JOHANNES TOMANA
and
REUBEN TOMANA
versus
TIAN ZE TOBACCO COMPANY (PVT) LTD
and
JOEL MAMBARA (N.O)

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 1, 4, 9, 10 and 17, 18, 22 and 24 November 2021

OPPOSED APPLICATION

F Mukwewa, for the applicant
G.R Sithole with *G.K Muchapireyi,* for the respondent

CHIRAWU-MUGOMBA J:

DISPOSITION

After going through the documents filed or record and hearing argument on the 1st of November 2021, I dispose of this matter as follows:-

1. The application for the setting aside of the arbitral award handed down by the 2nd respondent on the 18th of October 2018 at Harare in terms of the Arbitration Act [Chapter 7:15] in respect of the 1st applicant, is dismissed with costs.
2. The arbitral award described in paragraph 1 above remains intact in so far as it relates to payment of $114 749.80 and 50% of the 2nd respondent's costs by the 1st applicant.
3. The arbitral award described in paragraph 1 above against the 2nd applicant in so far as it makes him jointly and severally liable for payment of $114 749.80 and 50% of the 2nd respondent's costs, be and is hereby set aside with costs.

JUDGMENT

[1] This matter was placed before me as an application for the setting aside of an arbitral award given by the 2nd respondent on the 18th of October 2018. The applicants are the 1st and 2nd respondents in that matter with the 1st respondent being the claimant. The operative part of the award reads as follows:-

1. That the 1st and 2nd respondents, jointly and severally, the one paying and the other to be absolved, be and are hereby ordered to pay to the claimant, $114 749.80 together with interest at the prescribed rate from the date of the award to the date of full payment.
2. That each party pays 50% of the arbitration costs.

[2] The applicant seeks the setting aside of the award in terms of Article 34 of the Arbitration Act [Chapter *7:15*]. The applicants have placed before the court the following grounds for seeking the order that they do.

a. The 2nd respondent found in favour of the 1st respondent based on previous contracts which were not the basis of the claim or the cause of action. No proof was furnished by the 1st respondent of supplying inputs for the 2011/12 seasons. By making such a finding, the 2nd respondent dealt with previous contracts which were not the basis of the claim and or cause of action. The 2nd respondent therefore dealt with disputes which did not fall within the terms of the submissions for arbitration or he dealt with issues which were not properly before him.

b. By dealing with issues relating to other agreements other than those put before him, the 2nd respondent dealt with issues beyond the scope of the terms of submissions to arbitration.

c. The award is contrary to public policy as it imputes liability to the 2nd applicant who was not a party to the agreement upon which the 1st respondent's cause of action was founded and after finding the existence of *vis major*, the 2nd respondent surprisingly found the respondent liable.

d. A fourth ground appeared in the heads of argument to the effect that the arbitrator dismissed the applicant's assertion that the matter had prescribed based on a letter authored by the 2nd applicant who had no authority.

[3]At the commencement of the initial hearing of the matter on the 22nd of October 2021, I requested the parties to reflect on the absence of an agreed statement of facts and issues to be determined by the 2nd respondent. The matter was adjourned to the 1st of November 2021. Needless to say, the parties seemed to have fortified their positions. The procedure adopted in the matter may have led to the hard-line positions taken by the litigants. The 1st respondent submitted its statement of claim dated the 4th of June 2018. The 1st and 2nd applicants requested for further particulars. The 1st applicant submitted what it termed an answer to the claimant's statement of claim. This was followed by what was termed the 2nd applicant's supporting statement. The 1st respondent filed a replication and thereafter the applicants and the 1st respondent filed heads of argument. I note that in-between there was an 'application' by the 1st respondent to produce as part of its evidence a letter dated 29 May 2015 supposedly authored by the 2nd applicant. The applicants strenuously opposed production of this letter. The 2nd respondent proceeded to deal with the matter as per the documents placed before him. I have noted that unlike in other arbitration matters, there was no statement of agreed facts or issues placed before the arbitrator specifically to be dealt with. Despite this omission I note

that in terms of Article 19 of the Model Law, an arbitrator may conduct the proceedings in a manner that they deem fit as follows;-

> "ARTICLE 19
> *Determination of rules of procedure*
> (1) Subject to the provisions of this Model Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Model Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

[4] The gist of the matter as submitted for arbitration by the respondent can be summarised as follows:-

a. The respondent claimed the sum of US$114 749.80 for tobacco farming inputs supplied to the applicant on credit in terms of a farming contract.
b. The 2nd applicant at all material times negotiated the contracts on behalf of the 1st applicant.
c. The parties entered into various contracts from 2008 to 2012 and the claim arises from this period.
d. The respondent would supply the 1st applicant with tobacco inputs which would enable him to produce 40 000 kgs of tobacco. This would be sold to the respondent by the 1st applicant. The respondent would pay the 1st applicant the proceeds of the sale less the price of the inputs provided.
e. The respondent supplied the 1st applicant with inputs but he failed to honour the obligation of delivering the 40 000 kgs of tobacco as per the contract.
f. The 1st applicant initially ignored correspondence from the respondent's legal practitioners but in a letter written in September 2015, the 2nd applicant acknowledged indebtedness and made a payment proposal on behalf of the 1st applicant. Despite this undertaking, the applicants failed to honour their obligation and hence the referral of the matter to arbitration in terms of paragraph 17 of the contract.
g. Prescription was interrupted by the letter dated the 19th of September 2015 as well as part payment of US$30 000 by the applicants.
h. Force majeure does not apply because the contracts were entered into during the period of the targeted economic measure. The respondents collected inputs well knowing that they did not intend to fulfil their end of the bargain and in any event, the targeted measures affected every Zimbabwean.

[5] The applicants' response to the claim can be summarised as follows:-

a. The contract was entered into in 2008/9 and the claim being made in May 2015 has prescribed.
b. The claim is not enforceable having been affected by f*orce majeure* as contemplated in clause 15 of the contract. These in relation to the applicants are farm strikes and targeted economic measures commonly known as illegal sanctions.
c. The 2nd applicant acted with specific written authority as the 1st applicant's farm manager. Prior written consent was granted in respect to the years 2008/9.
d. A contract was entered into in 2008/9 but no such contract was entered into in 2011/12.
e. The 2nd applicant did not acknowledge liability in the sum claimed on behalf of the 1st applicant.

[6] At the hearing, Mr *Mukwewa* for the applicants made the following submissions. The claim had prescribed and the 2nd respondent was wrong to make a finding that the letters written by the 2nd applicant constituted interruption of prescription. The basis for seeking to have the award set aside is that the 2nd respondent went outside his mandate. He should only have dealt with the 2008/9 contract but he ventured into the 2011/12 contract which was not within his terms of reference. Page 22 paragraph 8 of the record shows that the dispute related to the provision of 40 000 kgs of tobacco for the 2011/12 season. This is buttressed by a letter written by the respondent's legal practitioners to the applicants' legal practitioners. There was no delivery note for the 2011/12 season and as such, the claim should be dismissed. The 2nd applicant did not sign paragraph 12 of the contract to make him liable. On public policy grounds, an award cannot be made against a third party such as the 2nd applicant who did not have authority to act. The 2nd respondent was wrong in finding that *force majeure* existed and failing to refuse the claim.

[7] Mr *Sithole*, for the respondent made the following submissions. The matter that the 2nd respondent was seized with is based on a statement of claim. At page 22 of the record in paragraph 8, basis of the claim was the agreement from 2008-2012. The amount claimed was not confined to one season only as contended by the applicants. The balance was clearly based on the total amount owing as at the 22nd of June 2015. The statement of claim was admitted by the applicants as per paragraph 10 record page 6. The paragraph reads that, *' It was agreed that the 1st respondent would submit its statement of claim which would form the terms of reference (cause of action) for arbitration by the 2nd respondent and that the 1st*

applicant would submit his response thereto'. This is exactly what the 2nd respondent did in accordance with the mandate given to him. On page 162 of the record and in his award, the 2nd respondent put it beyond doubt that his understanding was that as at the 14th of May 2014, the outstanding balance was US$114 749. 80. This balance included a roll- over of loans from previous contracts. The statement of claim and other documents submitted formed the basis of the award. Reference was made to *Augur Investments* v *Faircot Investments* – SC-8-19. The applicants responded to the statement of claim and participated in the proceedings. They are therefore estopped from alleging that the 2nd respondent went outside his mandate. They waived their right to object in terms of Article 4 of the Model Law.

The 2nd applicant did not distance himself from the matter. He wrote an acknowledgment to pay as a response to the letter of demand. He was under no duress. His letters dated the 14th of July and the 19th of September 2015 in which he admitted liability and undertook to settle the debt were correctly found by the 2nd respondent to have interrupted prescription.

The sanctions were correctly found by the 2nd respondent not to constitute *vis major*. The applicants never placed evidence before the 2nd respondent on how they were affected by the sanctions. They continued to annually contract with the 1st respondent despite the sanctions. These findings cannot be said to be contrary to public policy. No injustice has been shown in relation to the award.

[8] Article 34(2) of the Arbitration Act provides grounds upon which an arbitral award may be set aside by the High Court. It states:

> "(2) An arbitral award may be set aside by the *High Court* only if —
>
> (*a*) …….
>
> (*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*."

[9] The law on setting aside of arbitral awards has been developing over the years as cases challenging registration or seeking orders to set aside awards have been rising. The law has

been set out in a plethora of cases – see *Peruke Investments (Pvt) Ltd* v *Willousghby's Investments (Pvt) Ltd and anor,* 2015 (1) ZLR 491 and also Article 34 of the Model Law (First Schedule to the Arbitration Award) on the procedure and substantive grounds for setting aside an award. The *Peruke* case (*supra*) is also one of the authorities for the set legal position that courts are reluctant to invoke the limited ground of public policy 'except in the most glaring instances of illogicality, injustice or moral turpitude'. In *Decimel Investments (Pvt) Ltd* v *Arundel Village (Pvt) Ltd and anor*, 2012 (1) ZLR 581(H), MATHONSI J (as he then was) stated as follows: -

> "It should be appreciated that the limited grounds of attacking an arbitral award are meant to ensure international uniformity in the application of the model law contained in the Arbitration Act. That law is of international origin and is intended to govern both domestic and international arbitrations. *Pamire & Ors* v *Dumbutshena N.O. & Anor* 2001(1) ZLR 123(H) at 125 E."

As rightly observed by GOWORA J (as she then was) in *Pioneer Transport (pvt) Ltd vs. Delta Corporation and another,* 2012 (1) ZLR 58, the UNCITRAL model does not define the concept of public policy. In our law however, the standard was set in *ZESA* v *Maposa,* 1999(2) ZLR 452(S) where at 466 E-G GUBBAY CJ said:

> "Under articles 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 constitutes 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".

The rationale for a restrictive approach to setting aside arbitral award was aptly captured by MALABA DCJ (as he then was) in *Alliance Insurance* v *Imperial Plastics(Pvt) Ltd and anor,* SC-30-17 that:-

> "The salient feature of the provision is that it prohibits any recourse against an arbitral award other than in terms of its requirements and limits the grounds on which the award can be assailed. The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are followed. The courts therefore cannot interfere with the 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".

[10] In *casu,* the issue is whether or not the award is in conflict with public policy. While Mr *Mukwewa* strongly submitted that the 2nd respondent went outside his mandate by dealing with the contracts as from 2008 instead of 2011/12 only, Mr *Sithole* held a contrary view. This can only be answered by analysing the claim that was put before the 2nd respondent. As rightly submitted by Mr *Sithole,* the claim put before the 2nd respondent made it very clear (pages 21-23) of the record that the parties entered into various tobacco farming agreements between the years 2008-2012. Annexure B being a copy of the 2011/12 reason has a compelling clause 5(i) to the effect that the supply of inputs is subject to the loan repayment for the previous seasons. The applicant in paragraph 10 of his founding affidavit confirms that it was agreed that for arbitration purposes, the 1st respondent would submit its statement of claim which would form the terms of reference (cause of action) and that the 1st applicant would submit its response. In the response to the claim, the applicants never averred that the 2nd respondent should not consider the claim from the 2008 contract. Instead they raised a point in *limine* averring that 'Firstly*, the claim arising out of a contract I entered into with the Claimant in the year 2008, for the 2008-2009 season and being demanded in May 2015 has prescribed".* Further in paragraph 5 that "1st *respondent admits that in 2008/09, he entered into a contract farming agreement with the claimant but denies entering into such agreement with the claimant in 2011/12."* To claim therefore as the applicants do that the 2nd respondent acted outside his mandate is fallacious. To that end Mr *Sithole* correctly in my view submitted that the applicants are bound by Article 4 of the Arbitration Act in that they waived the right to object and in any event their contention is misguided. I also find no merit in the assertion by the 1st applicant that the 2nd respondent dealt with matters not put before him. The issue of the contracts as far back as 2008 was squarely put before him in the statement of claim and response by the applicants.

[11] Mr *Mukwewa* submitted that the 2nd respondent contradicted himself by acknowledging the existence of *force majeure* but then went on to make a finding against the applicants. In the 1st applicant's response to the 1st respondent's submissions before the 2nd respondent, he cited these as the farm strikes that he claimed were common cause, the targeted economic measures, currency and electricity challenges. The award reads as follows in relation to this issue.

> "The 1st respondent, on 17 June 2010 wrote a letter to the claimant in which he explained the challenges he faced during the 2008/9 season. These included strikes, illegal sanctions, and the crash of the Zimbabwe currency and electricity blackouts. Despite these challenges, the

> respondents managed to salvage something and sold some tobacco on the market. They undertook however to continue doing business with the claimant after having discharged what they owed during the season. The tone of the letter of 17 June does not reflect of the person who is pleading force majeure. It exhibits a readiness to discharge one's obligations and continue doing business with the other person……The instances related to that would then qualify force majeure were all common place instances. They affected the generality of the people and businesses in Zimbabwe alike. The onus was on the respondents to use their best endeavours to mitigate the situations, and indeed the letter of 17 June 2010 talks of the mitigatory measures the respondents took to avoid a total loss. Further I would understand force majeure to mean circumstances that would make it totally impossible for a party to perform its obligations under a contract. These would be circumstances that would destroy the whole base of the contract. In this matter, the circumstances related to have the effect of diminishing the yield and not completely destroying the venture. Thus the claim of force majeure must also be dismissed."

[12] Contrary to the assertion by Mr *Mukwewa,* the 2nd respondent indeed accepted *force majeure* but went on the discount it. Can that be said to be contrary to public policy? The answer can only be in the negative. The finding does not in my view constitute an affront to public policy and would not constitute a palpable inequity. As was submitted by Mr *Sithole,* the 1st applicant never placed evidence before the 2nd respondent to show how he was personally affected by the stated factors. He continued contracting with the 1st respondent despite these factors. He cannot seek to wriggle out of them.

[13] The applicants tie the issue of prescription to the authority of the 2nd applicant to act. The analysis by the 2nd respondent reads as follows:-

> "The respondents, in their argument further deny that the 2nd respondent was the 1st respondent's agent and therefore this acknowledgment of liability was of no force or effect. The fact that the 2nd (sic) was an agent of the 1st respondent should have been endorsed on the 211/12 season agreement, so the argument goes. I have already made a finding of fact that the claim does not relate to any one particular agreement but relates to the whole arrangement between the parties from 2008 to 2010. In fact the point is made by the respondents that the 2011/12 agreement did not materialize because claimant had changed directors. It was therefore clear between the parties that the $114 749 related to previous engagements. I have already perused the 2008/09 and 2009/10 season contract, they have no provision for endorsing the name of the agent. In any case, and in unequivocal language, the 2nd respondent advised the claimant that at all material times, he was the 1st respondents' agent. He was the one who negotiated all the contracts between the claimant and the 1st respondents. ……In the present matter, the 2nd respondent who was both the 1st respondents' brother, agent and manager acknowledged liability and undertook to clear the liability. The last undertaking was made by way of a letter dated 19 September 2015. Prescription was thus interrupted and when these proceedings were referred to arbitration, the claim had not yet prescribed."

In my view, the applicants have failed to establish that the finding by the 2nd respondent is contrary to public policy based on the standard and test set in the *ZESA* matter (*supra*).

[14] There is no doubt that the award in relation to the 1st applicant is intact and ought not to be set aside. Where the award falters however is that of holding the 2nd applicant liable jointly and severally with the 1st applicant. This is in instances in which the contract was never assigned to the 2nd applicant. Annexure B makes it very clear that the contract was between the 1st applicant and the 1st respondent. The 2nd respondent accepted that the 2nd applicant acted as an agent. Paragraph 17 of the 1st respondent's claim as put before the arbitrator states that as at the 22nd of June 2015, the 1st respondent (1st applicant in *casu)* was indebted to the claimant (1st respondent in *casu*) in the sum of US$114 749. The 2nd applicant never accepted personal liability but was in all instances acting as an agent. His name never appeared on the contracts. While the 1st applicant is bound by the actions of the 2nd applicant on the basis of agency, this does not extend to the 2nd applicant being jointly and severally liable. This is tantamount to what has been termed dragging non-parties to arbitration awards.

In *SN Prasad* v *Monnet Finance Limited,* (2011) I SCC 372, the Indian Supreme Court made it clear that a party that is not a signatory to an arbitration agreement cannot be dragged into and made a party to the arbitration proceedings for deciding a dispute that may have arisen between the signatories to the arbitration agreement.

It cannot be correct as submitted by Mr *Sithole* that by merely signing letters acknowledging liability, the 2nd applicant should be found liable. The 2nd applicant was not a party and therefore ought not to have been dragged along to the arbitration and ought not to have been found liable jointly and severally with the 1st applicant in the award.

[15] The immediate question is what then is the remedy? It is trite that this court sits neither as an appeals or review court. But can the award be severed nonetheless? In *Palabora Copper (Pty) Ltd* v *Motlokwa Transport & Construction (Pty) Ltd* (298/2017) [2018] ZASCA 23 (22 March 2018), the South African Court Supreme Court considered the issue of severability in the context of the Arbitration Act 42/65 as amended and stated that,

> "Other standard texts on arbitration in South Africa do not address the issue in the context of a finding of gross irregularity in the arbitration. They do, however, accept that where arbitrators exceed their powers and the exercise of excessive powers does not infect the entire

> award, the good may be severed from the bad and enforced… Bearing in mind that s 33(1) *(b)* of the Act deals with both exceeding powers and gross irregularity as grounds for setting aside an award, there seems no reason why the same principle should not apply where only part of an award is infected by a gross irregularity. The current English Arbitration Act addresses the problem directly by saying that where a court may set aside an award it may do so 'in whole or in part'. However, under its predecessor the wording was the same as the current South African statute, namely, that the court may 'set aside the award'. In the last edition of *Russell on Arbitration*... before the new statute the law in regard to this provision was summarised as follows:
> 'An award bad in part may be good for the rest. If, notwithstanding that some portion of the award is clearly void, the remaining part contains a final and certain determination of every question submitted, the valid portion may well be maintainable as the award, the void part being rejected …
> The bad portion, however, must be clearly separable in its nature in order that the award may be good for the residue. When it is so divisible, the faulty direction will alone be set aside or treated as null. … If the objectionable provisions in the award are inseparable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion, the award will be altogether avoided.'
>
> That approach seems to me to reflect a logical and sensible construction of the statute. There does not appear to be any sound reason why an arbitration, that has been properly conducted on certain issues and has properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue. Of course the court will need to be satisfied that the latter issue is wholly separate from the others, but, subject to that, this approach is consistent with the language of s 33(1) *(b)* and gives effect as far as possible to the parties' agreement to have their dispute determined by the arbitrator. It is also an approach that is consistent with those cases in which our courts have set aside portions of an award as being beyond the powers of an arbitrator, but made the balance of the award an order of court. In my view it is correct and should be applied in this case."

[16] In *William Hare UAE LLC* v *Aircraft Support Industries Pty Ltd*, NSWSC 1403, the New South Wales Supreme Court considered the issue of severability under the International Arbitration Act of 1974. DARKE J had this to say, (Citing from BROOKING JA)

> "When is severance of an award possible? Sometimes it is laid down that severance is possible if it may be effected without injustice. It has been said that for severance to occur it must appear that the residue that is to be allowed to stand was in no way affected by the part of the award that is rejected: *McCormick v Grey* (1851) 13 Howard 26 at 37; 14 Law Ed. 36 at 41. According to Blackburn J., the award is void altogether only if the void part is so mixed up with the rest that it cannot be rejected: *Duke of Buccleuch v Metropolitan Board of Works* (1870) L.R. 5 Ex. 221 at 229. But when will it be said that injustice will result from severance, or that the residue is in some way affected by the rejected part, or that the void part is so mixed up with the rest that it cannot be rejected? Most of the cases found in the reports fall into one or other of two categories. In the first, severance is impossible because it is unjust that the party resisting severance should perform the rest of the award while losing the benefit of a provision in his favour which the opposite party says should be severed as bad. In the second, severance is prevented by the possibility which exists that the arbitrator would have made some different provision in the part of the award sought to be preserved if he had realised that the other part of the award was bad. Cases in the first category may perhaps be regarded as no more than examples of the second, but the distinction is useful for the purpose

> of grouping the authorities. Both categories may be regarded as instances of the operation of a principle that severance will be impossible where there is such a connection between the bad part of the award and the part which, considered by itself, is good that it would be unjust to allow the "good" part to stand alone. Alternatively, to use the test laid down by the Supreme Court of the United States in *McCormick v Grey*, both categories may be seen as examples of a principle that severance is not possible unless the residue to be allowed to stand was in no way affected by the part of the award that is rejected."

Although cognisant of the fact that the cases cited are based on different arbitration acts, I am persuaded that the award in *casu* is severable. I have taken into account that the common factor in all the jurisdictions cited is that there must be an agreement to refer a matter to arbitration. All the acts have aspects of the model law. It will be an exercise in futility to set it aside in its entirety since I have found that the 1st applicant has not made a case for such relief. Severance will not affect the liability of the 1st applicant.

Mukwewa Law Chambers, applicants' legal practitioners
Muvirimi Law Chambers, 1st respondent's legal practitioners