1. HARARE SPORTS CLUB CASE NO. HC 9909/18
versus
ZIMBABWE CRICKET

2. ZIMBABWE CRICKET CASE NO HC 10011/18
versus
HARARE SPORTS CLUB
and
ARBITRATOR ADVOCATE DANIEL TIVADAR

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 22 May 2019 & 5 June 2019

Opposed Application

N Mugandiwa, for the applicant
B.Diza, for the respondent

MATHONSI J: This judgment is a two-in-one. It disposes of the application in HC 9909/18, an application in which Harare Sports Club (the applicant) seeks a registration of an arbitral award issued by an arbitrator and HC 10011/18 one in which Zimbabwe Cricket (the respondent) seeks the setting aside of the same arbitral award on the ground that it is contrary to the public policy of Zimbabwe. Registration of the award is caught by the applicant in terms of Article 35 while the setting aside of the award is sought by the respondent in terms of Article 34 of the Model Law in the Arbitration Act [*Chapter 7:15*]. The contentious arbitral award was issued in terms of an agreement entered into between the parties on 16 July 1999 supported by an order of this court, per MANGOTA J, handed down on 21 July 2017. The award itself was delivered on 28 August 2018.

By order of this court, per CHIKOWERO J, granted on 27 March 2019, the 2 mutually destructive applications were consolidated for set down and determination at the same time. At the commencement of the hearing counsel for the parties agreed that upholding one of the applications necessarily brings the other to its knees. In other words if the court finds that there is no merit in the application to set aside the arbitral award, it should without further *ado*, recognize the award and register it for enforcement.

The background is that the applicant is the registered owner of a sporting complex known as Harare Sports Club which it leased to the respondent, then known as Zimbabwe Cricket Union, by Notarial Agreement of Lease signed on 16 July 1999, at a time when the Zimbabwe dollar ruled the roost. The rental payable was therefore fixed in that currency at $40 000 per month and in terms of clause 3 (c) the rent was to be escalated on an annual basis with effect from the agreement's first anniversary at a rate to be agreed between the parties. In the event of the parties failing to agree the rent was:

> "to be determined and set by an independent arbitrator appointed by mutual agreement between the parties, whose decision shall be final and binding as between them based upon any fluctuation in the prime bank rate of interest and the inflation rate prevailing in Zimbabwe at the relevant juncture."

When the Zimbabwe dollar became moribund at the beginning of 2009 the parties could not agree on the rent in foreign currency and a dispute arose which has escalated over the years resulting in the need to refer the matter to arbitration in terms of clause 3 (c) of the agreement. The parties still could not agree on an arbitrator to resolve the dispute and as they bickered endlessly the applicant brought an application in this court under case no, HC 217/17 in which it cited both the respondent and the Commercial Arbitration Centre. It sought an order authorizing the Commercial Arbitration Centre to appoint an arbitrator to determine the dispute over rent.

The application was made in terms of Article 11 (4) of the Model law which recognizes the right of the parties to agree on a procedure of appointing an arbitrator but provides that should they fail to agree such arbitrator may be appointed by the High Court on request of a party. The respondent opposed that application arguing *inter alia* that Article 11 (4) empowers the High Court itself to appoint an arbitrator and not to delegate the power to appoint to someone else. The respondent also argued in opposition that the dispute over the appropriate rental for the property was governed by the Commercial Rent Regulations and should thus be determined by the Commercial Rent Board. The respondent further argued that clause 3 (c) of the parties' agreement which provides for arbitration of a rent dispute was void by virtue of s 29 of the Commercial Rent Regulations which provides:

> "……any agreement by which any person purports to limit his right to proceed under these regulations for the determination of a fair rent or the variation of such a determination, or the limit or affect any other rights to which he would be entitled under these regulations, shall be void."

The respondent sought to side-foot the imperatives of the agreement it entered into with the applicant and avoid arbitration by hiding behind the Commercial Rent Regulations which would have meant that the dispute would be referred to the Commercial Rent Board. MANGOTA J who heard the application was not persuaded by that argument. Neither was he persuaded by the argument that the High Court could not delegate the power to appoint an arbitrator to the Commercial Arbitration Centre. In *Harare Sports Club* v *Zimbabwe Cricket & Anor* HH 471-17 the learned judge upheld the principle of sanctity of contract holding that having crafted for themselves "a clearly defined manner of resolving their disputes" neither of the parties was entitled to renege from the agreement.

On the issue of the power of the court to delegate the authority to appoint an arbitrator, the learned judge ruled that this court has inherent jurisdiction to do so and in the exercise of that inherent jurisdiction, he authorised the Commercial Arbitration Centre to do the honours. It was by virtue of that judgment that *Daniel Tivadar* was appointed arbitrator and having heard the matter he issued the arbitral award which is the subject of this application. The case of *Harare Sports Club*, *supra*, is significant in two ways. Firstly it determined the issue of the arbitrator's jurisdiction to adjudicate over the dispute and clothed him with authority to do so. Secondly it completely resolved the issue of the validity of the arbitration clause, that is clause 3 (c) of the parties agreement, and ruled that it was valid notwithstanding s 29 of the Commercial Rent Regulations.

As shall be seen later, the respondent has not given up on these arguments which form the main thrust of its challenge to the arbitral award and why it moves that the award be set aside and why it should not are registered for reinforcement purposes. It is significant that the judgment of MANGOTA J in *Harare Sport Club*, *supra* has not been challenged in any way. It has not been appealed and remains extant to this day.

As I have said the applicant has made an application for the registration of the arbitral award in terms of Article 35 of the Model Law. The award directs the respondent to pay rent of US$7500 per month with effect from 28 August 2018 for the Sports Complex, to pay US$88 119.85 together with interest from 6 December 2016, to pay rent of US$3 000 per month from 1 January 2018 to the date of the award and costs of suit.

In its application for setting aside the award, the respondent states that the arbitral award is against the public policy of Zimbabwe because the arbitrator enforced clause 3 (c) of the

agreement which provides for referral of the dispute to arbitration when that clause is contrary to statute law, namely s 29 of the Commercial Rent Regulations which provides that any provision in a lease agreement which limits the rights of the parties in terms of those regulations shall be void.

Secondly, the arbitrator did not deal with the issue of rent escalation. As the parties had agreed on an interim rental of US$170-00 a month, it is that rent which should have been escalated in terms of clause 3 (c) of the agreement. Thirdly, the award unjustly enriches the applicant at the respondent's expense because it came out during the hearing that the applicant is renting out a portion of the complex to the Tobacco Industry Cricket Supporter's Association for a rental. Fourthly, the respondent submitted that the arbitrator pitched camp with the applicant because he allowed for expert evidence on what is a fair rent for the complex to be presented which the applicant had not submitted.

I must put the issue of unjust enrichment out of the way straight away. Mr *Diza* for the respondent conceded that it is an issue which was not argued before the arbitrator. Mr *Mugandiwa* for the applicant submitted that unjust enrichment is a cause of action which should have been pleaded before the arbitrator. It was not and therefore cannot be relied upon to challenge the award. I agree. Raising a defence which was not relied upon before the arbitrator only means that a party is seeking a fresh hearing of the case and not a challenge of the arbitrator's decision, a decision arrived at without consideration of the new defence. That cannot be allowed. The issue must end there.

Mr *Mugandiwa* took essentially 2 points *in limine* namely that the application for the setting aside of the arbitral award issued by the arbitrator on 10 April 2018 was filed out of time and should fail for that reason alone. Secondly, he submitted that the respondent cannot challenge the arbitrator's ruling on jurisdiction at this stage because the time during which to do so lapsed in terms of Article 16 of the Model Law. There is merit in both points *in limine*.

At the commencement of the arbitration process the respondent objected to the jurisdiction of the arbitrator to arbitrate the dispute. In fact the lack of jurisdiction was one of 7 preliminary objections made on behalf of the respondent at that stage. In an award dated 10 April 2018, the arbitrator dismissed that preliminary point holding that he had jurisdiction. He proceeded with the arbitration. An arbitrator is entitled to rule on his or her own jurisdiction in terms of Article 16 (1) of the Model Law. That Article further provides in paragraphs (2) and (3);

> "(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.
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> A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment, of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
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> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the High court to decide the matter, which decision shall be subject to no appeal; while such request is pending the arbitral tribunal may continue the arbitral proceedings and make an award."

The respondent did not challenge the determination on jurisdiction within the period of 30 days provided for in para (2) of Article 16. In fact the respondent only mounted the challenge in the main application filed on 30 October 2018, almost 7 months later. It could not do that without seeking condonation. That is not the only reason why the challenge on the arbitrator's jurisdiction cannot succeed. I have stated that in *Harare Sports Club*, *supra* this court determined the issue of the arbitrator's jurisdiction. It also determined the application of s 29 of the Commercial Rent Regulations, both arguments still being pursued by the respondent.

What we have therefore is a case in which the setting aside of an arbitral award is sought on arguments that have already been determined by this court and the determination has not been challenged leaving the court's decision extant. After exchanging pleasantries with Mr *Diza* on the propriety of that approach, he submitted that I am not bound by the judgment of MANGOTA J and that I should overlook it and uphold the respondent's challenge on the arbitrator's jurisdiction. Asked as to how that could be possible in light of the two of us enjoying the same level of jurisdiction, meaning that I cannot review the decision of another court of the same jurisdiction, Mr *Diza* submitted that the prior decision is not binding because it is premised on a wrong conclusion of the law.

Mr *Diza* obviously misses the point. The issue is not whether the decision is correct. It is that the arbitrator was appointed in terms of a court order which is still extant. Even if the arbitrator had no jurisdiction, the order of this court clothed him with jurisdiction. It was incompetent for the respondent to still insist on absence of jurisdiction in the face of a court order it did not challenge. It was also incompetent for the respondent to still raise the issue of an alleged invalidity of Clause

3 (c), the arbitration clause, when the court had ruled it valid and the respondent had not appealed the court's judgment. It was an exercise in futility.

That is what happens when a tenant is imbued with magical qualities beyond the ken of mortals, the power of resisting demand for payment of fair rent insisting on paying only what it wants to pay for a lengthy period of close to 10 years. When the magic is taken away by a court order, it disappears so inexplicably it may be seen as a terminal development. In fact, the respondent appears to have this unrivalled record of pressing the self-destruct button when it comes to its rent dispute with the applicant. How can a litigant which has a court order authorising the appointment of an arbitrator to its rent dispute beat the same drum about absence of jurisdiction before that arbitrator and again before the same court which authorised the appointment of the arbitrator? That is done at the expense of the merits of the matter.

This may well be a case of *res judicata*, that the issues of jurisdiction and the validity of clause 3 (c) have already been determined by this court and cannot be lawfully revisited again. The present legal fact is that the order remains valid and binding. Arbitration was conducted in terms of it. The Supreme Court made the crucial point in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316 B-C:

> "The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en'n Ander* v *Le Roux* 1967 (1) SA 446 (A) at 461 H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness."

The law recognises that once a dispute between the same parties has been exhausted by a competent court, it cannot be brought up for adjudication again. There is need for finality. As stated by MAKARAU JP (as she then was) in *Chimpondah & Anor* v *Muvami* HH 81-07 (unreported).

> "To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute."

See also *Towers* v *Chitapa* 1996 (2) ZLR 261 (H).

The decision to hold the respondent to the terms of the agreement between the parties is grounded in good authority. Quite often in their relations parties agree among themselves, as they conclude agreements, that any dispute arising therefrom be referred to and resolved by

arbitration which is an alternative dispute resolution mechanism in terms of which the parties refer their dispute to a third party, the arbitrator, for impartial determination. Although it does not oust the jurisdiction of the court, it simply compliments the court process, it is an accepted way of dispute resolution and is respected by the courts.

In the words of GOLDSTONE JA in *Amalgamuted Clothing & Textile Workers Union of South Africa* v *Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169 F-H:

> "When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and subject to the limited power of the Supreme Court under s 3 (1) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator ….. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

See also *Brumat Ltd* v *Multicom Ltd* 2000 (1) ZLR 637 (H).

So the ruling on the jurisdiction of the arbitrator, and therefore the validity of clause 3 (c) of the parties' agreement should have been approached by the respondent from 3 fronts, none of which was resorted to. The respondent could have appealed MANGOTA J's judgment authorising the appointment of an arbitrator. It was not done. When the arbitrator ruled on his own jurisdiction, the respondent had the leeway to challenge that determination in terms of Article 16 (2) within 30 days. This was not done. Finally the respondent could have sought that it be set aside in terms of Article 34 within 3 months. Again this was not done. Surely the respondent cannot be seen to smuggle that issue into the application now.

That then brings me to the last two factors considered by the respondent as indicative of the award being contrary to the public policy of this country namely that the arbitrator did not escalate the rent in terms of the parties' agreement and that the arbitrator pitched camp with the applicant by allowing more information to be provided which the applicant had not initially provided. In terms of Article 34 (2) (b) an arbitral award may be set aside by this court only if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of this country or the award is in conflict with the public policy of Zimbabwe.

Article 34 (5) goes further to set out what would ordinarily be regarded as being contrary to the public policy. It states:

> "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:
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> (a) the making of the award was induced or effected by fraud or corruption; or
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> (b) a breach of the rules of natural justice occurred in connection with the making of the award."

In a line of cases, the courts have been very careful to interpret that provision narrowly cognisant of the need to protest the principle of sanctity of contract. After all, it is the parties who voluntarily submit to arbitration as an instrument for the speedy and cost effective means of resolving their dispute. The courts are therefore more inclined to deprecate conduct of a party intent on disrespecting the agreement by undermining the process of arbitration agreed upon by the parties. Fanciful defences against registration of arbitral awards and frivolous applications seeking to set aside an award by inviting the court to plough through the same dispute which has been resolved by an arbitrator in the forlorn hope of obtaining a different outcome will not be entertained.

As eloquently stated in *Zesa* v *Maphosa* 1999 (2) ZLR 452 (5) at 466 E – G:

> "Under articles 34 and 36 the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision,"

See also *Delta Operations* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (5) at 85 C – D; *Provincial Superior Jesuit Province of Zimbabwe* v *Kamoto & Ors* 2007 (2) ZLR 8 (3) at 13 C – D; *Origen Corporation (Pvt) Ltd* v *Delta Operations (Pvt) Ltd* 2005 (2) ZLR 349 (H) at 355; *Decimal Investments (Pvt) Ltd* v *Arundel Village (Pvt) Ltd* 2012 (1) ZLR 581 (H).

I agree with Mr *Mugandiwa* for the applicant that an arbitrator is entitled to be wrong without attracting the setting aside of the award. That view was expressed with silky eloquence by GARDINER J in *Clark* v *African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77:

> "The courts will always be most reluctant to interfere with the award of an arbitrator. The parties have chosen to go to arbitration instead of resorting to the courts of the land, they have specially selected the personnel of the tribunal, and they have agreed that the award of the tribunal shall be final and binding. As Halsbury LC said in *Holmes Oil Co* v *Pumpherston Oil Co* court of Sess R 18 at 53:
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> > 'One of the advantages that people are supposed to get by reference to arbitration is the finality of the proceedings when the arbitrator has once stated his determination. They sacrifice something for that advantage. They sacrifice the power to appeal. If, in their judgment, the particular judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary

> citizen prosecuting his remedy in the courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their difficulties to arbitration, as they have here, you cannot set aside the award simply because you think it is wrong.'"

See also *Kolber & Anor* v *Sourcecom Solutions (Pty) Ltd & Ors*; *Sourcecom Technology Solutions (Pty) Ltd* v *Kolber & Anor* 2001 (2) SA 1097 at 1111 G – I, 1112 A.

The views expressed in the foregoing authorities were endorsed by the South African Supreme Court of Appeal in *Telcordia Technologies Inc* v *Telkom SA Ltd* 2007 (3) SA 266 HARMS JA stated at 302 A:

> "An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry- they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry."

Pursing the same line of reasoning that it does not matter that the arbitrator may have misinterpreted the agreement, failed to apply the law correctly or had regard to inadmissible evidence, the learned judge of appeal stated at 302 D-E:

> "Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly---. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it."

That position is settled, a party to arbitration cannot come to court because the arbitrator was wrong.

The court will only interfere with an award which is not just wrong but where the reasoning or conclusion goes beyond mere faultiness or incorrectness but can be regarded as constituting a palpable inequity so far-reaching and so outrageous in its defiance of logic or acceptable moral standards as to cause a fair-minded person to regard it as unbearably hurting all sense of justice and fairness. In my view the authorities set a very high threshold for the court to interfere. It is certainly not enough that a party does not agree with the decision of the arbitrator and would rather have a re-assessment of the dispute. That is not what Articles 34 and 36 are intended for.

Regarding the issue of escalation of rent provided for in Clause 3 (e) of the agreement the respondent's position is that when multi-currencies were introduced the parties reached an agreement that rent would be US$170.00 a month. For that reason it is that figure which should

have been escalated in terms of the agreement. The applicant's case was that the parties failed to agree on a fair rent and while the dispute escalated they agreed on an interim figure of US$170 which was later revised to US$3000. The arbitrator found in favour of the applicant concluding that the only agreed rent which was expressed in writing was one sounding in Zimbabwe dollars which could not be escalated after that currency ceased to exist. In light, *inter alia* of Clause 25 which required all agreements to be expressed in writing, there was no agreement for payment of any amount in United States dollars.

In my view the decision reached by the arbitrator was supported by full reasons. He applied his mind and came to a conclusion. I am unable to see anything contrary to the public policy of Zimbabwe. Surely public policy cannot be disturbed by a decision adverse to one of the contesting parties.

On the issue of the procedure adopted by the arbitrator in the conduct of arbitration, it should be observed that arbitration proceedings are free from the trappings of formal court formalities and procedures. In fact their informality is their major strength which continuously attract parties to resort to that alternative dispute resolution mechanism. The arbitrator invited parties to provide additional information he required to arbitrate. He openly did so and also gave them an opportunity to make representations in that regard mindful of the rules of natural justice. This was an arbitration conducted in terms of an agreement containing Clause 20 (d), to wit:

> "The arbitrator shall decide the matter submitted to him according to what he considers just and equitable in the circumstances and therefore the strict rules of law need not be observed or to be taken into account by him in arriving at his decision."

There can be no doubt that this clause liberated the arbitrator from the shackles of procedure allowing him to decide the matter in any manner he deemed just and equitable. I do not regard requesting expert evidence on a fair rent to be an act of descending into the arena of battle as envisaged in the case of *Leopard Rock Hotel (Pvt) Ltd* v *Warrent Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 278 B-F, relied upon by Mr *Diza*. Even a court of law which is bound by rules of procedure is entitled to call a witness to clarify grey areas in a case. There was therefore nothing wrong, at least nothing which would offend public policy, with the arbitrator calling for evidence on the current fair rent.

The application for setting aside the arbitral award is clearly meritless and cannot succeed. I have said that both parties agreed that a dismissal of the application for setting aside the award

necessarily means that the award should be registered by the grant of the application for registration. I am however disinclined to award punitive costs. The respondent was entitled to test the correctness of the arbitral award.

In the result, it is ordered that;

1. The application for the setting aside of the arbitral awards of *Daniel Tivador* dated 10 April 2018 and 28 August 2018 which is case No 10011/18 is hereby dismissed.
2. The application for registration of the arbitral award which is case No. HC 9909/18 is hereby granted.
3. The arbitral award of *Daniel Tivador* dated 28 August 2018 is hereby registered as an order of the High Court of Zimbabwe in terms of Article 35 (1) of the First Schedule to the Arbitration Act [*Chapter 7:15*].
4. The respondent shall pay the applicant the sum of US$112 119.85.
5. The respondent shall pay interest on the sum of US$88 119.85 at the rate of 5% *per* annum reckoned from 6 December 2016 to date of final payment.
6. The respondent shall pay the costs of suit.

Kantor and Immerman, applicants' legal practitioners
Mhishi Nkomo Legal Practice, respondents' legal practitioners