ZIMBABWE LEAF TOBACCO COMPANY (PVT) LTD
versus
ROBERT ALLEN STOKES
and
DANIEL TIVARDAR N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 27 October 2021 & 26 July 2023

Opposed Application

Ms T Ndawana, for the applicant
Mr R Stewart, for the respondents

CHINAMORA J: This is an application for setting aside of an arbitral award in terms of Article 34 (2) (b) (ii) of the Model Law as set out in the Arbitration Act [*Chapter 7:15*]. The applicant premises its application on the ground that the arbitral award offends against the public policy of Zimbabwe. The first respondent opposed the setting aside of the arbitral award on the basis that the award is not contrary to the public policy of Zimbabwe. He argued that the amount owing in the sum of US$106 960. 01 ought to be paid at the rate of US$1: ZWL$1 since the debt arose prior coming into effect of Statutory Instrument 33 of 2019.

The factual background of this dispute and the present application is common cause and can be summarized as follows: The applicant is a tobacco merchant who utilizes offshore funds in order to provide funding to various tobacco growers under its tobacco grower scheme. In that regard, the applicant and the first respondent entered into a Tobacco Grower Contract Agreement on 25 July 2018. In terms of this contract, the applicant advanced to the respondent a total sum of USD$654 199.91 which it had accessed offshore.

The first respondent repaid part of the amount advanced to him, leaving the sum of US$106 960.01 outstanding. The parties' bone of contention was whether payment should be in United States Dollars or Zimbabwean Dollars converted from the United States Dollars at a rate of 1:1 in terms of the Finance (No. 2) Act of 2019. After hearing the parties, the arbitrator dismissed the applicant's claim. In consequence, it meant that payment was to be made in Zimbabwean Dollars converted from United States Dollars at the rate of 1:1. Furthermore, the arbitrator ordered the applicant to pay the first respondent's costs on the ordinary scale. This is the award which the applicant seeks to have set aside on the basis that it offends against the public policy of Zimbabwe.

The applicant complains that the arbitrator's award conflicts with the public policy of Zimbabwe in that:

(a) the award conflicts the laws of Zimbabwe.
(b) the arbitrator failed to take into account that the question of currency and conversation did not arise, since tobacco merchants are bound by Statutory Instrument 61 of 2004.
(c) the arbitrator failed to consider that between August and October 2018 RTGS transfer referred to a system of transferring money from one account to another and is not synonymous with a transfer into an RTGS FCA account.
(d) the arbitrator applied the Exchange Control Circular No. 7 of 2019 applied in retrospect.
(e) the arbitrator did not apply the test set out in *Breastplate Service (Pvt) Ltd* v *Cambria Africa Plc* SC 66-20, despite being referred to that authority.

The applicant submits that, if the award is not set aside, there would be undesirable financial consequences. It means that a tobacco company, which uses offshore funds to finance tobacco growers in Zimbabwe, would be unable to recover the amounts due to it in foreign currency. Additionally, if the amounts advanced to the tobacco growers are converted from USD to ZWL at a rate of 1:1, that places tobacco growers at an advantage because they would receive payment for the tobacco produced in USD, but are in turn only required to repay the tobacco merchant the amount converted to ZWL at a rate of 1:1. Such a development, according to the applicant, would cripple the tobacco industry, since tobacco merchants who would have utilized offshore funds would not be able to pay their offshore financiers amounts advanced to them. It is apparent that this was one of the reasons for promulgating Statutory Instrument 61 of 2004, whose primary purpose was to protect the continuity of the tobacco growers' scheme. On the other hand, the first respondent opposes this application on the basis that the award is based on a law of general application. In other words, all Zimbabweans are equally affected by the provisions of Statutory Instrument 33 of 2019. Its argument is that, secondary legislation cannot supersede primary legislation, and that the matter before the second respondent was determined in terms of the primary legislation. In addition, the first respondent contends that the award considers previous decision of the superior courts, particularly, the case of *Breastplate Service (Pvt) Ltd* v *Cambria Africa Plc* (*supra*).

The second respondent submits that the Exchange Control Regulations pertaining to tobacco were put in place in the Zimbabwean dollar era to cater for foreign inputs. With the advent of the multi-currency regime in 2009, all contracts were in foreign currency. Then, primary legislation was enacted which converted all existing United States dollar obligations to RTGS as at 22 February 2019. Therefore, from that date (which was "the effective date"), the first respondent's bank balances were converted to RTGS at the rate of 1:1. This inevitably impacted on the corresponding domestic obligations. Consequently, the first respondent cannot remain owing the applicant in foreign currency when its own funds became RTGS by operation of law. No wonder, the first respondent argues that the net effect of the Finance Act (No.2) of 2019 was not only to introduce the "Zimbabwean Dollar", but converted all sums and obligations into RTGS. Effectively, the Finance Act (No.2) of 2019, convert the first respondent's funds and not those of the applicant. It was submitted for the first respondent, that such a conversion created the absurdity that the prejudice to the party whose funds were so converted cannot be consistent with public policy of Zimbabwe. Thus, the effect of Statutory Instrument 33 of 2019 and the Finance Act (No.2) is that United States Dollar funds were deemed to be RTGS funds. As a result, the first respondent argues that his obligation is not to third parties, but is exclusively a wholly domestic obligation. It also avers that tobacco growers are not fully paid for their tobacco in United States Dollars, since the market allows growers to be paid partly in Nostro FCA and in RTGS at the prevailing auction rate. However, that does not assist the matter *in casu* which relates to an obligation incurred before February 2019.

From the above facts, the real issue is whether the award is contrary to public policy. In other words, I have to consider if setting aside of the arbitral award offends the public policy of

Zimbabwe. In this jurisdiction, the approach is settled. The starting point is Article 34 (2)(b)(ii) of the Model Law, which is incorporated in the Arbitration Act [*Chapter 15*] provides:

> "2. An arbitral award may be set aside by the High Court only if-
> (a) …
> (b) The award is in conflict with the public policy of Zimbabwe."

For me to set aside the arbitral award on the basis that it is contrary to public policy, the applicant must demonstrate that some fundamental principle of the law, morality or justice was offended. In this context, in *ZESA* v *Maposa* 1992 (2) ZLR 452 (S) at 466 E-G GUBBAY CJ made the following seminal remarks about public policy:

> "Where, however, the reasoning or conclusion in an award goes beyond mere faultiness on incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standard 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."

What emerges from this judicial reasoning is that, an arbitral award is not contrary to public policy for the reason that it is wrong in law or fact. The award can still stand despite being erroneous in law and in fact. Crucially, for the award to be set aside on the basis that the conclusion reached is wrong, such conclusion should result in a palpable inequity or blatant injustice that is far reaching and outrageously defies logic and/or accepted moral standards to the extent that fair minded people would find inconstant with what is considered just in Zimbabwe. The question that I now pose (and which must be answered) is: Can the same be said of the current award?

As I have noted above, that the figures are outstanding and due is common cause. The applicant says that the agreement between the parties is *sui generis*. The applicant contends that the agreement is specifically created by statute, the incidents of which are extracts from the terms of the statute which established them, namely, the Exchange Control (Tobacco Finance) Order, 2004, Statutory Instrument 61 of 2004. I have perused that Crop Finance agreement between the parties, in particular para 3.9, which states that:

> "The Grower shall abide by all laws and regulations in Zimbabwe governing tobacco production, and shall remain registered as a tobacco grower in accordance with such regulations."

Evidently, *in casu,* the parties subjected themselves to the primary law regulating the tobacco production, namely, Statutory Instrument 61 of 2004. Given this legal position, I fail to understand the first respondent's contentions. It is my view that the arbitrator's award conflicts with public policy. Let me proceed to deal with the issue. As was noted in *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Valentine Mushayakarara* HH 220-20 (which was upheld by the Supreme Court in *Mushayakarara* v *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* SC 180-20), the Exchange Control (Tobacco Finance) Order, 2020 (SI 61 of 2004), the applicant was authorized to source funding offshore before the introduction of the multi-currency system and to use such funds to advance loans to the first respondent. In the same vein, the applicant was authorized by the same Statutory Instrument to recover, in United States Dollars, all funds it would have loaned the first respondent in United States Dollars. Clearly, this was done to enable applicant to service the offshore credit facility it would have accessed.

I have critically examined the papers before me and make the following observations. It is not in dispute that the applicant used offshore funds to provide crop finance to the first respondent. The Finance Act (No.2) of 2019 amended the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] by inserting section 44C, which reads:

> "44C Issuance and legal tender of electronic currency
>
> (1) ….
> (2) for the avoidance of doubt, it is declared that the issuance of any electronic currency shall not affect or apply in respect of-
> (a)…
> (b) foreign loans and foreign obligations denominated in any foreign currency, which shall continue to be payable in such foreign currency."

Though the first respondent contends that the applicant transferred RTGS to him, I am persuaded by the applicant's argument that the RTGS transferred to the first respondent between August and October 2018 represented the mode of transfer utilized by the parties and is not a transfer into an RTGS FCA account. Moreover, there is overwhelming documentary evidence on record proving that offshore funds were employed by applicant to finance the first respondent. On the other hand, the first respondent asserted, without proof, that the funding that he obtained was in RTGS. In all fairness, the loan advanced to the first respondent was a foreign loan or foreign obligation, and should be payable in United States Dollars. The same position was also emphasized in the Exchange Control Circular No. 7 of 2019. Section 2 of this circular states:

> “**2. Treatment of USD Denominated Inputs Advanced to Growers**
>
> 2.1 Tobacco merchants have the option to use foreign currency sourced from local banks (through global facilities) or offshore financing to procure inputs for distribution to tobacco growers under contract arrangements.
> 2.2 Where tobacco growers receive USD denominated input loans, repayment to the tobacco merchant shall be in foreign currency in order to protect the tobacco merchant’s investment.”

In *Tian Ze Tobacco* v *Mugweni* HH 601-20, DUBE J had this to say in respect of the above which, in my view, is pertinently instructive:

> “The circular was issued to clarify treatment of US dollar denominated inputs advanced to growers in the tobacco industry. Tobacco merchants are given the option to use foreign currency sourced from local banks or offshore financing to procure inputs for tobacco contract farming growing. The effect of the circular is that tobacco farmers who receive United States dollars input loans are required to repay the loans in foreign currency.” **[My own emphasis]**

These statutory instruments all speaks to one thing, namely, if applicant advanced United States Dollar denominated inputs from offshore funds, the recipient respondent ought to pay back the money in United States Dollars. This court had occasion, in the *Mushayakarara’s case* (*supra*), to deal with a claim for payment of money advanced to a tobacco farmer in United States Dollars by a tobacco merchant. It was held that the applicant was authorized to recover all funds it advanced to tobacco growers in that currency. The inescapable conclusion is that the debt is payable in United States Dollars. From the foregoing, the arbitrator’s reasoning, as held in *ZESA* v *Maphosa* (*supra*), went beyond faultiness on incorrectness and constitutes a palpable inequity that is so far reaching. If the first respondent is allowed to pay the outstanding amount in Zimbabwean Dollars converted at the rate of 1:1, the applicant will not be in the position to service his foreign obligation it would result in an injustice with far reaching consequences to the tobacco industry in Zimbabwe. The award is not only outrageous in its defiance of logic. It goes beyond the general policy in Zimbabwe and fair-minded persons would be intolerably hurt by the award and, in my view, it would be contrary to public policy to uphold it. Having taken this view, it is now left for me to consider, the question of costs. It is settled law that costs follow the cause. I have nothing before me to justify an order of costs on a punitive scale. I will award costs on the ordinary scale.

Consequently, I make the following order:

1. The application be and is hereby granted.

2. The award rendered by the second respondent on 28 September 2020 be and is hereby set aside.
3. The first respondent shall pay applicant's costs on an ordinary scale.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Matizanadzo & Warhurst, respondent's legal practitioners