SHAHID MAHMOOD
versus
MEHMBOOB MULLA
and
HONOURABLE A. MAZARIRE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 25 September 2014 & 26 November 2014

Opposed Matter

Ms *R. Bwanali*, for the applicant
O. Matizanadzo, for the respondent

MTSHIYA J: On 11 April 2013, the second respondent granted the following lengthy award in favour of the first respondent.

"1. That the agreement entered into by and between the claimant and the Respondent on the 06th of March 2012 be cancelled immediately.

2. The Respondent and all persons claiming occupation through him be and are hereby ordered to vacate by no later than j30 April 2013 the immovable property known as an undivided 12.6% share being on Share No. 6 in certain piece of land situated in the District of Salisbury called Stand 1565 Salisbury Township measuring 1 487 square metres also known as Share No. 6 6, 51 Belvedere Road, Belvedere, Harare.

3. The Respondent to pay the Claimant monthly occupational rental damages from the 1st of July 2012 up to the date when the Respondent will vacate the premises at a rental rate to be determined by an appropriate qualified appointee of the Real Estate Institute of Zimbabwe.

4. The Respondent to pay to the Claimant the sum of US$681.25 being the amount due in respect of rates and related City of Harare charges from 1 July 2012 to 31 December 2012 plus an additional sum of US$112.85 per month from the 1st of January 2013 up to the date when the Respondent will vacate the premises less any amounts the respondent paid to the City of Harare in respect of rates and related charges.

5. The Respondent to pay the Zimbabwe Electricity Supply and Distribution Company all charges for electricity used at the premises from July 2012 up to the date when the Respondent will vacate the premises and furnish proof of

such payment to the Claimant before release by the Claimant of the balance due to the Respondent.

6. The Respondent to pay the Claimant the sum of US$1 725.00 being legal costs paid by the Claimant for the drafting of the agreement of sale

7. The Respondent to pay the fees and expenses of the Arbitral Tribunal and the Commercial Arbitration Centre related to this arbitration.

8. The Respondent to pay the fees of an Appointee of the Real Estate Institute of Zimbabwe who may be appointed in terms of Clause 3 above.

9. The Claimant to refund the Respondent the balance of the amounts paid by the Respondent towards the purchase price after deducting the amounts due to the Claimant in respect of this Award within thirty days of the Respondent vacating the property.

10. The Respondent to bear the Claimant's costs relating and incidental to the breach of contract including costs of these proceedings as determined in accordance with the Law Society of Zimbabwe Tariff of Legal Practitioners' fees in force as at the date on which such costs were incurred".

On 16 May, 2013 the applicant filed this application seeking to have the above award set aside on the ground that it "flouts the public policy of Zimbabwe in several ways". In line with his prayer, the applicant attached the following draft order to his application.

"IT IS ORDERED THAT:-

1. The Arbitral Award be and is hereby set aside.
2. That the dispute between the Applicant and the First Respondent be and is hereby remitted to the Commercial Arbitration Centre for the appointment of a new Arbitrator to hear the dispute *de novo.*
3. There shall be no order as to costs unless Respondents oppose the application in which case costs shall be on an attorney and client scale".

The background to the relief sought is that on 6 March, 2012 the applicant enteredinto an agreement of sale with the first respondent. The first respondent offered to sell his property, namely stand 1565 Salisbury Township measuring 1487 square metres (the property). The agreed purchase price was US75000-00 (Seventy five thousand United States Dollars) payable as follows:-

"(i) A deposit of **thirty thousand United States Dollars (US$30 000-00)** to be paid directly to the Seller on or before date of signing the agreement;
(ii) One instalment of **fifteen thousand United States Dollars (US$15 000)** to be paid on or before the 31st of March 2012;

(iii) The balance of **thirty thousand United States Dollars (US$30 000.00)** shall be paid directly to he Seller by the Purchaser by way of monthly instalments of **US$10 000-00** each on or before the 30th April, the 31st of May and the 30th of June 2012."

After encountering difficulties with payments the applicant was allowed more time within which to pay. The applicant was allowed to effect final payment by 30 August 2012. The amount

then outstanding as at that date was $20 000-00 (twenty thousand United States Dollars) which amount/balance should have been paid as follows:-

"(i) 31 July 2012 = US$10 000-00

(ii) 30 August 2012 = US$10 000-00

Total = US$20 000-00

The deferred payments did not result in any formal amendment of the agreement of sale concluded on 6 March, 2012. Following default in payment, on 4 September 2012 the first respondent, through his Legal Practitioners, addressed the following letter to the applicant:-

"RE: **AGREEMENT OF SALE: M. MULLA AND YOURSELF**

Reference is made to the above matter, in particular to the Agreement of Sale between yourself and our aforementioned client in terms of which you ought to have paid the balance due in respect of the purchase price by the 10th of August but you have not done so.

Under the circumstances, we demand that you effect the balance of the purchase price in the sum of US$20 000.00 before the close of business on Friday the 7th of September failing which, our client will proceed to cancel the agreement and retain the amount paid so far as damages for breach of contract.

We hope this will not be necessary and look forward to timeous compliance from yourself.

Yours faithfully

O. Matizanadzo
MATIZANADZO & WARHURST"

Nothing was achieved through the above letter and thus prompting the first respondent to write yet another letter to the applicant on 13 September 2012 in the following terms:-

"RE: OUR CLIENT MR MEHBOOB MULLA : BREACH OF CONTRACT

We refer to the above matter, in particular to the telephone discussion between yourself and the writer on the 11th instant and regret to note that despite undertaking to call the writer later that day, you did not do so and have not been picking up the writer's calls.

We confirm that you are in breach of the contract more particularly in that you failed to pay the instalment of **US$10 000.00** which was due on the 31st of May and the last instalment of **US$ 10 000.00** which was originally due on the 30th of June 2012.

Subsequently, the two instalments were deferred by mutual agreement to the 31st of July and August respectively but you neglected to effect payment of the two instalments on those dates.

Under the circumstances, this letter is formal notice requiring you to rectify your breach of the contract by effecting payment of the balance of the purchase price in the sum of US$20 000.00 within thirty days of the date of this letter.

Further, you are required to effect payment of the sum of **US$8 00-00** being occupational rental from June to September.

Should you fail to comply with the demands contained herein within the time stipulated above, our client will cancel the agreement and retain the amount paid as damages for breach of contract.

He will proceed to evict you from the premises and put the property on the market for sale.

Please be advised that in light of your failure to communicate with us, we shall not be bothering ourselves with attempting to contact you and will implement our client's instructions.

Yours faithfully

O. Matizanadzo
MATIZANADZO & WARHURST".

Sadly the letter of 13 September, 2012 again failed to move the applicant.

Notwithstanding earlier threats to cut further contact, on 10 October 2012, the first respondent again felt compelled to send the following letter to the applicant:-

"RE: OUR CLIENT MR MEHBOOB MULLA: BREACH OF CONTRACT

Reference is made to the above matter, in particular to our letter of the 23th of September which was received by your wife on your behalf on the 17th of the same month and to the telephone discussion the writer and yourself on the 5th of October.

We confirm you made an appointment to discuss the matter with the writer but did not turn up for the appointment on Monday.

This letter serves to confirm that the notice given in our letter of the 23th of September remains in force and that our client shall proceed to cancel the agreement in the event of you failing to comply with the provisions of that letter before the expiry of the applicable time limit.

We also confirm that it is not necessary for you to make any further appointments to discuss the matter with the writer as what is required is the rectification of your breach of contract failing which, our client will proceed to cancel same in which case, the consequences referred to in the letter of the 13th of September will ensue.

Yours faithfully

O. Matizanadzo
MATIZANADZO & WARHURST"

The above letter was placed in the letter box at the property. That letter elicited a response from the applicant's Legal Practitioners. On 18 October, 2012 the first respondent's legal practitioners wrote as follows:-

"We refer to your letter dated the 10th October 2012 whose contents have been noted with thanks.

We have been handed over your letter for a response on behalf of our client, Mr Shahid Mehmood. Our instructions are that client is not aware of your letter dated the 17 of September 2012 and will be pleased if same is availed at our offices without delay.

Our client would very much want to uphold the terms of the contract. We shall be pleased to hear from you at your earliest convenience".

In response to the above letter, on 23 October 2012 the first respondent's Legal Practitioners despatched the following letter to the applicant's legal practitioners:

"**RE : AGREEMENT OF SALE: MEHBOOB MULLA AND SHAHID MAHMOOD**

We acknowledge receipt and thank you for your letter of the 18th instant which we received on the 22nd instant.

Firstly, we wish to highlight an error in your letter wherein you referred to our client Mr Mehboob Mulla as being your client. We assume as suggested in the second

paragraph of your letter that your client is Shahid Mahmood whom you referred to as Shahid Mehmood.

With regards to the issues raised in your letter, we do not even hesitate to advise that your client is lying to yourselves which he should not be doing if he wants you to be of substantive assistance to him.

The correct position is that we did not write a letter to your client on the 17th of September. As is clear from our letter of the 10th of October, we wrote to him on the 13th of September and the letter was delivered to his wife on the 17th of September.

With regards to our letter of the 13th of September, your client is aware of same as that letter was the subject matter of he telephone discussion between the writer and your client on the 5th of October when he undertook to come and discuss the contents of the letter with the writer at 14:30 hours on Monday the 8th of October but did not do so.

We note that in your letter there is indication of a desire on your client's part to uphold the terms of the agreement.

We regret to advise that that is not good enough as your client is in breach of the agreement between him and our client and has been acting in a dishonest manner which include not picking the writer's calls and requesting his employees to misrepresent to the writer that he was not around on occasions the writer went out of his way to discuss his breach of contract with him.

Under the circumstances, especially in light of your client's failure to act honestly as well as his failure to remedy his breach of contract, he should now be prepared for the consequences of his failure to remedy the breach of contract.

Yours faithfully

O. Matizanadzo
MATIZANADZO & WARHURST"

The above letter was followed by yet another letter from the first respondent's legal practitioner. On 31 October 2012 which reads as follows:-

"**RE: AGREEMENT OF SALE: MAHMOOD MULLA AND SHAHID MAHMOOD**

Further to our letter of the 23rd of October, this letter serves to confirm the cancellation of the agreement entered into by and between your client and ours on the 6th of March 2012 on account of your client's failure to remedy his breach of contract in compliance with the formal notice calling upon him to do so which was served on him on the 17th of September 2012.

> Under the circumstances, we demand that your client hands over keys to the property at our offices within seven (7) days of the date of this letter failing which, the matter will be referred to the Commercial Arbitration Centre in accordance with the provisions of section 14 of the agreement
>
> Yours faithfully
>
> O. Matizanadzo
> **MATIZANADZO & WARHURST"**

In terms of the record, the above appears to have been the last and final letter from the first respondent. The next move, I want to believe, was referral to arbitration. I say so because the second respondent confirms in his introductory paragraph that he was advised of his appointment through a letter dated 14 November 2013. I think the correct date was 14 November 2012 because his award is dated 11 April 2013. He could only have been appointed before that date.

I do not have the terms of reference for the second respondent but in his award he deals with the issues presented to him by both parties. He sets them out in the following manner:-

> "In his submissions, the Claimant has cited the following as the issues to be determined by the arbitration.
>
> (a) Whether or not the Respondent is in breach of the agreement of the 6th of March 2012.
> (b) If the Respondent is in breach of the agreement, what is the nature of the relief which the Claimant is entitled to?
> (c) What is the quantum of damages suffered by the Claimant as a result of the breach of contract?
>
> Further to the above, the Respondent has added the following as issues for determination:
>
> (a) Whether or not there was a valid notice of termination of contract in terms of the law?
> (b) Whether or not in light of the wholesome variation to the document dated the 6th of March 2012, same can be taken as the exclusive embodiment between the parties?
> (c) What is the appropriate remedy?"

Upon have dealt with all the above issues, the second respondent proceeded to make the award referred to at pp 1-2 herein.

In saying the arbitral award offends public policy the applicant sets out, in his founding affidavit, eight grounds upon which the second respondent's award should be set aside for offending public policy. These are:

"(a) The Second Respondent erred and misdirected himself in conceding that no payment was done in terms of the document dated the 6th of March 2012, but proceeded to regard it as the exclusive embodiment of the parties' intention. All parties agreed that the document of the 6th of March 2012 was consummated *ex post facto* the initial instalments.

(b) The intention of the parties could not possibly have been found in the agreement dated the 6th of March 2012. The Second Respondent erred in insisting and holding that the agreement reflected the intention of the parties, contrary to the evidence led before him. This also appears clearly in respect of the dispute that the First Respondent had with one Mr Chigombo, *viz a viz* occupation of the premises by the Applicant.

(c) The Second Respondent also erred at law and misdirection himself factually in finding that a notice to terminate the contract had been served and delivered to the Applicant. It was not established by the First Respondent as a fact that the notice was served. The Learned Arbitrator assumed delivery and service of the notice to terminate contrary to law.

(d) The second Respondent further erred at law in ordering that the First Respondent should pay rentals for the occupation benefit Applicant enjoyed up to the date vacation. In this vein, the Second Respondent was acting outside the agreement between the parties. On the contrary, the Second Respondent did not make a finding as to the concomitant obligation on the First Respondent as regards the US$55 00-00 that had been paid to the First Respondent. Applicant by right, would logically be entitled to benefit from the Sum of US$55 000-00 that he paid to the First Respondent (if he rental finding is to be logical.

(e) The Second Respondent further erred and misdirected himself in holding that cancellation was the appropriate remedy when the only amount outstanding at the date of the hearing was the sum of US$20 000-00. It was not the just and equitable remedy in the circumstances.

(f) The Second Respondent further erred at law in ordering that the total sum of US$1 725-00 for legal costs be borne by the Applicant for drafting the agreement of sale contrary to the parties agreement. Such costs legally are to be borne equally by both parties.

(g) At any rate, the Second Respondent further erred and misdirected himself in imposing the Real Institute of Zimbabwe in the dispute between the Applicant and the First Respondent when it was not party to the proceedings. This was a clear error at law.

(h) The Second Respondent also erred in holding that there are City of Harare bills due when no evidence was produced to establish that factual position.
In any event, the City of Harare bills are not to the First Respondent but to the City of Harare and therefore, the First Respondent lacks the *locus standi* to demand that which to another party".

However, in his heads of argument, the applicant, mindful of his grounds listed above, proceeds to make the following submission:-

"9. In terms of the Arbitration Act, Chapter 7:15, Article 34, an arbitral award can only be set aside exclusively by the High Court on limited grounds. The present application has been made in terms of Article 34 (2)(b)(ii) of the Act which provides as follows:-

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

(i) ….
(ii) ….
(iii) ….
(iv) ….

Or

(b*) The High Court finds, that-*

(i) ….
(ii) *The award is in conflict with the public policy of Zimbabwe*".

Acknowledging the decision in *Zimbabwe Electricity Supply Authority* v *Maposa* (1999) (2) ZLR 452 (S) where the Supreme Court defined public policy, the applicant further submitted that:-

"An award would be contrary to public policy if-
(a) It was induced by fraud or corruption;
(b) A breach of natural justice occurred".

There is no specific application of the above law to each of the grounds relied on, but the important point is that the applicant informs us that the application is made in terms of Article 34(2)(b)(ii) of the Arbitration Act [*Cap 7:15*] ("the Act"). That law goes on in subsection 5 to confirm the applicant's submission quoted above. The said subsection provides as follows:-

"(5) For the avoidance of doubt, and without limiting the generality of paragraph (2) (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".

It is unfortunate that no attempt was ever made by the applicant to demonstrate that the award in question fits into the categories of the grounds spelt out in our law in relation to the violation of public policy.

In his heads of argument the first respondent notes:

"2.2. On the 16th of May 2013, the Applicant filed a Court Application seeking an order for the setting aside of the Arbitral Award on the basis that it is in conflict with the public policy of Zimbabwe as envisaged by Article 34(2)(b)(ii) of the Arbitration Act Chapter 7:15.

2.3. On the 2nd of July 2013, the First Respondent opposed the application on the basis that the reasons given by the Applicant in Paragraphs 5(a) to (h) of his Founding Affidavit do not fall within the contemplation of an award which is contrary to the public policy of Zimbabwe and further on the basis that the attack on the award is based on the Arbitrator's factual and legal errors".

The first respondent then refers to *Beazley N.O.* v *Kabel and Anor* 2003(2) ZLR 198(S) where SANDURA JA said:-

"4.3 In interpreting the provisions of Article 34(2)(b)(ii) as read with the provisions of Article 35(5)(a) of the First Schedule to the Arbitration Act Chapter 7:15, our Courts will consider an award to be contrary to the public policy of Zimbabwe if "…… 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 in intolerably hurt by the award. 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 mention above".

The first respondent does not end there but goes on to rely on other relevant authorities. He states:-

"4.5 With regards to the power of the High Court to determine the correctness or otherwise of an award Gowora J (as she then was) had this to say in Husaiwevhu and others vs UZ-USF Corroborative Research program 2010

> 'This Court is not, in this instance siting as a Court of appeal to adjudicate or correct the erroneous nature of the reasoning of the Arbitrator. Its task is to consider whether the award by the Arbitrator is one that should not be registrable having regard to the requirements of Articles 34 and 36 of the Arbitration Act. I am persuaded that an award by an Arbitrator is not contrary to public policy merely because the Arbitrator was wrong in law or in fact in reaching the conclusion that he arrived at …….".

The authorities, properly cited by the first respondent, do, in my view, disable me from going into the detailed findings made by the second respondent upon making the award. The initial observation that I make is that the grounds relied on by the applicant do not in any way relate to the assault on public policy envisaged by the law.

I do not find the award *in casu* to be unreasonable or in conflict with public policy mainly because"

a) the applicant admits the agreement of 6 March 2012 was never varied.
b) The applicant is in default to the extent of US$20 000-00
c) The applicant's failure to pay was not due to the problem that the second respondent had with Chingombe – which problem was anticipated as reflected in the agreement of sale.
d) The applicant took occupation but still owes the first respondent US$ 20 000-00.
e) The agreement is clear on what happens in case of default – correspondence proves that the applicant was made aware of the consequences and finally;
f) The applicant breached the agreement of sale. (See para (e) of applicant's grounds for setting aside the award).

The correspondence exchanged *in casu* clearly depicts an uncooperative applicant who wanted things done his way. The law says no to that approach. Contracts must be honoured.

I find that all the issues placed before the second respondent were addressed and the ultimate finding was that the applicant breached the agreement of sale. In the face of the admitted breach, I find it difficult to interfere with the second respondent's award. Public policy cannot in any way condone the failure by a party to honour obligations under a contract.. It was therefore not against public policy for the second respondent to tell the applicant the consequences of breaching a contract. The second respondent's award cannot be faulted. I therefore find no merit in this application.

The application is dismissed with costs.

Messrs Venturas & Samukange, applicant's legal practitioners
Messrs Matizanadzo & Warhust, first respondent's legal practitioners