ALLIANCE INSURANCE COMPANY (PVT) LTD
versus
IMPERIAL PLASTICS (PVT) LTD
and
THE HONOURABLE JUDGE L. G SMITH (RETIRED) N.O.

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 20 May 2016 and 3 August 2016

Opposed Matter

R Jambo, for the applicant
T Mpofu, for the 1st respondent

MTSHIYA J: This is an application for the setting aside of an arbitral award. The application is opposed.

On 9 June 2015, the second respondent granted the following award in favour of the first respondent:

"My award is as follows-

(a) the Respondent shall, before 30 June 2015, replace the crane that was used at the premises or pay the Claimant amount equivalent to the value of the crane as sourced from a suitable supplier;
(b) the Respondent shall pay the Claimant $188 815.90 in respect of the stock that was destroyed:
(c) the Respondent shall pay the Claimant all costs it occurred associated with and incidental to this Arbitration process, including attorney-and-client scale."

Under the award of the second respondent wrote:

"If there is any dispute regarding the replacement of the crane or the value thereof, either party may make an application to me and I shall settle the dispute."

In its claim before the second respondent, the first respondent, who was then claimant, wanted the following relief:

"(i) the Respondent replaces the crane or pays a sum equivalent to the value of the crane which can be sourced from suitable suppliers;
(ii) the forensic report by BDO be adopted and the Respondent pays replacement value of stock as per the BDO Report;
(iii) the Bill of Quantities for electricals be prepared by a reputable contractor appointed by the Arbitrator at the Respondent's expense to replace the damaged electricals and the value thereof to be paid to the Claimant by the respondent;
(iv) reimbursement of all costs associated with or incidental to this Arbitration process, including costs on an attorney-and-client scale."

The offer by the second respondent to deal with any further dispute relating to "the replacement of the crane or the value thereof" was never taken up by the applicant.

The applicant instituted this application to have the entire award set aside because "it contains decisions on matters beyond the scope of the submission to arbitration and that it offends the public policy of Zimbabwe."

In making the application, the applicant also relied on Article 34 of the Arbitration Act [*Chapter 7:15*] (the Act), which, in full, provides as follows:

"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) 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, filing 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 or not falling within the terms of the submission or arbitration, or contains decision on matters beyond the scope of the submission to arbitration provided that, if the decisions on matters submitted to arbitration cab 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 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;

(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

(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 an 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 of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral award proceedings to take such other 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 natural justice occurred in connection with the making of the award.

The matter was referred to arbitration because a dispute had arisen between the parties. The first respondent, who was insured by the applicant on an "Assets All Risks Policy", had its business property destroyed by fire on 11 August 2013. Upon the applicant having paid what it believed was covered under the policy, disputes arose with respect to a crane that was used at the premises, the amount paid for lost stock and payment for damaged electricals. As already seen, these issues are captured in the relief sought by the first respondent when the matter was placed before the second respondent.

From the manner this matter was handled, I must say all concerned took the issues raised very seriously.

The first respondent gave detailed evidence to support its claim. It called in five witnesses before the second respondent.

On its part, the applicant called six witnesses to its defence.

In addition to the evidence tendered by both parties, detailed submissions were made before the second respondent.

The award being challenged herein is based on a detailed analysis of the evidence that was placed before the second respondent by both parties.

In dealing with the kind of relief that the applicant seeks herein, apart from quickly reminding myself that what is before the court is not an appeal or review, I stand guided by what

the Supreme Court said in *Zimbabwe Electricity Supply Authority* v *Maphosa* 1999 (2) ZLR 452 (SC). In that case the Supreme Court guided as follows:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.
>
> Under article 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.
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> 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." (My own underlining)

Apart from being instructive, the above guidelines also assist in indicating where one's focus should be directed when dealing with matters of this nature.

A lot was said in this case but I believe that, guided by the above principles, a brief look at how the second respondent dealt with issues raised by both parties will assist in the disposal of this matter.

In its founding affidavit, the applicant summarises its case as follows:

> "9.1 That there is no basis for the 1st Respondent to claim for the crane because the crane was not insured. In any event, the crane was not part of the building.
>
> 9.2. That the 1st Respondent's claim for electricals was equally baseless because the 1st Respondent, by refusing to have the Applicant replace the damaged building while insisting on getting paid cash in lieu of the replacement costs.
>
> 9.3. That the claim in respect of stocks had no foundation because 1st Respondent received payment in the sum of US$257, 482 which was calculated based on the information which the 1st Respondent supplied. The 1st Respondent was bound not to rely on any other information which was not presented to the insurer at the time when the claim was lodged as this would amount to blatant violation of the policy."

The first respondent, in part, dismisses the above averments of the applicant in the following manner:

> "1.5 This is largely not in issue. What must be underscored from the outset is that the statement of claim simply sets out the structure of the claims. In this regard, a statement

> of claim is not subject to any rules and none were agreed to between the parties. The evidence then amplified the structure so set out and on its basis closing submissions were drawn which made computations based on the evidence led. Those computations constituted first respondent's case and became the foundation of the award rendered. Applicant had ample opportunity to deal with same and did in fact avail itself of that opportunity."

The first respondent then proceeds to show how each of the issues raised was dealt with by the second respondent.

To begin with, I must say, after careful reading of the papers before me and hearing argument from the parties, I have been unable to find where the second respondent exceeded his terms of reference. I say this because I also agree that the terms of reference were a guide as to what the parties wanted resolved or determined.

Let us now look at how the second respondent dealt with each issue placed before him.

In dealing with the issue of stock, the second respondent concluded his findings by saying:

> "In its Reply the claimant said that it left the matter of the valuation of the stock to be determined by the auditor appointed by the Respondent. It was only after the KPMG proposal was received by the clamant that it decided to get a second opinion, because the proposed settlement fell way short of the sum insured. Since there were no detained records in place, both KPMG and BDO had to make assumptions because it was not possible to determine with absolute certainty the value of the stock that was in place. The Respondent disputed the Claimant's submission that the KPMG team spent only a short time at the premises interviewing the Claimant's management. Mr Deepak Chouhan confirmed the Claimant's submission. The Respondent called only one witness to deal with the issue of stock, Mr de Beer, and he was not a member of the KPMG team. He could not deny the submissions of the Claimant. I consider, from the evidence that was produced, that the KPMG report is defective and that the BDO report is the one that should be accepted. The BDO report established that the KPMG team made some serious errors in their report. They should have treated IP and Mymake as separate entities and done two different valuations. However they combined the two and treated them as one entity. Mr Kiran Chouhan said that the KPMG team only came to the Premises once and stayed for about half an hour. The Respondent did not call any member of the KPMG team to give evidence, so the testimony of the claimant's witness has to be accepted. Mr de Beer, who was the witness called by the Respondent to testify in relation to the stock, was not a member of the team. He accepted that some elements such as working costs and goods in transit should have been – included by the KPMG team in its valuation. The claim by the respondent that members of Claimant's management withheld information from it or the KPMG team cannot be upheld. Neither the Respo0ndent nor the KPMG team requested the information.
>
> I consider the BDO report to be much more accurate than the KPMG report and should be accepted to assess the value of the stock that was burnt. The fact that the KPMG team considered that the value of the plastic materials were to be used to make the bags should be depreciated because the plastic was many years old shows that the team made their estimates without seeking information from competent people."

Clearly the second respondent was guided by the BDO report in dealing with the value of the stock.

Given the above, I do not see how a person who accepts the formula suggested in the BDO report, can then fail to order payment of a specific sum as replacement value for the stock.

In its submissions, dated 15 May 2015, the first respondent placed its claim, upon calculations based on the BDO report as follows:

> "In summary the Claimant is therefore entitled to settlement from the Insurer in full the following (sic) amounts in addition to the amounts already paid:
>
> (i) In respect of the destroyed Crane an amount of $50 600.00.
> (ii) In respect of the destroyed stock an additional sum of $184 815.90
> (iii) In respect of the reinstatement of the mains electricals instillation and internal electrical distribution and fixtures an amount of $40 800.00."

Admittedly, the amount in the award is given as US$ 188, 815.90. That means the award is US$4 000.00 more than what was claimed per the above submission. As submitted by Advocate *Mpofu,* on behalf of the first respondent, I want to quickly accept that there was an error. However, such error cannot vitiate the fact the second respondent considered the BDO report and what it meant to the parties. It meant that the application of the formula in the BDO report would result in an amount of US$ 184 815.90 payable to the insured (i.e. the first respondent). I am therefore unable to declare the finding of the second respondent on the stock issue as being unreasonable.

The rate at which information was released to the applicant did not at any point become a critical issue before the second respondent. this is so because both parties were aware that records were destroyed by fire. The applicant was aware of the difficulties militating against the obtaining of the requisite information timeously.

On the question of the crane, at p 20 of his award and after considering evidence and submissions made by both parties, the second respondent concluded as follows:

> I find it incredible that the respondent can claim that electricals are part of the building, when they are easily detachable, but the crane was not part of the building. The respondent argues that there was never a separate policy or premiums payable for electricals and that there should have been a separate policy and premium for the crane. The respondent also admits that the stock was covered by the policy. The stock was not part of the building.
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> In my opinion the crane was part of the building, but even if that is not the position, it was covered by the policy because it was a tangible asset that was owned by the claimant. It should therefore have been valued and the amount included in the amount submitted by the respondent to the claimant being the value of the building.

> The amount of the premium to be paid to the insurer is fixed by the insurer not the insured. In fixing the amount of the premium it is the responsibility of the insurer to inspect the property that is to be insured and value it and then determine what it considers to be an appropriate premium. If the respondent did not end anyone to inspect and value that property then it bears the risk. Jif it did send someone to do that and the person concerned felt that the crane was not part of the building, then he should have reported that so that the respondent could have specifically excluded the crane. There is no such exclusion in the policy.
>
> Accordingly I find that the claimant is entitled to the award it is claim – that the respondent replaces the crane or pays the claimant a sum equivalent to the value of the crane which has been obtained from a suitable supplier."

It is not denied that the applicant's underwriters inspected what was being insured. It is on that basis that the applicant arrived at the total premium cover of US$500 000.0. It is also not denied that this was an "Asset All Risks Policy." The crane belonged to the insured and upon inspection the underwriters noted that the crane was attached to the building and used as a lift. It was the first respondent's asset. That explains why, in paying part of the claim, there was no question about the support structures for the crane. I therefore find it difficult to accept that the finding on the crane could be termed "so unreasonable" as to offend public policy.

On the issue of electricals the second respondent ruled as follows:

> "The respondent has obtained a quotation from TNZ to construct a replacement building. The tender value was $130 000 for labour only. It produced a Bill of Quantities for the replacement building. The cost of materials only to complete the works, excluding delivery, was $241 728.30 and that of labour to complete the works was $130 000. Included in the materials was "electrical and mechanical" for $20 000. The claimant, in its Statement of Claim, filed a Bill of Quantities which it claimed had been supplied by it contractor. It specifies the quantity of trusses, purlins, beams and rail for the crane, columns, ties, bracing, bolts, steel staircase, mezzanine floors, glazing and cladding, rail, gutters and gable ends. No prices are quoted and there is no mention of electricals. There is nothing in the Claimant's Statement of Claim to indicate the purpose of the Bill of Quantities or what it was used for. The claimant elected to replace the building. The new building is apparently different from the one that was burnt. The claimant accepted the amount offered by the respondent subject to reservations about the crane and electricals. The costs of electricals for the new building are not the obligation of the respondent. All it had to pay was the cost of the electricals in the building that was burnt down. There is a cost for electricals in the TNZ quotation.
>
> I consider that the claim for electricals cannot be upheld."

The above suggests that on the basis of the TNZ quotation presented by the applicant, electricals for the replaced building were covered. The cost of the "new building" including electricals, was as quoted for by the applicant. There was, in my view, as found out by the second respondent, no basis for a further claim for electricals. In any case, apart from merely

indicating how issues were determined by the second respondent, the issue of electricals is of no concern to the applicant.

Taking into account the relevant provisions of the law as provided for in Article 34 of the Act, and as read together with the instructive principles of law enunciated the *ZESA* v *Maphosa* (*supra*), I am unable to find any merit in interfering with the second respondent's award.

The application is dismissed with costs.

Jambo Legal Practice, plaintiff's legal practitioners
Joel Pincus Konsom & Wolhuter, 1st respondent's legal practitioners