SAMUEL JAKATA
versus
SOURCE PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 September, & 27 November 2019

Opposed Matter

R Goba, for the applicant
S Machingambi, for the respondent

DUBE J: The applicant is unhappy with an arbitral award of Rtd Justice L.G SMITH. He seeks an order to have it set aside in terms of Article 34 of the Arbitration Act, [*Chapter 7:15*],the Act , on the basis that it is contrary to the public policy of Zimbabwe.

The applicant's case is based on the following background facts. He leased the respondent's butchery shop at Arcadia Shopping Centre, Harare, initially for a six month lease agreement which was extended for two years. On 2 October 2018, the lease agreement was extended for the period 1 September 2018 to 31 January 2020. He duly signed it and returned it to the respondent for its signature but the lease agreement was not returned to him signed by the respondent. On 12 February 2019, he was given notice to vacate the premises before the lease expired. He did not sign the Groombridge lease agreement submitted for arbitration by the respondent. This is not the correct lease agreement the parties entered into. This dispute was referred to an arbitrator who was asked to determine if the applicant should vacate the premises. The arbitrator ordered that the applicant vacate the premises.

Aggrieved by the award, the applicant applied to this Court for the award to be set aside on the basis that it is contrary to the public policy of Zimbabwe. The grounds upon which the applicant seeks to have the arbitral award set aside are captured in his written submissions as follows. The Groombridge lease agreement refers to a shop in Groombridge. He never signed a lease agreement which stated the lease property as the one in Groombridge. It is a forged document and was prepared in haste. His signature was forged. This is not the lease agreement the parties entered into. The agreement referred to arbitration is vitiated by unlawfulness and is invalid. The lease agreement has expired and was therefore unenforceable and hence the

respondent had no cause of action. The arbitrator had no jurisdiction over this matter as he could only be conferred power to determine this matter through a valid lease agreement between the parties. It cannot be expected that the legal process of Zimbabwe should enforce contractual obligations which are of no legal validity. The appointment of the arbitrator is shrouded in mystery. He was not notified of the appointment of the arbitrator and the proceedings were conducted without any formal hearing. He preferred to have led oral evidence to challenge the validity of the respondent's claim. The award of the arbitrator endorsing the lease agreement is contrary to public policy.

According to the respondent, the parties entered into an agreement in respect of Shop Number 1 located at Arcadia Shopping Centre, Arcadia. It was signed by the parties on the 23rd of August 2018 and covers the period 1 September 2018 to 31 January 2019 and has expired. The lease agreement erroneously indicates the leased premises as Shop number 16, Stand 216 Groombridge, Harare. The respondent never wished to refer to the Groombridge shop but to the Butchery shop at Arcadia Shopping Centre. The applicant is in occupation of the Arcadia Shop and is paying rentals as agreed in the signed Groombridge lease agreement. The error is not fatal since both parties' meeting of the minds relates to the 'butchery shop' in Arcadia. He sought the ejectment of the applicant on the basis that the lease agreement has expired and the applicant has refused to vacate the premises in terms of the agreement. He is now an illegal occupant of the property. In his submissions before the arbitrator, the applicant alleged that his signature was forged as opposed to fraud which he now alleges. He failed during the arbitral proceedings, to prove that his signature was forged. He made bare allegations of fraud and has not shown that he reported a case of fraud against the respondent. He failed to file supporting affidavits to show that no witnesses of his signed the lease agreement. He is blowing hot and cold. At one time he alleges that the lease had expired and on the other that it was a fraudulent lease. He failed to challenge the appointment of Rtd Justice SMITH at the hearing. He is the one who suggested that the matter proceed on the basis of written submissions. It maintained that the applicant has not shown a basis for the setting aside of the award.

On 10 May 2019, Retired Justice L.G SMITH found that the lease agreement filed by the respondent is not a forged document and that the applicant's signature on the lease agreement filed by the respondent is not a forgery. He found that there was a clerical typing error which the parties overlooked when signing the leas and that at the time the parties signed the agreement, the parties minds were ad idem in relation to the property concerned. The intention of the parties in the lease agreement was to refer to the Arcadia property. He

discounted the applicant's assertion that there was fraudulent conduct and found that he failed to raise the mistake and he suffered no prejudice. He found that the lease agreement between the parties had expired and ordered that the applicant vacate the leased premises.

The court has been asked to determine if the arbitral award impugned offends public policy. Article 34(2) of the Act states as follows:

> "(2) An arbitral award may be set aside by the High Court only if —
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> (a) the party making the application furnishes proof that —
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> (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 an indication on that question, under the law of Zimbabwe; or
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> (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
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> (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
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> (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
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> (b) the High Court finds that —
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> (i) ……or
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> (ii) the award is in conflict with the public policy of Zimbabwe."

The *locus classicus* case on setting aside of awards on the basis that they offend the public policy of Zimbabwe is *Zesa* v *Maphosa* 1999 (2) ZLR 452 (S). In this case, the court said the following of the test to be applied,

> "What has to be focused upon is whether the award, be it foreign or domestic is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign forum would be prepared to recognise and enforce it."

The court went on to opine that an award is not contrary to public policy simply because the reasoning and conclusions of the arbitrator are wrong in fact and in law. On p 466E the learned court said the following,

> "An arbitral 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."

At p 466F–G, the court said the following of the conclusions of the arbitrator;

> "Not every amount of injustice or unfairness suffices to set aside an arbitral award. An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact and/or in law. The reasoning or conclusions of the arbitrator must go 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 concept of justice in Zimbabwe would be intolerably hurt by the award."

The approach laid out in the *Maphosa* case was followed in *Alliance Insurance* v *Imperial Plastics (Pvt) Ltd and Anor* SC 30/17 and in *Peruke Inv (Pvt) Ltd* v *Willoughby's Inv (Pvt) Ltd* SC 208 /14, where the court held that an award will be set aside only where there are "glaring instances of illogicality, injustice and moral turpitude" in the arbitral proceedings.

Art 34(2) (b) (ii) lays down public policy as one of the grounds for impugning an award. The article does not define instances when an award may be said to be contrary to public policy. The role of defining the ambit of the article has been left to the courts. The objective of the article is to give autonomy to arbitral awards and ensure finality of arbitral proceedings and the power of the courts to interfere with arbitral awards is very limited. The courts are slow to interfere with arbitral awards and lean towards upholding the concept of finality of arbitral awards. The concept of public policy is to be construed narrowly. If the courts were to have the final word on the merits of the awards, the process of arbitration would be undermined. The legislative intention of Art 34 is not to enable courts to revisit the findings of the arbitrator.

The article does not concern itself with the mistakes or correctness of the findings of an arbitrator or his reasoning. A court dealing with an application to set aside an award need not concern itself with the merits of the award. The court does not assume the role of an appeal court. The article reposes on the court supervisory powers and serves as a checking and balancing mechanism for arbitral proceedings at enforcement stage.

The assessment of the court is focussed on the award. Public policy has both procedural and substantive aspects. A party challenging arbitral proceedings on the basis that they are contrary to public policy can challenge both procedural and substantive aspects of the proceedings. Courts will only interfere with arbitral awards where the awards are incurably bad

and' go beyond mere faultiness or incorrectness'. The court's focus is on whether enforcement of the award offends the notions of public policy in Zimbabwe and is so illogical to the extent that it can be said that public perception of justice will be offended by the award. Below are some of the instances when an award will be set aside on the basis that it is contrary to public policy;

a) if it disregards fundamental values, interests and policies which are the basis of legal order in Zimbabwe
b) if it shocks the conscience and violates the most basic notions of morality and justice and social order of the country
c) There must be substantial injustice and it must be shocking to the court's conscience rendering enforcement repugnant
d) It must be patently illegal

Arbitral proceedings are of an informal nature. In terms of Art 34 (2) (a) (iv), the procedure followed during the arbitration proceedings must be in accordance with the agreement of the parties. The respondent submitted that the applicant chose to proceed by way of written submissions. This suggestion is supported on the papers and was not refuted. Having so elected, the applicant was afforded an opportunity to file written submissions and heads of argument .The rules of natural justice were observed. The arbitrator followed proceedings as agreed to by the parties.

In terms of clause 26. 3.2 of the lease agreement, in the event of arbitration, the proceedings were to be done by either Rtd Justice SMITH or Rtd Chief Justice GUBBAY. The later was reportedly in Canada and unavailable to conduct the arbitration. The only person left to do the arbitration in terms of the lease agreement was Rtd SMITH J. There is no mystery about the appointment of the arbitrator.

The arbitrator had power to rule on aspects related to his authority and jurisdiction. No formal application was made for his recusal. If the applicant was not happy with the choice of arbitrator, the procedure regarding his appointment and the conduct of the arbitral proceedings as a whole, he ought to have asked to be heard on the point. There is nothing contrary to public policy about the appointment of the arbitrator. This point lacks merit.

The arbitrator found that the questioned lease agreement was not forged and hence was not unlawful. The applicant challenges the reasoning and conclusions of the arbitrator and is asking the court to relook the award and revisit the arbitrator's findings of both fact and law. It

is not competent for this court to reopen the arbitrator's findings to decide for itself if the lease was forged or is a fraud. The fact that the arbitrator may have made a mistake and made wrong findings on either law or fact need not concern the court. It may not correct and substitute the findings of the arbitrator with those of its own even though the arbitrator may have misdirected himself. The court is not sitting as an appeal court. In any event, the allegations of fraud do not relate to the arbitration process or the award itself and are therefore irrelevant.

The challenge that the lease relied on by the respondent is not the correct one as the property was incorrectly described and is therefore invalid was discarded by the arbitrator. The Court will not revisit that finding. The applicant, despite the mistake in the lease, went ahead and occupied the correct premises for the duration of the lease. It is only at the stage when the lessor sought to eject him from the premises that he challenged the lease agreement on the basis that the lease relied on by the other party is not the correct one, the property wrong and that the lease agreement that the parties entered into is unlawful and unenforceable. Public policy takes into account notions of justice and the need to do simple justice between man and man, see *Pamire & Ors* v *Dumbutshena NO* 2001 (1) ZLR 123 (H). In that sense, it cannot be accepted that a man enters into a lease agreement, occupies the premises concerned, only to turn around after the lease has expired and when he has received full benefit from the premises to challenge the same lease agreement on the basis that it is illegal and unenforceable. An award that disregards such an attitude and orders ejectment of such a tenant, cannot be said to disregard fundamental values, interests of justice and policies which are the basis of legal order in Zimbabwe. This award cannot be said to shock the conscience of the court.

There is nothing contrary to public policy about an arbitrator sitting to determine whether a lease agreement has expired and whether a lessor is entitled to eject a tenant from premises .I am not satisfied that the arbitral proceedings or award has 'glaring instances of illogicality, injustice and moral turpitude' and shocks the conscience of the court. The applicant has failed to prove that the award of Rtd Justice L.G SMITH hurts the public policy of Zimbabwe No justification has been shown for the intervention of the Court.

Accordingly, application is dismissed with costs.

Nyika Legal Practitioners, applicant's legal practitioners

Tavenhave & Machingauta, respondent's legal practitioners