JOHANNES CONRAD MAKONYE
versus
KENAE RAMODIMOOSI
and
ENTREDEV PROPERTY GROUP
and
C. H. LUKAS

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 28 October 2013, 19 February 2014

Opposed application

J. Burombo, for the applicant
M. Gwaunza, for the 1st respondent
L. Rufu, for the 2nd respondent
No appearance for 3rd respondent

CHIGUMBA J: This is an application in terms of s 34 of the Model Law as set out in the second schedule to the Arbitration Act [*Cap* 7:15] for the setting aside of an arbitral award dated 23 February 2012, granted by the third respondent. Second respondent was applicant's estate agent. At the hearing of the matter, I dismissed the application with costs on a legal practitioner client scale, being of the view that the application was entirely devoid of merit. I have now been asked to provide detailed reasons for judgment for purposes of appeal. These are they:

The Arbitral award that is sought to be impugned, reads as follows:

"IT IS AND IS ORDERED THAT:

1. The termination of the agreement of lease in respect of number 7 Westcott road Mount Pleasant Harare signed by the parties on the 6th of September 2011 is confirmed.

2. The respondent (applicant in the matter now under consideration) refunds and pays to the claimant the sum of US$16 800, 00 plus interest thereon from the 1st of November 2011 to the date of receipt of payment.

3. The costs of the Arbitrator, amounting to US$2 000-00, and covered by a deposit paid by the claimant, be refunded to the claimant by the respondent."

The background giving rise to the dispute between applicant and the 1st respondent involved the termination of a lease agreement entered into by the parties on 6 September 2011. The parties had agreed that the 1st respondent would occupy the leased premises on 1 November 2011. The premises were under renovation, and applicant gave an assurance that the renovations would be complete by the date of occupation. 1st respondent paid a sum of US$16 800-00, being a deposit and six months' rent in advance, to the applicant. Both parties submitted voluminous written statements to the arbitrator, applicant, as the respondent, on 31 December 2011. Second respondent, the letting agent, also submitted a written statement to the Arbitrator, on 9 February 2012.

The arbitrator found that the rental amount had been assessed based on the size of the kitchen, which the applicant had promised to extend and make bigger according to 1st respondent's specifications. This is the reason why 1st respondent had agreed to pay six months' rent in advance. Applicant was unable to complete the renovations by the agreed date of occupation. The parties entered into further negotiations which broke down after applicant demanded more money which first respondent refused to advance. On 1 November 2011, the date of occupation, the premises were still under renovation. First respondent terminated the lease agreement and claimed a refund of the US$16 800-00 that had been advanced. The arbitrator found that the applicant's inability to renovate the kitchen by the agreed date went to the root of the lease agreement, and confirmed that the lease agreement had been correctly terminated, and ordered that the applicant refund the monies advanced to him by first respondent.

The basis of the application to set aside the arbitral award is that the applicant was not given an opportunity to be heard by the arbitrator. He averred that he never agreed that the arbitrator could determine the mater on the papers filed by the parties. He averred further, that 3rd respondent only remitted US$12 800-00 to him, and that first respondent had already been reimbursed US$3 840-00 by the second respondent. Applicant averred that the arbitral award

should be set aside on the basis that it had been awarded contrary to public policy in Zimbabwe, and in breach of the rules of natural justice.

First respondent opposed the application on the basis that applicant had given a mandate to the respondents to file a written report before the arbitrator in an electronic mail dated 7 January 2012. First respondent averred further, that the arbitrator, had, in an electronic mail communication to all the parties dated 5 January 2012, asked the parties how they wished to proceed and the parties agreed to make written submissions to the arbitrator. First respondent pointed out that applicant, in the e-mail dated 7 January 2012 to the arbitrator, stated that:

> "…written submissions only are fine, more focused and cheaper financially and time wise by me."

First respondent admitted that the amount outstanding was US$12 800-00 and averred that when the arbitral award is registered, it will be registered in that sum. First respondent reiterated that it was not fatal to an arbitral award if parties agreed to forgo an oral hearing and mandated the arbitrator to make a determination on the basis of written submissions. Second respondent opposed the application and averred that it had no interest in the outcome of the matter, but merely wished to protect itself against an adverse order as to costs. 2nd respondent averred that it was given a mandate to manage applicant's property, number 7 Westcott Road, Mt Pleasant, Harare, in August 2011. Pursuant to that mandate, it secured first respondent as a tenant for those premises. It averred that a dispute arose between the parties which resulted in first respondent terminating the lease agreement and to demand a refund of rentals and deposit paid in advance. Second respondent confirmed that both applicant and first respondent requested that it submit a written report to the arbitrator. Second respondent maintained that it had been improperly joined to the proceedings.

In regards to the merits of the matter, second respondent averred that it failed to find any justification in the applicant's complaints against its report, which applicant had specifically requested that it be submitted to the arbitrator. Copies of e-mails between the parties were attached to confirm second respondent's version of events. Second respondent reiterated that applicant's contention that it was not given an opportunity to be heard were entirely devoid of merit.

Second respondent raised a point *in limine* that it had been improperly joined to the proceedings, and submitted that the court ought to use its powers in terms of order 13, Rule 87(2)(a) of the High Court Rules 1971, to order that it cease to be a party. The case of *Tsitsi Veronica Muzenda* v *Patrick Kombayi & Zimbabwe Electoral Commission* HH47-08 was cited in support of that submission. After applying the test of whether Second respondent has any real or substantial interest in the proceedings or their outcome, the court finds that second respondent was improperly cited as a party to the proceedings and orders that it cease to be a party, and that applicant ought to pay second respondent's costs on a legal practitioner client scale. This is because second respondent was put to the unnecessary expense of having to defend itself.

The question that the court must determine is whether the arbitral award handed down by the third respondent is contrary to public policy in Zimbabwe as envisaged by art 34 of the Model Law, Arbitration Act [*Cap* 7:15]. In other words, did the third respondent grant the arbitral award without proper consideration of the terms of the lease agreement between the parties, without affording applicant an opportunity to be heard, or with fraud and corruption? Article 34 of the Model Law provides that:

"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—
(*a*) the party making the application furnishes proof that—
(i)…
(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iii) …
(iv) …
(*b*) the *High Court* finds, that—
(i) …
(ii) the award is in conflict with the public policy of *Zimbabwe*.

Article 19 of the Model law provides that:

"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."

Article 24 of the Model law provides that:

"ARTICLE 24
Hearings and written proceedings
(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

The test applies to an arbitral award, in order to set it aside on the basis that it is contrary to public policy is that:

"An arbitral decision can only be held to be contrary to public policy if some fundamental principle of law or morality or justice is violated or if it is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt".

See *Chanakira* v *Mapfumo & Anor* HH 155-10, and *Husaihwevanhu & Ors* v *USF*. And see *Collaborative Research Programme* HH237-10, where the court stated that:

> "The courts in this country have construed the defense of public policy very restrictively so that the objective of finality to arbitration is achieved. It follows that the grounds upon which an award may be set aside…are very narrow. The import of Article 34 and article 36 of the first schedule to the Act is not to endow the court the court before which the award is set aside with powers of appeal to determine the correctness of the decision of the arbitrator…an award by the Arbitrator is not contrary to public policy merely because it wrong in law or in fact in reaching the conclusion arrived at…award…goes beyond mere faultiness or incorrectness and constitutes a palpable iniquity that is so far reaching…." See *Pioneer Transport Private limited* v *Delta Corporation Ltd & Anor* HH18-12

Based on the provisions of Art 19, I find that it was entirely proper and permissible for the Arbitrator and the applicant and the first respondent to agree on the procedure to be followed. The Arbitrator was even at liberty, to conduct the arbitration in such manner as it considered appropriate if the parties failed to agree on which procedure could be used (Art 19 (2). The

power conferred on the tribunal included the power to: "determine the admissibility, relevance, materiality and weight of any evidence." There is nothing in the papers filed of record which suggests that the arbitrator did not have these powers. The evidence placed before this court, via copies of electronic mail communication between the parties, clearly shows that applicant consented to the mater being determined on the basis of written submissions placed before the arbitrator. Applicant is on record as celebrating the advantages of this course of action as being cheaper and less time consuming. To turn around now and ask this court to find that the arbitral award was made without affording applicant an opportunity to be heard is downright dishonest, and dishonorable.

Article 24 of the model law gives the arbitrator the power to override any agreement between the parties themselves in regards to how the matter should proceed, and stipulates that the arbitral tribunal SHALL decide whether to hold an oral hearing or whether the proceedings shall be conducted on the basis of documents or other materials. In essence the conduct of the hearing is entirely at the tribunal's discretion. There is no onus on the tribunal to hear oral submissions. The onus on the tribunal relates to notification of the hearing, and an arbitrator has exclusive jurisdiction, contrary to the parties' wishes to decide how to collate evidence. There is no provision to compel the arbitrator to hear oral evidence. What is required is for all the parties to be notified of the hearing, to be given an opportunity to present their case as stipulated by the arbitrator, and to have sight of the submissions made by the other parties, if in writing.

Second respondent was clearly implored by all the parties to submit a written report to the arbitrator. A careful reading of the party's e-mails will confirm this. There is therefore no basis on which the applicant can aver that despite advising the arbitrator that he preferred being heard verbally, his request was denied or ignored. In fact the evidence before the court is that applicant submitted the most voluminous written submissions before the arbitrator.

The court has also been unable to find any evidence of fraud on the part of the arbitrator in determining the arbitral award. There is no evidence that the offence of fraud was committed, or reported to the police by the applicant. Fraud is a criminal offence which involves an element of misrepresentation to deceive another to his prejudice. There is no evidence that applicant was operating under any misrepresentation by the arbitrator, or of any prejudice which he may have suffered as a result of such misrepresentation.

According to *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (SC) @464, Art 34 of the Model law "…means that if for example if the arbitrator was fraudulently misled or bribed by a party, the award, however innocuous would be contaminated in the process of making and contrary to public policy.

There is simply no evidence before the court that the third respondent misrepresented himself in order to deceive or cause prejudice to any of the parties, ot that he received a gift or benefitted in any way in reaching the decision that he did. The allegations of fraud and corruption against the 3rd respondent, by the applicant, are clearly baseless and without foundation.

The Court has been unable to find any evidence that the arbitrator misinterpreted the terms of the lease agreement between the parties. Clearly applicant has been unjustly enriched by the deposit and rental in advance paid by 1st respondent. On the termination of the lease agreement, it was just and equitable that 1st respondent be re-imbursed US$16 800-00, in the absence of evidence of fraud, corruption, breach of public policy, breach of the rules of natural justice, as provided in Art 34 of the model law. The test for contravening public policy, that: "…some fundamental principle of law or morality or justice is violated or if it is so defiant of logic or accepted moral standards that the concept of justice in Zimbabwe would be intolerably hurt", was not established. There was nothing immoral about the arbitral award that applicant return monies given to him pursuant to a lease agreement which was terminated before it commenced, due to failure on his part to complete renovations to the property by an agreed date. That award did not defy logic, or intolerably hurt the concept of justice in Zimbabwe. In fact the opposite is true, the concept of justice in Zimbabwe would have been hurt by allowing the applicant to keep the US$16 800-00. Applicant would have been unjustly enriched at the expense of the first respondent, who was innocent of any wrongdoing which resulted in the termination of the lease agreement.

Applicant is not entitled to have the arbitral award set aside. Further, the basis of the application before the court is so flimsy; it would appear the application was conceived as a gimmick to frustrate the first respondent by delaying payment. It is for that reason that the court acceded to the application that costs be awarded on a higher scale, to discourage such conduct in future, and to mark its displeasure at the blatant abuse of court process. This application is

entirely devoid of merit and is dismissed with costs on the higher scale of legal practitioner and client. It is ordered that second respondent cease to be a party to these proceedings, and that applicant pay second respondent's costs on a legal practitioner client scale.

Maja & Associates, applicant's legal practitioners
Gwaunza & Mapota, 1st respondent's legal practitioners
Dzimba Jaravaza & Associates, 2nd respondent's legal practitioners