HB 312-17
HC 2132-16
HC 2079-16

J. T MALINGA AND ASSOCIATES (PVT) LTD **HC 2132-16**
and
JOSHUA TEKE MALINGA
versus
OLD MUTUAL PROPERTIES INVESTMENTS CORPORATION (PVT) LTD
and
GORDON GEDDES N.O

OLD MUTUAL PROPERTIES INVESTMENTS CORPORATION (PVT) LTD **HC 2079-16**
versus
J.T MALINGA AND ASSOCIATES (PVT) LTD
and
JOSHUA TEKE MALINGA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 12 OCTOBER 2017 AND 19 OCTOBER 2017

Opposed Application

K Ncube for the applicant
Ms S Ngwenya for the 1st respondent

MATHONSI J: Ever since the dawn of dollarization in February 2009 the parties herein have been fighting over rentals for business premises known as Shop 31 situated at the sprawling Nkulumane Shopping Mall in Bulawayo and measuring 179, 18 square metres belonging to the first respondent which it let out to the first applicant in terms of a written lease agreement signed by them in August 2006.

The said written lease agreement was for a fixed period commencing on 1 August 2006 and expiring on 31 July 2009. It is however common cause that upon its expiration the relationship of landlord and tenant continued and was governed by the terms of the expired lease. The first applicant therefore remained rooted at Shop 31 while flatty refusing to pay the rental fixed by the landlord but instead insisting on paying what it regarded as fair rent, calculated at the rate of $1, 00 per square metre and therefore giving the princely sum of $179-00 per month

right up to now. It is also common cause that even that amount which the first applicant arbitrarily fixed for itself it did not pay for extended periods succeeding in only paying a sum of about $12 000-00 to date over a period of 8 years 8 months of occupation of what is in fact very up market business premises.

The second applicant, who happens to be the managing director of the first applicant company signed a deed of suretyship on 3 August 2006 binding himself as surety and co-principal debtor for the first applicant's due and proper fulfillment of its obligations in terms of the lease agreement. Specifically, the second applicant's suretyship included:

> "any debt or liability from whatsoever cause arising and in particular arising from or out of or in terms of an Agreement of Lease between the landlord and the tenant, or any renewal, amendment, breach or cancellation of that lease and in particular any agreed or imposed increase in rental."

Renouncing the benefits of excussion, division and cession of action, the second applicant further agreed that;

> "this suretyship shall remain in force as a continuing covering security until such time as all the obligations of the tenant to the landlord in terms of the said Agreement of Lease have been duly and properly fulfilled and for as long as the terms of the said Agreement apply to the tenancy, whether statutory or contractual."

The long running rent dispute between the parties was referred to arbitration which was eventually assigned to the second respondent in terms of clause 40.1 of the lease agreement which reads:

> "Any dispute between the parties in regard to any matter arising out of this lease agreement or its interpretation or their respective rights and obligations under this agreement or its cancellation or any matter arising out of its cancellation shall be submitted to and decided by arbitration."

In terms of clause 40.6 of the said lease agreement;

> "The decision of the arbitrator shall be final and binding on the parties to the dispute and may be made an order of court at the instance of any of the parties to the dispute."

When the second respondent handed down an arbitral award in favour of the first respondent, the two applicants were displeased. In HC 2132/16 they brought an application in

terms of Article 34 of the Unicitral Model Law contained in the Arbitration Act [Chapter 7:15] for the setting aside of the arbitral award on basically two grounds namely that;

1. The arbitral award deals with a dispute not contemplated by or falling within the terms of the submission of the matter to arbitration as the arbitrator exceeded his mandate.
2. The award is in conflict with the public policy of Zimbabwe given that the arbitrator ignored legal principles of Zimbabwe.

In HC 2079/16 the first respondent made an application for the registration of the same arbitral award sought to be set aside by the applicants in the former matter for purposes of enforcement. Both applications are opposed but counsel agreed that a resolution of HC 2132/16 automatically resolves HC 2079/16 meaning that if the arbitral award is set aside the application for its registration will necessarily fall by the wayside. On the other hand, if the application for the setting aside of the award is unsuccessful I should proceed to register the award in HC 2079/16. Therefore this judgment disposes of both applications.

In its founding affidavit deposed to by Joshua Teke Malinga, the first applicant stated that the parties agreed that the rental for the premises would be calculated at the rate of $1-00 per square metre. For that reason the rent should be calculated at that rate which is binding on the parties. Malinga stated that although the rent was agreed, the first respondent still saw it fit to refer the matter to arbitration, which we know was done in 2010 and Honourable Chief Justice GUBBAY was appointed by the Commercial Arbitration Centre to arbitrate. He stated further that the arbitration proceedings initiated in 2010 were "withdrawn by the first respondent and therefore terminated." Malinga did not state what it is that was referred to arbitration if there was an agreement between the parties as to the payable rent and why it became necessary to go to arbitration without a dispute.

He went on to say that after termination of the initial arbitration proceedings the first applicant is the one which took the initiative to refer the matter to arbitration for the second time on 4 September 2015. As proof of that assertion he made reference to annexure "B" which surprisingly turns out to be the "claimant's statement of claim" prepared and filed with the second respondent by Coghlan and Welsh the legal practitioners for the first respondent and certainly not the first applicant's claim as alleged. The first applicant was setting out that

background in order to advance the argument that by awarding arrear rent from January 2009 most of what was awarded by the second respondent was prescribed in terms of the Prescription Act [Chapter 8:01] and therefore awarded contrary to public policy. This is because arbitration proceedings were instituted on 4 September 2015.

Malinga stated that in the arbitral award, the second respondent declared an open market rent for shop 31 as $2, 50 per square metre and therefore $448-00 per month when the second respondent was never asked to determine the open market rent. For that reason there was an irregularity in that the second respondent exceeded his mandate.

The first applicant also challenged the interest of 14, 25% awarded to the first respondent by the second respondent. According to the applicants this was a "grievous error" because this was made without the second respondent satisfying himself that it was the applicable rate. A further challenge was made against an award of interest even on Value Added Tax. In the applicants' view the lease agreement was between the parties herein. There was no agreement on payment of interest on overdue VAT.

Finally the applicants took issue with the award being made against the second applicant. This is because the suretyship of the second applicant only subsisted during the period of the written lease agreement. It was not "a perpetual suretyship." For all the foregoing reasons the applicants prayed for the setting aside of the arbitral award.

In its opposition, the first respondent bemoaned the decision of the applicants to make this application when the parties agreed to submit themselves to arbitration and bound themselves to the provision in their agreement that the decision of the arbitrator before whom any dispute was placed was final. Therefore the parties should respect the covenant that they signed.

Faith Dube, the first respondent's property manager strongly denied that the arbitration proceedings commenced in 2010 were ever withdrawn. She stated that arbitration commenced within the 3 year period provided for in the Prescription Act. The Commercial Arbitration Centre appointed Chief Justice GUBBAY but the applicants objected to his appointment. Other arbitrators were appointed by the Centre but still the parties rejected those appointments as well

thereby stalling the proceedings. Eventually the second respondent was appointed which appointment was accepted by both sides.

According to the first respondent arbitration proceedings were not instituted on 4 September 2015. By then they were already in motion. The statement of claim filed on 4 September 2015 was just a continuation of what was already pending. Therefore the issue of prescription does not arise at all. The first respondent also stated that in any event, the applicants unequivocally acknowledged indebtedness in writing thereby breaking the running of prescription. They can therefore not rely on prescription at this stage.

Regarding the other matters raised by the applicants like the question of the determination of fair rent by the second respondent which the applicants said was not placed before him for determination, the first respondent disputed that. As far as it is concerned the determination of a fair rent was contemplated by the parties as seen from the submissions they made to the arbitrator. The applicants can therefore not deny that now.

The first respondent also took the view that most of the issues now being raised by the applicants in order to bring their challenge within the ambit of the public policy concept in Article 34, like the award of 14, 25% interest on outstanding amounts, the award of interest on VAT which the first respondent had to pay to ZIMRA owing to the applicants' default and the challenge of the second applicant's liability under the suretyship agreement, were never raised before the arbitrator at all. The applicants are therefore precluded by law from raising them at this stage.

The second respondent also filed opposition. The thrust of his opposition relates to the applicant's claim for costs of suit on the punitive scale even against the arbitrator. According to him there is no legal foundation for seeking those costs against him. He also took time to clarify most of the issues relating to the arbitration itself.

The applicants contracted out of all other rights that they may have had in law when they included clause 40 of the lease agreement. According to that provision the decision of the arbitrator is final and binding on the parties. Any challenge to the decision of the arbitrator can only be made in terms of Article 34 of the Model Law which provides a limited remedy. The Article provides:

"(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) ----
(ii) ----
(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
(iv) ----, or
(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."

Article 34 also declares categorically what is regarded as being contrary to the public policy of Zimbabwe. It states at paragraph (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."

Mr *Ncube* for the applicants submitted that their challenge to the award is twofold namely that the arbitrator made an award which was not within the contemplation of the parties making the award bad at law and secondly that the award is in conflict with the public policy because the arbitrator disregarded legal principles in making the award.

Ordinarily parties submit themselves to the process of arbitration with their eyes very wide open. They do so because they would rather contract out of the tedious and cumbersome procedure of the courts and in order to achieve a quick resolution of their disputes at the least expense. It is for that reason that they usually insert a clause that once the arbitrator has resolved the dispute his or her decision is final. Therefore Article 34 provides a very limited window of

opportunity for parties who have deliberately decided to limit their rights to still have a remedy of contesting the award in limited circumstances.

As stated by MTSHIYA J in *OK Zimbabwe Limited* v *Admbare Properties (Pvt) Ltd and Another* HH 236/16, the limited grounds for contesting an arbitral award provided by the law giver in Art 34 protect the institution of arbitration. One should also add that the grounds for setting aside an arbitral award under that article must be construed very narrowly in order to protect the principle of sanctity of contract. A party should not lightly be allowed to ignore what they signed for, that the decision of the arbitrator shall be final, on the stroke of a finger. It is only in those situations where a grave injustice might occur that this court should intervene.

On the aspect of the arbitrator exceeding his terms of reference *Mr Ncube* submitted that the parties never asked the arbitrator to determine a fair market rent for the premises. He could not however say what it is that the parties referred to arbitration. One would like to assume that the parties went to arbitration because they had a dispute which they wanted the arbitrator to resolve. They certainly did not go there to while up time. If, as suggested by *Mr Ncube*, there was an agreement that the rent to be paid by the applicants was $1-00 per square metre, surely there would have been no need for arbitration. At the very least they would have enforced the agreement. That is especially so as *Mr Ncube* conceded that the issue of operating costs due by the applicants was never an issue placed before the arbitrator.

Quite apart from that, in their submissions to the arbitrator, the parties placed the question of a fair rent squarely before the arbitrator. In their very own written submissions to the arbitrator in support of their case the applicants made it clear they wanted fair rent to be determined. They stated at paragraphs 5, 6 and 7 thereof;

> "5. The crux of the matter is what is the charge of rent and operational costs where there is no agreement between the parties ---.
> 6. It is submitted that the honourable arbitrator must come up with a fair market value of the rent relying on the statutory body of the rent board or any qualified surveyors registered and recognized by the Estate Agents Council or recognized boards.
> 7. It is further submitted that the matter before the Honourable arbitrator has plenty of issues to be dealt with. A determined rent must first be arrived at in order to qualify the Claimant's claim. The claimant is simply claiming where there is no determined rent and also in the absence of an agreed rental and operational costs."

In light of the above submissions made before the arbitrator *Mr Ncube* was quick to realize that he was standing on sinking sand. In an effort to extricate himself from that he then made the strange submission that even though the parties had asked the arbitrator to determine fair rent both counsel erred by requesting the arbitrator to determine fair rent. He should not have allowed himself to be swayed by the parties' closing submissions. Honestly that cannot be taken seriously.

It is a celebrated principle of our law that a party cannot be allowed to approbate and reprobate a course in the proceedings. Having asked the arbitrator to determine fair rent, the applicants cannot be allowed to unask him. When he has determined fair rent, the applicants cannot cry foul that what they asked the arbitrator to do should not have been done. It does not make sense. I therefore reject the argument that the arbitrator determined fair rent when he was not asked to do so.

I now turn to deal with the next leg of the applicants' challenge, that the award is in conflict with the public policy of Zimbabwe. The *locus classicus* on that is the case of *Zesa* v *Maphosa* 1999 (2) ZLR 452 (S) at 466 E-G where the court pronounced itself as follows:

> "Under articles 34 and 36 the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. Where however, the reasoning or conclusion in any 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 acceptable moral standards that a sensible or 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."

See also *Delta Operations* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 85 C-D; *Provincial Superior Jesuit Province of Zimbabwe* v *Kamoto and others* 2007 (2) ZLR 8 (S) at 13 C-D; *Decimal Investments (Pvt) Ltd* v *Arundel Village (Pvt) Ltd* 2012 (1) ZLR 581 (H).

The applicants take the view that the award is contrary to public policy because the arbitrator made an award dating back to 2009 in respect of outstanding rent, when part of the claim for arrears had expired at the time the arbitration was instituted in September 2015. In

addition it was contrary to public policy to award interest on outstanding amounts at the rate of 14. 25% per annum without legal foundation. It was also wrong to award interest on VAT without satisfying himself that the first respondent had paid the VAT to Zimra. Finally it was contrary to public policy to hold the second applicant jointly and severally liable with the first applicant when the surety deed expired at the time the written lease also expired.

I agree with *Ms Ngwenya* for the first respondent that the issue of interest and indeed the expiry of the suretyship were raised by the applicants for the first time in this application. None of those issues were argued before the arbitrator. To raise them now as a ground to set aside an award, is an unacceptable ambush. That part of the applicants' case cannot succeed for that reason. In any event, I am satisfied that the question of interest was dealt with in terms of the agreement of the parties it being common cause that the terms of the expired agreement continued to bind the parties. I am also persuaded that the agreement allowed the first respondent to recoup interest on the VAT paid to the revenue authority.

The same goes for the liability of the second applicant. Before the arbitrator his liability was never placed in issue and cannot be raised now. But still, as appears from the provisions of the suretyship which I quoted above, the second applicant cannot escape liability for as long as the first applicant remains liable. He remains liable as long as the terms of the expired lease apply to the tenancy which they do. Therefore the authorities relied upon by *Mr Ncube* have no application in this matter.

Regarding prescription I do not agree that the arbitrator ignored the law. In fact he considered the submissions made by counsel and determined the matter. He made the point that s17 (d) of the Prescription Act [Chapter 8:11] delays the running of prescription if the dispute is submitted to arbitration and that s18 (1) of the Act interrupts the running of prescription by an express or tacit acknowledgement of liability by the debtor. He found that the dispute had been submitted to arbitration in 2010 and not 2015 as argued by the applicants, thereby interrupting the running of prescription. He also found that there was tacit acknowledgement of liability during the period when the matter remained pending. In any event, the applicants admitted liability even in their statement of defence filed in October 2015. There is therefore no merit in the challenge based on prescription.

I conclude that the standard required by the authorities for the setting aside of an arbitral award have not been met in this application. There is no basis for faulting the reasoning of the arbitrator and it certainly cannot be said that the reasoning or conclusion in the award constitutes a palpable inequity so far reaching or outrageous in its defiance of logic or acceptable moral standards that a fair minded person's conception of justice in Zimbabwe would be intolerably hurt by the award. Clearly it is not contrary to the public policy of this country.

It has been stated before that parties who submit to arbitration agreeing that the decision of the arbitrator shall be final and binding upon them should desist from such footling litigation the moment the decision goes against them. The applicants have shown a lamentable unwillingness to commit to what the parties agreed to and has displayed a stubbornness in refusing to pay a fair rent for business premises over a lengthy period of 8 years which is unprecedented. Even this application for the setting aside of the arbitral aside of the arbitral award is so hopeless and betrays a perpetuation of their unwillingness to pay that it should be visited with punitive costs as a seal of this court's disapproval of such conduct.

As I have said the failure of the application to set aside the award means that there remains no basis for not recognizing the award.

In the result it is ordered that:

1. The application for the setting aside of the arbitral award in HC 2132/16 is hereby dismissed.

2. The application for registration of the arbitral award in HC 2079/16 is hereby granted and as such the arbitral award of G Geddes dated 8 June 2016 is hereby registered as an order of this court.

3. The Open Market rent for Shop 31 Nkulumane Shopping Mall, Bulawayo is US$2, 50 m² being US$448-00 per month. The first applicant shall pay outstanding rentals from 1 January 2009 to 1 February 2016 in the sum of US$69085-23. It is recorded that they have paid US$6755-17 during this period.

4. The first applicant is liable to pay the outstanding operating costs in the sum of US$34365-89.

5. The first respondent is required by statute to raise VAT on rent and operating costs and pass on such charges to the first applicant.

6. The first respondent is entitled to raise interest at the rate of 14. 25% per annum on outstanding balances.

7. The first applicant is found to be in breach of the lease agreement and the first respondent's right to cancel the lease is hereby confirmed.

8. The first applicant and all persons claiming title and occupation through it are to be evicted.

9. The first applicant shall pay hold over damages equivalent to the monthly rental of US$448-00 per month and monthly operating costs as long as it remains in occupation of the leased premises or anyone claiming through it.

10. The first and second applicants shall pay the costs of suit of the first respondent on an attorney and client scale.

11. The second applicant is liable as surety of the first applicant for the due and proper fulfillment of all its obligations.

Messrs Coghlan and Welsh, applicant's legal practitioners
Messrs Kossam Ncube and Partners, respondent's legal practitioners