GROUPAIR (PRIVATE) LIMITED
versus
CAFCA LIMITED
and
MUCHADEI MASUNDA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 2 February 2016 and 6 April 2016

Opposed Matter

T. Zhuwarara, for the applicant
D. Ochieng, for the 1st respondent

MTSHIYA J: This is an opposed application wherein the applicant seeks to have the arbitral award granted in favour of the first respondent by the second respondent on 22 June, 2015, set aside. The said arbitral award reads as follows:

> "8.1 Groupair is ordered to pay Cafca the sum of US$18 600 together with interest thereon @ 5% per annum calculated with effect from 27th November 2012, being the date on which demurrage was paid to DAMCO, to the date of payment.
>
> 8.2 Groupair is ordered to pay Cafca's party and party legal costs
>
> 8.3 Groupair is order to pay the costs of this arbitration".

This application is premised on article 34 of the Arbitration Act [*Chapter 7:15*] ("the Act") which provides as follows:

> "(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the High Court only if –
>
> (a) The party making the application furnishes proof that –
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or , failing any indication on that question, under the law of Zimbabwe; or
>
> (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) 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) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;

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 of Zimbabwe.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(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".

The above is the law under which an arbitral award can be set aside. In *casu* the applicant relies on (2) (b) (ii) above as read with (5) above.

The background to the relief sought is that in 2012, the applicant, a clearing agent, was engaged by the first respondent to clear its (first respondent) imported galvanised wire through Forbes Border Post. From 24 September 2012 to 3 October 2012, eleven (11) of the first respondent's trucks, carrying galvanised wire, were detained at the border post. This was due to a disagreement on the rate of duty payable in terms of Zimbabwe Revenue Authority regulations (ZIMRA).

Prior to the disagreement that arose, the rate payable on the total value of the goods appearing on the proforma invoice was 10%. However, on 24 September 2012 the ZIMRA officials told the applicant that in terms of Statutory Instrument 111 of 2012 the rate of duty

had been revised from 10% to 15%. According to ZIMRA officials, the trucks could therefore only be cleared upon the payment of duty at the rate of 15%.

When, after arguments with the applicant and the first respondent, ZIMRA finally reconfirmed duty at 10%, the 11 trucks of the first respondent had accumulated demurrage charges amounting to US$18 600-00. That amount was payable to a company called Logistics Shipping Holdings Limited t/a DAMCO.

The first respondent paid the above demurrage charges and then tried to recover same from the applicant. It accused the applicant of "failing to discharge its duties as per the contract between the parties" i.e negligence. A dispute therefore arose relating to liability on the question of demurrage. That dispute led to the matter being referred to an arbitrator, namely the second respondent (the Arbitrator). The arbitrator identified the issues for determination as follows:

> " 4.1 The ultimate issue which I am called upon to determine is whether or nor Groupair's alleged negligence as Cafca's clearing agent in requiring Cafca to pay the wrongfully claimed duty was the cause of the delayed clearance of Cafca's consignment from Hong Kong and the resultant demurrage amounting to US$18 600-00 which Cafca to pay to DAMCO.
>
> 4.2 The wrongly charged excess duty on Cafca's consignment from Hong Kong is no longer in issue as it was subsequently recovered by Groupair from ZIMRA on Cafca's behalf".

I think it will, for the purposes of clarity in this case, be important to highlight the full findings of the arbitrator.

In dealing with issue 4.1 above, the arbitrator stated his main finding(s) as follows:

> "7.8 I am satisfied that Groupair had a duty, as a customs clearance agent to familiarize itself with the applicable duty which was not 15% but 10% and had been for months before the arrival at Forbes Border Post of Cafca's consignment of galvanized steel wire.
>
> 7.9 On the basis of the documentary evidence before me, I am satisfied that, on a balance of probabilities, Groupair failed to take remedial action timeously from Monday, 24th until Friday, 28th September, 2012 to avoid demurrage. It is my finding that Groupair should have challenged the officials in the Department of Customs & Excise at the Forbes Border Post about the correct duty which was 10% and not 15%. Groupair's negligent failure to do so resulted in Cafca incurring a loss amount to US$18 600 in respect of demurrage which Cafca was obliged to pay to DAMCO.
>
> 7.11 The prime cause of the demurrage charges was the delay on the part of Groupair in raising the requisite Bill of Entry which would have expedited the customs clearance of the trucks and trailers which were laden with the galvanized steel wire that Cafca had imported from China. This is the crucial question which necessarily involves a hypothetical inquiry into what would have happened had the delay not occurred.

Generally the onus is on Cafca to establish this proposition n a balance of probabilities.

After considering all the evidence and adopting a common sense approach it, seems to me that the demurrage charges would have been avoided had Groupair acted more diligently and expeditiously. The fact that Cafca, on its own admission, paid the duty of US$52 098-55 into ZIMRA's account with MBCA Bank Limited instead of a Special Manual Bank is not a material issue. Amongst the documents which were submitted to me, there was e-mail correspondence involving officials from ZIMRA, Cafca and Groupair. A ZIMRA official, Mr Trust T. Mawere, raised the following pertinent points with his correspondents whose addresses are tendin@cafca.co.zw caroline@cafca.co.zw and jnchipunga@groupair.co.zw.

I humbly refer to my 19 April 2013 conversation with Mr Chipunga in the mail chain attached. Our position remains the same. We remain baffled that you continue to hold ZIMRA solely culpable for the time lags. If you note, the Bill of Entry C 100995 was registered on the 24th of September 2012 and the same day (Refer to your cancellation appeal notice you attached) a query in Form 45 ref 3509 was raised on the same day 24/11/2012 for the amendment of the tariff and it became your duty through your Agent to Manual Bill of Entry. How it took your agent until the 4th of October 2012 to lodge a manual entry ZWFB/MAC 43 remains a mystery to us. The movement of funds from the Agent's Prepayment Account is a simple process done by the Station Manager which takes no more than 3 minutes. Please note the process is only done when the Agent brings the manual entries to ZIMRA. I hope this clarifies issues. Should you need clarification, please don't hesitate to call REFER TO THE ASYCUDA CAPTION BELOW FOR THE SEQUENCE OF EVENTS EVEN YOUR CANCELATION WAS PROCESSED THE SAME DAY IT REACHED MY OFICE REFER TO THE CANCELLATION NOTICE.

7.13 In my view, Cafca has discharged the onus of proving, on a balance of probabilities, that Groupair's failure to act as expeditiously as it should have was the cause of the demurrage charges".

It is the above findings that the applicant avers "are contrary to the public policy principles of Zimbabwe and grossly unreasonable". The applicant, in part, avers:

"11.1 The Arbitrator ordered the applicant to pay demurrage in circumstances where it was clear that, liability was caused not by the Applicant's conduct but rather by ZIMRA's conduct in wrongly and erroneously insisting on duty to he paid at the rate of 15% instead of the statutorily set 10%. It therefore produces a sense of shock how the Arbitrator found that the prime cause of the demurrage was the Applicant's conduct.

11.2 With Respect it stands to reason that he ZIMRA applied the law correctly, to wit, accepted the Excise Duty payment at the rate of 10%, as per the law, no liability for demurrage to talk about would have arisen. How then can one, using a "common sense approach" arrive at the conclusion that the cause of the demurrage was the Applicant?

11.9 Additionally, and in any case the effect of the award is to make the Applicant solely responsible for the accumulated demurrage charge even in circumstances were it is clear that the 1st Respondent's conduct also contributed to the final figure of the demurrage charged.

11.10 All the above clearly shows that the Arbitral Award violates Zimbabwe's notions of elementary justice and constitutes a palpable inequity that hurts the conceptions of justice in Zimbabwe. The award goes beyond mere faultiness or incorrectness; it founds an inequity that is so far reaching and outrageous. It goes against the accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt".

It is mainly in view of the above reasons that the applicant now seeks to have the arbitral award set aside.

On its part the first respondent, argues, in part, as follows:

"6.4 I aver that had the Applicant been (*sic*) familiar with the correct rates of duty and change of dates, as it was reasonably expected to know as a clearing agent, it would have known that the First Respondent's imported goods were to be calculated at a rate of 10% and never acquiesced to the additional 55 demanded by ZIMRA which acquiescence led to the First Respondent incurring additional demurrage charges.

7. Ad para 8:11

…… The hold up, as is admitted by the Applicant in paragraph 8.9 of its founding affidavit began on Monday the 24th of September 2012. The Applicant however only advised the First Respondent of this hold-up on Friday the 28th of September 2012 thus prejudicing the First Respondent of almost five days in which it could have addressed the situation and mitigated its losses. The Applicant however never advised the First Respondent on time of the additional duty which was levied by ZIMRA and consequently, there was a delay as from the 24th of September 2012 to the 28th of September 2012 which the Applicant up to this date has failed to explain, which delay resulted in the additional charges levied against the First Respondent.

9.2 Firstly, the demurrage charges were caused by the failure by the Applicant to calculate the correct duty and insist on its payment, and also by the Applicant's delay in addressing the matter. This delay was initially by the Applicant's conduct in not promptly advising the First Respondent of ZIMRA's request. Secondly and most importantly, as is reflected by the record of proceedings, the Applicant only prepared and provided the manual bill of entry required by customs on the 4th of October 2012, which document the First Respondent required to make payment. Again, the Applicant has omitted this fact from its papers.

9.3 ……..

9.4 ……. ZIMRA confirms that the issue of payment being made into the wrong account was non-issue in as far as clearing the First Respondent's consignment was concerned as such issue could be rectified within three minutes through an internal bank transfer. In the said email, ZIMRA confirmed however that the reason why the matter was taking long to be resolved was as a result of the Applicant's conduct in taking an inordinate period to lodge a manual bill of entry. In the said email, ZIMRA confirms that even it did not understand why the Applicant was taking such a long period to complete the process the process required to have the First Respondent's goods cleared.

9.5 ……..

10. ……..

11. ……..

11.1 It is denied that the findings of the arbitrator can in these circumstances be held to be contrary to the public policy principles of Zimbabwe as is alleged by the Applicant".

Paragraph 5 of Article 34 of the Act, under which this application has been brought before the court, clearly states, in relation to public policy, as follows:

"(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".

In *casu,* (a) and (b) above are not relied upon. In the main, the applicant argues that:

"11.10 ……..the Arbitral Award violates Zimbabwe's notions of elementary justice and constitutes a palpable inequity that hurts the conceptions of justice in Zimbabwe. The award goes beyond mere faultiness or incorrectness; it founds an inequity that is so far reaching and outrageous. It goes against the accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt".

In determining this matter, it is therefore important to have a clear understanding of what is meant by 'the public policy of Zimbabwe'.

In its submissions, and relying on authorities from both the Supreme Court and the High Court, which authorities include *Zesa* v *Maphosa* 1999 (2) ZLR (S), the applicant states:

"6. The issue of what constitutes a conflict with the public policy of Zimbabwe was dealt with recently in the case of NATIONAL COMMERCIAL EMPLOYERS ASSOCIATION OF ZIMBABWE VS THE COMMERCIAL WORKERS UNION & ANOR HH 533/15 where the court commented as follows:

It is only when the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award".

In the above submission, the applicant correctly cites the often quoted authorities that spell out the principles of law to be relied on *in casu*.

It cannot be denied that ZIMRA contributed to the delay that led to the demurrage charges. However, as found by the arbitrator, it cannot be ignored that the submission of the

requisite Bills of Entry would have triggered the timeous preparation of the necessary documentation for the clearance of the trucks. That was not done until 4 October 2012. ZIMRA had indicated to the applicant the crucial need for the Bills of Entry to be placed in its hands.

However, I note that in its answering affidavit, the applicant disagrees.

It states:

> "7.4 The issue of the lodging of the manual bill of entry is irrelevant because that process is done right at the end and only after confirmation of the money having been received by ZIMRA in the correct account. This is why the bill of entry was only lodged on 4th October 2012 because that is when the amount reflected in the correct ZIMRA account".

The above, however, is not in line with ZIMRA's own position which was given as follows:

> "I humbly refer to my 19 April 2013 conversation with Mr Chipunga in the mail chain attached. Our position remains the same. We remain baffled that you continue to hold ZIMRA solely culpable for the time lags. If you note, the Bill of Entry C 100995 was registered on the 24th of September 2012 and the same day (Refer to your cancellation appeal notice you attached) a query in Form 45 ref 3509 was raised on the same day 24/11/2012 for the amendment of the tariff and it became your duty through your Agent to Manual Bill of Entry. How it took your agent until the 4th of October 2012 to lodge a manual entry ZWFB/MAC 43 remains a mystery to us. The movement of funds from the Agent's Prepayment Account is a simple process done by the Station Manager which takes no more than 3 minutes. Please note the process is only done when the Agent brings the manual entries to ZIMRA. I hope this clarifies issues. Should you need clarification, please don't hesitate to call. REFER TO THE ASYCUDA CAPTION BELOW FOR THE SEQUENCE OF EVENTS EVEN YOUR CANCELATION WAS PROCESSED THE SAME DAY IT REACHED MY OFICE REFER TO THE CANCELLATION NOTICE".

Clearly the issue of paying the money into a wrong account does not appear to absolve the applicant from the need for timeous action with respect to the submission of the necessary documents, namely the bills of entry. A situation had arisen where speedy action, pertaining to the submission of the bills of entry, was called for. No convincing reason is given as to why the bills of entry were not sent as demanded by ZIMRA.

In any case the applicant does not wholly deny responsibility. In its submissions, it states:

> "20. Additionally and in any case the effect of the award is to make the Applicant solely responsible for the accumulated demurrage charges even in circumstances were it is clear that the 1st Respondent's conduct also contributed of the final figure of the demurrage charged".

The above is a prayer to the court to find the existence of contributory

negligence. However, the failure on the part of the arbitrator to place emphasis on contributory negligence, does not, in my view, necessarily mean that the award is so bad in the eyes of the law as to entitle me to declare that it:

> "goes beyond mere faultiness and incorrectness and constitutes a palpable inequity that tis so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award".

In reaching the above conclusion I am also mindful of the fact that, with respect to the relief sought, the law does not in any way clothe this court with appeal powers. To that end, the first respondent is correct in submitting that:

> "6. This court has repeatedly confirmed that when hearing applications in terms of the Model Law, it
>
> 'does not exercise any appeal power and neither upholds nor sets aside nor declines to recognise and enforce an award by having regard to what it considers should have been the correct decision'.
>
> City of Harare v Municipal Workers' Union 2006 (1) ZLR 491 (H) at 494A.
>
> As has been demonstrated, the applicant's entire case is premised upon what the applicant considers (and urges the court t find) should have been the correct decision. Whilst the first respondent maintains that there is no error in the award, even if an arbitrator's decision is wrong in fact or law, that will not constitute a violation of public policy that might justify the setting aside of an award:
>
> Husayiwevhu & Ors v UZ-USF Collaborative Research Programme 2010 (2) ZLR 448 (H) at 455 D- 456 B".

In view of the foregoing, I find no basis for setting aside the second respondent's award. It does not, in any way, offend public policy to warrant its being set aside.

I must also hasten to mention that the only relief available under Article 34 of the Act is the setting aside of the arbitral award. In terms para (4) of Article 34, the only other course the court could take is spelt out as follows:

> "(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitrator an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside".

The above is not called for *in casu* and was not prayed for. Accordingly, in terms of the law, there can be no room for the alternative relief sought by the applicant.

The application is dismissed with costs.

Chinamasa, Mudimu & Maguranyanga, applicant's legal practitioners
Coghlan Welsh & Guest, 1st respondent's legal practitioners