REPORTABLE: (7)

RIOGOLD (PRIVATE) LIMITED
v
(1) FALCON GOLD ZIMBABWE (2) THEMBINKOSI MAGWALIBA

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHITAKUNYE JA & MWAYERA JA
HARARE: 18 NOVEMBER 2021 & 27 JANUARY 2023

T. Mpofu, for the appellant

F. Mahere, for the first respondent

No appearance for the second respondent

MWAYERA JA: This is an appeal against the whole judgment of the High Court, which dismissed the appellant's application for setting aside an arbitral award made by the second respondent.

FACTUAL BACKGROUND

The appellant and the first respondent are both mining entities. On 30 September 2016, the two parties entered into a Share Purchase Agreement of the entire share capital of a company known as Palatial Gold Investments (Pvt) Ltd ("Palatial"). Palatial operated a mine under the style Dalny Mine in which it owned claims, a processing plant, buildings and other assets necessary for the undertaking of the mine. The mine was once owned by the first respondent before it was transferred to Palatial whose shareholding was 100% owned and controlled by the first respondent.

Following the conclusion of the share purchase agreement the appellant alleges that it came to light that, when the agreement between the appellant and the first respondent was concluded, Palatial had liabilities that were either not disclosed or not adequately disclosed to the appellant as required under the agreement. The appellant claimed that the first respondent had failed to disclose that some employees were aggrieved by the manner in which their employment had been terminated. Further it claimed that these employees were in occupation of property that belonged to Palatial, which they ought to have vacated when their employment terminated.

The appellant, as the buyer, sought at arbitration to enforce the first respondent's obligation to indemnify it against the undisclosed liabilities. In the alternative, the appellant sought relief on the basis that the first respondent had breached certain contractual warranties. According to Clause 14 of the agreement, the appellant, in its discretion was entitled to elect to make a claim under breach of warranty or under indemnity or breach of undertaking.

Further according to the appellant there were various claims being made against the first respondent. The fact that several claims had also been made against the first respondent was not disclosed to the appellant. The first claim against the first respondent was instituted in August 2017 by the National Employment Council for the Mining Industry in the case of *Robes Mabheka & 715 Ors v Dalny Mine*. In this claim, the seven hundred and sixteen claimants claimed that they were employees of Dalny Mine and that they were owed a total US$10 129 360.00 in salary arrears dating back to 2013. The second claim instituted against the first respondent was in 2018 in the case of *Binomi Nkomo & 17 Ors v Falcon Gold Group and Riozim (Pvt) Ltd*. In this case the 18 applicants claimed to be employees of Dalny Mine. They alleged they were owed US$1 064 525.48 in salary arrears dating back to 2013. Further,

the appellant discovered that most of Dalny Mine village houses were not occupied by civil servants as misrepresented by the first respondent but were rather occupied mainly by people who claimed to be employees of Dalny Mine. Out of the several hundreds who claimed to be employees of Dalny Mine, only fifty-three employees had been disclosed by the first respondent. Even for the employees disclosed, the status of their contracts were not disclosed.

The appellant contended that the first respondent had breached its duty of full disclosure as required under the Share Purchase Agreement. In terms of the agreement the first respondent had a duty to disclose the "full and accurate details of the identities, job titles, place of work and dates of commencement of employment of all employees" during the due diligence exercise. The failure to disclose the status of the eight hundred and thirteen employees was central to the appellant's claim. The appellant then instituted arbitration proceedings against the first respondent since the agreement between the parties was subject to an arbitration clause. The second respondent was the arbitrator.

The appellant sought before the arbitrator an award for its indemnification in respect of claims or expenses or losses arising from the termination or intended termination of the employment of any person not named on Annexure A. The claims were to include expenses or losses to which the indemnification applied. These were to include arrear emoluments "found to be due", any compensation for loss of employment that may be found to be due, any liability of a fiscal nature arising from the existence or termination of such employment. The claim also related to the total of any dues owing or that may be owed to any social security fund, national employment council, trade union, regulator or any other body on account of such employment. It further claimed the cost of all legal and other professional

advice attendant upon resolving any issues arising from such employment whether or not legal proceedings had been instituted or defended.

Secondly, the appellant sought an award indemnifying it and Palatial in respect of all costs, losses or expenses attendant upon obtaining vacant possession of any house forming part of Dalny Mine village which as of 30 September 2016 was occupied by any person who is either not named in Annexure 'A' to the statement of claim or not a civil servant. Lastly it claimed for an award that the first respondent shall pay the costs of arbitration and bear the fees and expenses of the arbitration tribunal.

In defending the claim, the first respondent insisted that it had made the relevant disclosures as was required under the agreement at the material time. All contracts between the first respondent and Palatial employees were availed to the appellant. The first respondent contended that all information was disclosed including that the mine workers had been placed on unpaid leave as from 30 August 2013 immediately upon the mine being placed under "care and maintenance". The first respondent maintained that all related legal issues were disclosed to the appellant, the purchaser.

The second respondent, after hearing submissions, found in favour of the first respondent. He held that the indemnity could only kick in after a loss had been incurred and as such the claims for indemnification were dismissed in their entirety. He found that all details that were reasonably necessary to enable the appellant to make relevant considerations were availed by the first respondent. As such, the fact that there was fair disclosure as contemplated by clause 10.4 of the agreement meant that there were no flaws justifying indemnity.

Aggrieved by the award disentitling it to indemnity the appellant approached the High Court on review seeking to set aside the award on the basis that it was in violation of public policy.

The court *a quo* found that the grounds raised by the appellant for setting aside the arbitral award were not sustainable. It found that the appellant had failed to establish that the arbitral award was contrary to public policy. It further, held that the appellant failed to show that the reasoning and conclusions of the second respondent were wrong either on fact or in law.

GROUNDS OF APPEAL

Dissatisfied with the determination of the court *a quo*, the appellant noted the present appeal on the following grounds:

1. Having come to the conclusion that the agreement between appellant and first respondent entitled the former to an indemnity, the court *a quo* erred in not holding that second respondent had in dismissing the claim deprived appellant of the benefits of its contract and had breached the public policy of the forum in so doing.
2. The court *a quo* contradicted itself and erred at any rate in coming to the conclusion that the indemnity could only be activated in the face of an actual loss and so erred in not considering that contractually, the indemnity covers every form of liability and must by law be granted even before any loss has been suffered.
3. A fortitori the court *a quo* erred in failing to appreciate that the arbitrator had misconstrued the terms of the submission, failed to appreciate the essence of the case before him and that his award ought to have been vacated for being contrary to public policy on those grounds.

4. The court *a quo* erred in not coming to the conclusion that the arbitrator had affronted a basic principle of the law in negatively assessing the evidence of appellant's witness under circumstances where first respondent had led no evidence of its own.

SUBMISSIONS ON APPEAL

Mr *Mpofu*, counsel for the appellant, made submissions on two main points. Firstly, he submitted that the arbitral award which was upheld by the court *a quo* was contrary to the provisions of the agreement entered into between the appellant and the first respondent. He contended that the arbitrator misconstrued and failed to appreciate the case that was before him because the legal effects of Clause 14 were disregarded which resulted in a remedy not provided for in the agreement being awarded. Secondly, he submitted that the proceedings were not conducted properly particularly the manner in which the arbitrator assessed the evidence presented before him. Counsel contended that the arbitrator only assessed evidence that was led by the appellant and as such no findings of credibility can be made on the evidence. Further, it was submitted that by not adducing any evidence, the first respondent failed to discharge its onus. As such no correct assessment was made by the arbitrator because there was no evidence led by the first respondent.

Per contra, Ms *Mahere*, counsel for the first respondent, submitted that the appeal had no merit because the appellant failed to satisfy the requirements set out in *Zesa v Maposa* 1999 (2) ZLR 452 (S) for the setting aside of an arbitral award. She further submitted that the appellant just did not agree with the arbitrator's factual findings. Concerning the evidence of a single witness, it was argued that the first respondent exercised its right not to lead further evidence because it was unnecessary in light of the evidence led by the appellant's witness. She further contended that the arbitrator knew and properly construed the

case before him and gave an appropriate order. She submitted that there was no basis for this Court to interfere with the court *a quo's* findings which confirmed the arbitrator's findings.

ISSUE FOR DETERMINATION

Only one issue falls for determination in this matter. The issue is whether or not the arbitral award depriving the appellant of relief under its contract with the first respondent was contrary to public policy.

THE LAW

Article 34 of the Model Law, which is a schedule to the Arbitration Act [*Chapter 7:15*], prescribes both the procedure for setting aside an arbitral award and the substantive grounds upon which it may be set aside by the High Court. For purposes of the present matter, the relevant provisions are in para 2 (b) (ii). Paragraph 2 (b) (ii) it provides as follows:

> "(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) ---
> (b) the High Court finds that-
> (i) ---
> (ii) the award is in conflict with the public policy of Zimbabwe."

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 arbitrator 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."

It is important to note that the appellant and the first respondent freely and voluntarily entered into an agreement which was subject to arbitration in the event of any dispute "Arbitration Clause 18."

Clause 14 on indemnity as read with clause 10.4 (on warranties) of the purchase agreement when read together with the second respondent's findings shows that the arbitrator appreciated the case before him and properly assessed same when he dismissed the appellant's claim.

Clause 14 of the share Purchase Agreement reads as follows:

"14.1. Without prejudice to any of the other rights of Purchaser arising from any provisions of this agreement, the Seller Indemnifies the purchaser and company against all loss, liability, damage or expense which the purchaser and or company may suffer as a result of or which may be attributed to:

14.1.1. any other liability of the company which is known or which reasonably ought to have been known arising prior to the completion date and not disclosed to the purchaser prior to the signature date; and/or

14.1.2. any claims as a result of any breach of contract or delictual tort, act or omission by the company occurring before completion date and not disclosed to the purchaser and/or;

14.1.3 a breach by the seller of warranties, which breach shall include legal action being taken against the purchaser, of the company by a third party in respect of which the purchaser had relied on a warranty given by the seller."

Clause 10.4;

"10.4 The Warranties are limited and qualified to the extent to which a fair disclosure of any or circumstances has been made in the agreement, but only to the extent any such fact and circumstances has been fairly disclosed in the Disclosure Letter attached hereto as Schedule 9. For purposes of the aforegoing a "fair disclosure" is defined-:

> "fair disclosure is one where all information detail facts and circumstances that are reasonably necessary to be disclosed to enable a proper appreciation and consideration by a purchaser of the relevant issue and attendent risks have been disclosed." (Underlining my emphasis)

It is a reading of clause 14 and 10 which puts colour to the second respondent's finding that the appellant was not denied information which it required in order to make an informed decision. The disclosure was made prior to the completion or effective date of the Share Purchase Agreement. Fair disclosure on relevant issues and attendant risk was made as contemplated by clause 10.4 of the agreement.

APPLICATION OF THE LAW TO THE FACTS

The argument submitted on behalf of the appellant is that the fundamental principle of sanctity of contract between the parties has been violated. It was further submitted that the indemnity clause, Clause 14 of the Sale Agreement was not interpreted to give effect to the meaning intended in the contract.

It is common cause that the parties to a contract are bound by the terms of the contract and this also applies in circumstances where the parties have chosen arbitration as a means of dispute resolution. It is settled that the courts safeguard against interfering with decisions made by arbitration unless a party can prove that the conclusion reached was in contravention of the Arbitration Act or that it is an outrageous decision warranting interference. In the *Alliance* case *supra*, the position was emphatically spelt out when the court stated:

> "The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as proper procedures are followed. The court therefore cannot interfere with arbitral award except on the grounds outlined in Article 34 (2). An application brought before the court under this provision is in essence, a restricted appeal and the applicant should prove the grounds set out in order to succeed in its application."

Consequently, in *casu*, the fact that the arbitrator may have been wrong in fact or at law in reaching his conclusion on whether or not the appellant is entitled to be indemnified in the face of liability, would not be a ground for setting aside the arbitral award, unless such a conclusion constitutes a palpable inequity that is far reaching and outrageous in its defiance of logic or acceptable standards.

In this case, the arbitrator's conclusion does not amount to an outrageous and illogical decision neither does it run contrary to the public policy of Zimbabwe. The appellant sought for specific performance in circumstances where no liability had been incurred. To the extent that requirements for specific performance were not met the arbitrator, did not accede to the relief sought. The court *a quo* in turn did not register the award. It dismissed the appellant's application.

It is clear that the courts ought to adopt a cautionary approach when determining whether or not an arbitral award should be set aside. The courts are reluctant to interfere with the objectives of arbitration proceedings by setting aside awards merely because a party does not agree with the findings. In the absence of violation of a fundamental principle of law and justice, there is no basis for this Court to interfere with the decision of the court *a quo*. The requirements for setting aside the arbitral award set out in Article 34 (2) (b) (ii) were not satisfied. In the circumstances the appeal has no merit.

In respect of costs, there being no reason to depart from the general rule that costs follow the result, the general rule shall prevail.

Accordingly it is ordered that:

1. The appeal be and is hereby dismissed.

2. The appellant shall bear the costs.

BHUNU JA : I agree

CHITAKUNYE JA : I agree

Wintertons, appellant's legal practitioners

Atherstone & Cook, 1st respondent's legal practitioners