodora and Ors v Care International Zimbabwe* SC 24/14, *Simbi Steel Makers (Pvt) Ltd* v *Shamu & Ors* SC 71/15, *Wells* v *South African Alumenite Company* 1927 AD 69.

After citing a long line of case authorities, the first respondent sums up its position in paragraphs 12 - 14 of its heads of argument in the following terms:

> "12. It has been well recognised by courts that contractual relations are the bedrock o economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.
> 13. The simple task that confronted the arbitrator in this matter was to ascertain what the parties agreed, and to enforce the terms of that agreement.
> 14. Ariston simply wanted to be protected from what it believes was a bad bargain. For that reason, it has sought to rely on any straw it can lay its hands on. The reality is that no court or arbitrator could lawfully come to its aid."

I have made extensive reference to the provisions of s 4(1)(d) of the SI 33/19, and the interpretation that was made by the Supreme Court in the *Zambezi Gas* case. Going by that clear interpretation, once it is accepted that or established that the debt in question is denominated in United States dollars, and was incurred prior to the effective debt, then it falls within the purview of SI 33/19.

In the instant case, the debt is denominated in United States dollars. It was incurred prior to 22 February 2019, the effective date. That places it within the ambit of s 4(1)(d) of SI 33/19. It is as simple as that. The first respondent strenuously argued that this was a special agreement involving exportables. The earnings from the exportables render SI 33/19 inapplicable. I am unable to uphold this contention. The proceeds from the exportables remain a domestic debt incurred in United States dollars. The Supreme Court was clear in *Zambezi Gas, supra*, that it does not matter what the source or origin of the debt was. The court stated, at p 9 of the cyclostyled judgment;

> "Section 4(1)(d) of SI 33/19 is specific as to the type of assets and liabilities that are excluded from the reach of its provisions. The origin of the liabilities is not a criterion for exclusion. In other words, the fact that the liability is based on a court order does not exempt the liability from the application of the provisions ofs4(l)(d) of S.I. 33/19. <u>What brings the asset or liability within the provisions of the statute is the fact that its value was expressed in United States dollars immediately before the effective date and did not fall within the class of assets and liabilities referred to in s 44C(2) of the Reserve Bank of Zimbabwe Act [*Chapter 22: 15]* ("the principal Act").</u> (emphasis added)

Having regard to this clearly enunciated position of the law, the second respondent erred in holding that SI 33/19 is inapplicable to the debt in question. The debt falls within the ambit of SI 33/19. This disposes of the issue in the first of the two - rung enquiry I have adopted in this matter. To recap, I have identified and formulated the issues in two rungs as follows:

(1) Whether or not the second respondent was correct in excluding the liability of the applicant to the first respondent from the provisions of SI 33/19.
(2) Whether or not such exclusion provides a basis for setting aside the arbitral award.

<u>Whether exclusion of SI 33/19 justifies setting aside the arbitral award</u>

Going by the applicant's submissions, resolution of the first issue should be the end of the matter. Exclusion of the provisions of SI 33/19 to the applicant's debt was a fundamental and gross misdirection. It is contrary to public policy and warrants the setting aside of the arbitral award. In impugning the arbitral award, the applicant uses exceptionally strong language. The following expressions appear in its written submissions;

> "palpable inequity"
> "totally unsustainable"
> "grossly wrong"
> "offends the notions of justice"
> "it boggles the mind"
> "wanting in the most basic of respects"
> "has far reaching and outrageous effects"
> "completely devoid of merit"

It is significant to note that the applicant and the first respondent freely and voluntarily entered into the Agreement the latter sought to enforce by recourse to arbitration. Such recourse was in terms of the Agreement. It has not been argued that the resultant award was induced by fraud or corruption, or in violation of the principles of natural justice as envisaged in Article 34(5) of the Model Law.

Even more significant to note is the fact that the applicant substantially complied with the terms of the Agreement. It made several payments in United States dollars, post promulgation of SI 33/19. It was fully aware of the nature of the Agreement and obligations arising therefrom. It made payments consistent with the agreed schedule of repayments. The applicant has not satisfactorily explained this aspect in its submissions. The arbitrator simply gave effect to the terms of that agreement. SI 33/19, whilst it rates the United States and RTGS dollars on a one-to-one basis, does not make payment in United States dollars illegal where the parties have agreed to such payment.

Parties who voluntarily subject themselves to arbitration for the adjudication of their disputes must realise that the arbitral award arising from such adjudication is not one that can be easily set aside. As seen in the authorities cited, the threshold for interfering with such awards is very high. It can only be done in the most compelling and exceptional circumstances. It is my considered view that the circumstances of the instant case do not reach that threshold. Borrowing the language used by GUBBAY CJ in *ZESA* v *Maposa, supra*, it cannot be said that the decision or conclusion reached by the second respondent "*goes beyond mere faultiness or incorrectness and constitute 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*". Neither can it be said that the award reflects the grossness or outrageousness portrayed in the strong terms used by the applicant in impugning the arbitral award, as listed above.

In the circumstances, the application to set aside the arbitral award cannot be upheld. I t is noted that the parties combined the hearing of the application for review, which was filed under Case No. HC 5555/21, with a counter application for registration of the arbitral award, filed under Case No. HC 6005/21. This aspect of the matter need not detain the court. The outcome of the application under HC 6005 is simply a consequence of the outcome of the application under HC 5555/21. The application for review having been dismissed, it follows that the application for registration must be granted. The first respondent has sought costs on the legal practitioner and client scale. This is a matter in which both parties vigorously agued their case. It cannot be said there was an abuse of court process by the losing party to warrant costs on the higher scale. It is my view that costs be awarded on the ordinary scale.

<u>DISPOSITION</u>

In the result, it is ordered that:-

1. The application to set aside an arbitral award be and is hereby dismissed.
2. The application for the registration of an arbitral award issued by the second respondent on 10 September 2021 be and is hereby granted.
3. The arbitral award of the second respondent dated 10 September 2021 be and is hereby registered as an order of the High Court of Zimbabwe in terms of Article 35(1) of the First Schedule to the Arbitration Act [*Chapter 7:15*].
4. The applicant bears the first respondent's costs.

Artherstone & Cook, applicant's legal practitioners
Mtetwa & Nyambirai, first respondent's legal practitioners