ZIMBABWE REVENUE AUTHORITY

Versus

MIKE HARRIS TOYOTA (PVT) LTD

And

KEVIN TERRY (NO)

HIGH COURT HARARE

COMMERCIAL DIVISION

CHIRAWU-MUGOMBA J

6, 9, 10 and 13 November 2023

N. B Munyuru, for the Applicant

T. Zhuwarara, for the first Respondent

No appearance for the second respondent.

OPPOSED APPLICATION

CHIRAWU MUGOMBA J: This matter was placed before me as an application for the setting aside of an arbitral award in terms of Article 34 (2)(b)(ii) of the Arbitration Act [Chapter *7:15*]. The award was rendered by the 2nd respondent on the 8th of June 2023. The applicant contends that the award conflicts with public policy in three main respects. (1) The award is contrary to the terms of the agreement between the parties which is binding on them and that the second respondent attempted to rewrite the contract for the parties, (2) the second respondent failed to consider submissions by the applicant and failed to make a determination on breach of contract while such breach formed the basis of the applicant's claim and (3) the second respondent's reasoning was grossly outrageous in failing to award anything to the applicant when it was apparent that the applicant made payment to the first respondent for the remaining batch of motor vehicles.

The background to the matter is that the applicant flighted a tender for the supply and delivery of motor vehicles. The first respondent was the successful bidder. A contract of

supply and delivery was entered into between the parties. Some vehicles were delivered and others were not after some payments had been done. The applicant effectively declared a dispute by sending a notice of termination. Both parties accepted the jurisdiction of the arbitrator under clause 18:2 of their contract. The applicant's statement of claim that adds more detail can be summarised as follows.

The contract between the parties was for delivery by the first respondent of 35 double cab Toyota vehicles and fifty Toyota Corolla vehicles. The total contract price was US$3,939,000. This amount was to be paid in three equal monthly instalments. The purchase price was to be paid in Zimbabwe dollars at the Reserve Bank auction rate applicable as at the date of payment. Upon signing of the agreement, the applicant made a payment of an equivalent of US$876 000 and as a result , a total of 15 Toyota Hilux vehicles were delivered. On the 24th of February 2022, a total of ZWL 209, 658, 911.21 was paid to the first respondent. Despite this payment, the first respondent failed to deliver the motor vehicles after full payment. Several meetings were held between the parties but to no avail. The first respondent averred that it could not deliver the vehicles due to challenges in procuring foreign currency. The applicant submitted to the second respondent that it had made payment in full and that the first respondent had failed to deliver. Therefore the applicant cancelled the contract due to the breach. The applicant therefore sought reimbursement of the figure of US$3,063,000 from the first respondent.

The defence put before the second respondent by the first respondent can be summarised as follows. The contract was affected by currency fluctuation, a fact that both parties were aware of. It is wrong for the applicant to make a claim in United States dollars that it never paid. Instead, what it paid were Zimbabwean dollars and the RBZ would then allocate funds as it did for the 15 delivered vehicles. The total amount paid by the applicant if converted does not equate to the claim made. There was no wilful default on the part of the first respondent as the allocation of money from the RBZ is beyond its control, hence force *majeure* applies. The applicant is refusing to take heed of the currency fluctuations and pay a top-up amount.

The second respondent crystallized the claim before him as follows.

a. The applicant sought confirmation of the cancellation of the agreement of the 28th of September 2022.

b. The applicant sought an order that the first respondent pays US$ 3, 063, 000 payable in ZWL at the RBZ auction rate at the date of payment together with interest at the prescribed rate from the date of the award.

c. The applicant sought damages in the sum of US$ 3, 063, 00 payable in ZWL at the RBZ auction rate at the date of payment.

d. The applicant sought costs of arbitration on an attorney-client scale.

Having considered the submissions before him, the second respondent made the following award.

1. The contract between the parties **WAS NOT** cancelled on the 28th of September 2022 (my emphasis).

2. The applicant is **NOT** entitled to payment by the first respondent in the sum claimed payable in ZWL at the RBZ auction rate together with interest (my emphasis).

e. The applicant is **NOT** entitled to damages in the sum of US$ 3, 063, 00 payable in ZWL at the RBZ auction rate at the date of payment. (my emphasis).

3. Costs are awarded to the first respondent.

At the hearing, Mr. *Munyuru* relied mostly on the heads of argument filed of record. He implored the court to pay regard to the decision in *Zesa vs. Maposa,* 1999(2) ZLR 452(S) on the well settled position relating to setting aside of arbitral awards. Mr. *Zhuwara* submitted that on the authority of *Peruke Investments (Pvt) Ltd vs Willoughby's Investments (Pvt) Ltd and anor,* 2015 (1) ZLR 49(S), arbitral awards on the ground of conflicting with public policy can only be set aside in exceptional circumstances. He also relied mostly on the heads of argument filed of record.

The purpose of registration of an arbitral award has been set out in a plethora of cases. For instance in *Gwanda Rural District Council vs. Botha (snr),* SC-174-20. BHUNU JA stated as follows:-

> "Before delving into the merits or otherwise of the grounds of appeal, I pause to observe that when presiding over the registration of an arbitral award, the court *a quo* had very limited jurisdiction. This is mainly because its function was merely to register the arbitral award for purposes of enforcement. To that end, it did not in the main exercise its appellate or review jurisdiction".

Although this is in the context of registration, it equally applies to the role of a court when faced with an application for setting aside an award. The court does not sit as an appeals or review court.

The application is based on Article 34 (2)(b)(ii) which reads as follows.

> "ARTICLE 34
> *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—
> or
> [Subparagraph amended by Act 14/2002]
> (*b*) the *High Court* finds, that—
> (i) ……..or
> (ii)**the award** is in conflict with the public policy of *Zimbabwe*.

There is also a plethora of cases that deal with the meaning of public policy.

In *Riogold (pvt) Ltd vs. Falcon Gold Zimbabwe and anor,* SC-7-23, the Supreme Court had occasion to deal with the section cited above as follows.

> "According to Article 34 (2) (b) (ii) of the Arbitration Act, the High Court can set aside an arbitral award if it finds that the award is in conflict with the public policy of Zimbabwe. This is the ground upon which the appellant relies on to have the arbitral award set aside.
>
> The *locus classicus* on the subject is the case of *Zimbabwe Electricity Supply authority v Maposa* 1999 (2) ZLR 452 (S) at 465 D-E wherein GUBBAY CJ provided an exposition of the law on the approach to be adopted by a court in determining whether an arbitral award is in conflict with the public policy of Zimbabwe as follows:
>
> "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."
>
> Further in the same case at 466 E –G, the Chief Justice stated as follows:
> "An arbitral 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 correctness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable 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 arbitrators has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above".

In the case of *Alliance Insurance v Imperial Plastics (Private) Limited & Anor* SC 30 – 17 MALABA DCJ (as he then was) related to the remarks in the *Maposa* case *supra* and made the following pertinent remarks at p 10:

> "The import of these remarks is that the court should not be inclined to set aside the arbitral award merely on the basis that it considers the decision of the arbitrator wrong in fact/or in law.
>
> If the courts are given the power to review the decision of the arbitrator on the ground of error of law or of fact, then it would defeat the objectives of the Act, it would make arbitration the first step in a process which would lead to a series of appeals."

Likewise, in *Peruke Investments (Pvt) Ltd v Willoughby's Investments (Pvt) Ltd & Anor* 2015 (2) ZLR 491 (S) at 499H – 500F PATEL JA (as he then was) reiterated the grounds on which an award will be set aside and the approach to be adopted in interpreting the defence of public policy. He stated as follows:

> "As a general rule, courts are generally loath to invoke this ground except in most glaring instances of illogicality, injustice or moral turpitude."

It is settled that a cautionary approach ought to be adopted when determining whether or not an arbitral award can be set aside. The doctrine of sanctity of contracts is a foundational principle in our jurisdiction. It provides that once a contract is entered into freely and voluntarily, it becomes sacrosanct and courts should enforce it. In the case of *Kempen v Kempen* SC 14/16, this principle was aptly captured as being the freedom of parties to enter into a contract and the duty of the court to respect the agency that parties have in this regard. It was held as follows;

> "Our legal system pays great honour to the doctrine of sanctity of contract to the effect that lawful agreements are binding and enforceable by the courts.
> In *Book v Davison* 1988 (1) ZLR at p 369F, the court held that it is in the public interest that agreements freely entered into must be honoured."

To buttress this point, the court in *Magodora v Care International* 2014 (1) ZLR 397 (S) held that:

> "In principle, it is not open to the courts to rewrite a contract entered into between parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be on onerous or oppressive. This is so as a

> matter of public policy. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict, with its express terms."

Similarly, the court in the case of *ZFC Limited v Tapiwa Joel Furusu* SC 15/18 emphasised the same points as follows:

> "Contracts are sacrosanct unless evidence shows that they were not entered into freely and voluntarily."

The applicant's contention is that the award is contrary to the terms of the agreement between the parties which is binding on them and that the second respondent attempted to rewrite the contract for the parties. I do not perceive how this can be so. The parties entered into the contract freely. They submitted to arbitration freely. They both accept that after the second batch of cars was not delivered, they held several meetings to try to resolve the matter. This ground has no merit at all and is as a matter of fact an attempt by the applicant to compel this court to re-write a contract entered into freely between the parties.

The second contention is that the second respondent failed to consider submissions by the applicant and failed to make a determination on breach of contract while such breach formed the basis of the applicant's claim. This is simply not correct. Reference to the *Chartpril Enterprises(pvt) Ltd and ors vs. Sino Electrical Systems (pvt) Ltd and ors,* HH-602-21, is misplaced. The second respondent dealt with the issue of cancellation and therefore breach. He found that there was no cancellation and there cannot be breach without cancellation. What is clear is that the applicant expected the second respondent to uphold the termination of the contract. When he did not, the applicant was unhappy. In my view and as amplified by Mr. *Zhuwarara,* an arbitrator has a right to be 'wrong'. – *Townsend Enterprises vs. Sinohydro Zimbabwe (pvt) Ltd,* HH-143-23. The contentions by the applicant who freely entered into an arbitration contract and put specific issues before the second respondent , in my view amount to asking this court to review the award. That is not our duty. As cited above, the ground of public policy is very limited. A litigant cannot found a claim on its general unhappiness over an award and claim that it is in conflict with public policy.

The third contention is that the second respondent's reasoning was grossly outrageous in failing to award anything to the applicant when it was apparent that the applicant made payment to the first respondent for the remaining batch of motor vehicles. A reading of the award shows that the second respondent did indeed deal sufficiently with the figures, i.e the

amounts paid and the legal implications. This ground is again more about the unhappiness of the applicant over the award. It has no merit.

As submitted by the first respondent in the heads of argument, in the *Alliance Insurance* matter, the Supreme Court posed the following question,

> 'These remarks ought to guide the Court in determining whether the award by the first respondent is contrary to public policy. The question that should be in the mind of a Judge who is faced with this ground for setting aside an arbitral award is that, in light of all the
>
> submissions and evidence adduced before the arbitrator, is it fathomable that he would have come up with such a conclusion. If the answer is in the affirmative, there is no basis upon which to set aside the award'.

The second respondent received submissions and considered all the issues put before me. I do not perceive any violation of a fundamental principle of law and justice and accordingly, in my view the application for the setting aside of the arbitral award cannot stand.

On costs, the applicant ought to have reflected more seriously on the application. While not taking away the right of a party to litigate, sight should not be lost of the fact that the applicant's contentions are akin to asking this court to review the award. The application itself has no merit. Accordingly while I am loath to award costs on a higher scale, I will award them on the ordinary scale to the first respondent.

DISPOSITION

1. The application be and is hereby dismissed.
2. The applicant shall pay the first respondent's costs.

Muvingi and Mugadza, Applicant's Legal Practitioners.

Gill, Godlonton and Gerrans, first Respondent's Legal Practitioners.