JEFT MARKETING (PRIVATE) LIMITED
versus
REDAN ENERGY PETROLEUM (PRIVATE) LIMITED
and
SAKUNDA PETROLEUM (PRIVATE) LIMITED
T/A PUMA ENERGY

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 29 March & 11 April 2018

Opposed application

TG Mboko, for the applicant
S Dhlakama, for the respondents

TSANGA J: This is an opposed application in which the applicant seeks to have a decision of the arbitrator set aside in terms of s 34 of the UNCITRAL Model Law, on the grounds that it offends public policy. The arbitrator's decision is to the effect that the applicant is liable to the respondents for the payment of specified sums of money and to vacate certain premises used in the conduct of fuel business. The background facts to the arbitrator's decisions are as follows.

The applicant is a company formed by former employees of the respondents as a means of empowerment pursuant to their retrenchment. The respondents are in the fuel business. Pursuant to the realisation of the goal of empowering former employees, a "Licence Agreement" was entered into between the parties for the conduct of the fuel business for which purposes the applicant had been set up. Under that agreement a bank guarantee of the US$100 000.00 was to be furnished by the applicant. It was the obligation of the applicant to furnish this guarantee. The applicant encountered difficulties securing the guarantee from BancABC. Pending the quest for the supply of this guarantee from NMB bank, an "Interim Arrangement" was entered into for the supply of fuel under consignment.

Following the supply of fuel under consignment, the applicant was alleged to have conducted itself in a business manner which led to the respondents cancelling the primary licence and the interim arrangement. The unethical conduct on the part of the applicant that led to the fall out and termination of both the licence agreement and the interim agreement included failure to account for, and/or remit proceeds for the sale of petroleum products; to obtain the product deposit and/or bank guarantee as required by clause 7 of the licence agreement and, to account for physical stock.

Following failure of mediation, the matter was arbitrated upon. The respondents claimed US$18 813.80 from the applicant for failure to remit and account for consignment stock supplied on specific dates and another $11 982.00 for unaccounted sale proceeds from swiping transactions; $ 3037.34 for unaccounted lubes; security costs amounting to $1686.60 and loss of revenue to the tune of $41 340.00.

The applicant counter-claimed that the respondents were in breach of the contract for failing to organise US$100 000 funding for the applicant; wilfully stopping fuel to the prejudice to the US$64 014.80; failing to remit dealer margins as agreed in the licence agreement worth $10 542.90 and failing to brand the site in the licence agreement. As a result, it sought payment of $174 557.79 from the second respondent. It further sought the resumption of supplies and that the second respondent be held to its obligations to organise funding.

The arbitrator ruled that the termination had been properly made and dismissed the applicant's counter claim. Save for the claim relating to dealer margins.

The issues

The applicant herein seek to have the arbitrator's decision set aside on the grounds that the arbitrator's decision offends public policy on several grounds as outlined below. Firstly, it is argued that the arbitrator lacked jurisdiction to hear the matter as there was no arbitration clause in the interim arrangement. Also, the applicant argues that the agreement which was terminated was the interim arrangement and not the licence agreement. This is based on applicant's assertion that the two were distinct and unrelated agreements. In other words, the applicant views the licence agreement and the interim arrangement as having had no bearing on each other. The Arbitrator's finding was that there was only ever one agreement being the licence agreement and that when the interim measure for the supply of

fuel was entered into, it was under the umbrella of that licence agreement. The applicant argues that the Arbitrator should have declined to arbitrate on the interim arrangement.

Secondly, it is also argued that the Arbitrator was biased as evidenced by the language he used in describing the applicant's behaviour as disruptive and dismissing its version as semantics. He is also said to have dismissed the counter claim without sufficient evidence. It is further argued that they were material dispute of facts all of which were found against the applicant.

Thirdly, the arbitrator's decision is said to be against public policy on the basis that he arbitrated without terms of reference.

Fourthly, the applicant also dispute the finding that the respondents lost business arguing that the latter should have sought their eviction properly before a court of law since they were aware of the dispute concerning termination of the licence agreement. The applicant also argues that it is the one that in fact lost business as a result of the termination of the licence agreement" and the interim arrangement. The findings in relation to loss of business are said to be patently incorrect.

Fifthly, the Arbitrator is said to have neglected the fact that the counter claim was based on the fact that the respondents reneged from the original agreement. The applicant argues that the arbitrator should have declined to arbitrate on the interim agreement and should have concentrated on the real dispute between the parties which applicant says is the fact that the respondents had reneged from the agreement.

The respondents dispute that the arbitrator's decision in any way offends public policy. Under the circumstances that led to cancellation they say it would have defied logic not to terminate the licence agreement and the interim arrangement and to conduct business as normal whilst increasing financial exposure. They further emphasise that in terms of the licence agreement under which the whole arrangement fell, the decision of the arbitrator is final and binding.

In response to the above claims and in challenging the claim that Arbitrator's decision goes against public policy, the respondents aver that since the provision of the bank guarantee was peremptory, and, cognisant of the challenges that had been encountered in obtaining the guaranteed, they had acted in good faith in putting in place an interim argment. This was in order to assist the applicant and to move a step further in consummating the agreement. Putting in place an interim agreement was in fact giving the applicant an olive branch. They

argue that they were entitled to revoke the benefits derived from the interim arrangement at any time. The interim arrangement was at all times a stop gap measure. Furthermore they emphasise that it was material and necessary for the parties to adhere and abide by the terms in the licence agreement. It is the applicant that is said to have failed to abide by the conditions.

The legal position

In terms of Article 34 of the UNCITRAL Model Law an arbitral award may be set aside by the High Court if the award offends the public policy of Zimbabwe. The legal position on when an Arbitrator's decision may be set aside on the grounds that it offends public policy is one which is well articulated.

The Supreme Court case of *Peruke Invstms (Pvt) Ltd* v *Willoughby's Invstms (Pvt) Ltd & Anor* 2015 (1) ZLR 491 (S) at p 493C-D, captures the courts' attitude in such matters.

> "The courts are generally loath to invoke the public policy defence except in the most glaring instances of illogicality, injustice or moral turpitude. His decision could not be said to be faulty or incorrect in any material respect so as to warrant a different conclusion."

The case of *Zimbabwe Posts (Pvt) Ltd* v *Communication & Allied Svcs Workers' Union* 2014 (1) ZLR 150 (H) at p151 B-C also highlights that:

> "The approach to be adopted is to construe the public policy defence restrictively in order to preserve and recognize the basic objective of finality in all arbitrations. 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. 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."

Furthermore the role of the High court in hearing of such matters is equally clearly spelt out in case law:

> "In exercising the powers given in terms of arts 34 and 36 of the First Schedule to the Arbitration Act [*Chapter 7:15*], the High Court is not sitting as an appellate court. It is not, therefore, required to embrace what it would consider to have been the correct decision. It is only when "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" that the court would interfere with the award on the ground of it being contrary to the public

> policy of the country. Not every mistake, be it of fact or law, warrants the setting aside of an arbitral award in terms of art 34 on the grounds of it being contrary to the public policy of Zimbabwe. For it to merit the intervention of the court the incorrectness must be so serious as to constitute a subversion and negation of justice and fairness." *See Matthews* v *Ebrahim NO & Ors* 2015 (1) ZLR 168 (H)

In addition case law is also clear that where parties have submitted to arbitration the arbitrator's decision is final. As stated in *Zimbabwe Educational, Scientific, Social & Cultural Workers' Union* v *Welfare Educational Institutions Employers' Association* 2013 (1) ZLR at p 187

> "Where parties make submissions to arbitration on the terms that they choose their own arbitrator, formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the courts will proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The Arbitration Act is clear that the only court that has jurisdiction in those limited circumstances is the High Court, not the Labour Court."

Legal and Factual analysis

On the issue that the arbitrator lacked jurisdiction to hear the matter as there was no arbitration clause in the interim arrangement, a reading of the background to the dispute reveals that the Arbitrator was absolutely correct that there was only ever one agreement with the interim arrangement being put in place to simply to kick start the applicant due to delays and difficulties encountered in obtaining a guarantee. Arbitration took place on the strength of the licence agreement which was the embodiment of the agreement between the parties.

The Arbitrator cannot therefore be said to have lacked jurisdiction on the strength that an interim arrangement did not mention arbitration. The reasons given by the Arbitrator of reaching to the conclusion that the interim arrangement could not be divorced from the primary arrangement emerge most vividly from the facts that led to the arrangement. There was nothing outrageously illogical or immoral in his reasoning or conclusions, regarding his finding that there was only ever one agreement, being his licence agreement under which the interim measure was crafted for the benefit of the applicant. There is nothing that offends public policy in this aspect of his factual finding. The respondents' counsel is also correct in drawing attention to articles 4 and 16 (2) of the Arbitration Act [*Chapter 7:15*] in terms of the observation that the applicant cannot be heard to complain about the jurisdiction of the

arbitrator when it proceeded to arbitration resulting in the award. In terms of s 16(2) the issue of lack of jurisdiction is to be raised after the statement of the defence.

The argument that the Arbitrator was biased as evidenced by the language he used in describing the applicant's behaviour as disruptive, and, dismissing its version as semantics equally lacks merit. There was nothing in the Arbitrator's award that suggests that the arbitrator was in any way biased in reaching the conclusion that then the applicant was being difficult. The factual grounds for the award were traversed and cannot be re traversed again unnecessarily under the guise that they offend public policy when they clearly do not.

As for the argument that there were dispute of facts, an arbitrator is free to make a decision as to how he will deal with evidence. Case law is also clear on what is permissible as far as an arbitrator's conduct is concerned.

As stated in *Makonye* v *Ramodimoosi & Ors* 2014 (1) ZLR 111 at pp 111 F-112 A

> "The fact that the arbitrator, with the consent of the parties, decides to receive written, rather than oral, submissions does not mean that either of the parties was not able to present its case. The arbitrator has a wide discretion as to how to conduct the proceedings. Article 24 of the Model Law (set out in the Schedule to the Arbitration Act) 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."

An array of documents was presented to the Arbitrator as evidenced by the documents attached to this application in which the record was well over 400 pages. His decision cannot be said to be against public policy on the basis that oral evidence should have been heard when the award makes it clear that he had more than sufficient information to reach his conclusion.

On the issue that the arbitrator's decision is against public policy because he arbitrated without terms of reference, it is evident from the reading of the record that the issue of the terms of reference was discussed before the hearing and the Arbitrator indicated to the parties that the hearing would proceed under terms of reference as discussed by the parties at a specified meeting that all had attended. Also an examination of the applicant's own supporting documents in particular shows that its gravamen related to its perceived

distinction between the licence agreement and the interim arrangement as two distinct and independent documents – an issue which the Arbitrator canvassed and concluded that there was only one agreement. As for the cancellation of the licence, which according to the applicant was the real gravamen of the dispute, again the Arbitrator found that the applicant ran the business for four months under the consignment arrangement and it was during this period that serious anomalies in the conduct of its business emerged. This was after all a business arrangement and the respondents had every right to terminate the arrangement including its offshoot the interim arrangement, against a backdrop of improper conduct of business by the Applicant from the very onset.

The applicant's argument that the Arbitrator erred in his finding that the respondents lost business cannot stand as parties are bound by the factual findings of the Arbitrator. Similarly, given the factual backdrop of the falling out between applicant and the respondent, there is nothing that goes against public policy in the finding that they applicant should vacate the premises. There is nothing outrageously illogical or immoral in his reasoning or conclusions on both score.

This is indeed one of those cases where the applicant have simply brought a matter for the sake of not wanting to adhere to the findings of the arbitrator. Consequently, the respondent in seeking dismissal of this application also seeks that the Directors be held personally for liable the debts owed and for their negligent breach of the agreement in terms of the s 314 (1) of the Companies Act [*Chapter 24:03*] which states that:

> **"318 Responsibility of directors and other persons for fraudulent conduct of business**
> (1) **If at any time** it appears that any business of a company was being carried on—
> (*a*) recklessly; or
> (*b*) with gross negligence; or
> (*c*) with intent to defraud any person or for any fraudulent purpose;' the court may, on the application of the Master, or liquidator or judicial manager **or any creditor** of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly parties to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct."

The court may lift the corporate veil where manifest injustice would be denied. *Mukombachoto* v *Commercial Bank of Zimbabwe and Registrar of Deeds* HH 10/02. The applicant does not have assets and that as such the likelihood of the respondents being reimbursed for the funds that were unaccounted for in addition to their loss of sales will be

prejudicial to them as they point out. The respondents have made a compelling case for s 318 (1) to be brought into effect. The court has to show its displeasure to the filing of unnecessary matters to simply buy time when there is clearly no merit in the matter.

Accordingly:

1. The Applicant's application to set aside the arbitral award is dismissed.
2. The Directors of the Applicant are declared jointly and severally liable with each party absolving the other for the settlement of the debt due and owing to the Respondents as granted in the arbitral award.
3. Costs are awarded on a higher scale.

Mboko Legal Practitioners, applicant's legal practitioners
Dumbutshena & Co Attorneys, 1st and 2nd respondent's legal practitioners