(1) TN HARLEQUIN LUXAIRE LIMITED (2) LIFESTYLE HOLDINGS LUXAIRE LIMITED
v
QUEST MOTORS MANUFACTURING (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, MAKARAU JA & BHUNU JA
HARARE, MARCH 1, 2018 & JUNE 18, 2018

S. M. Hashiti, for the appellants

F. Mahere, for the respondent

MAKARAU JA:

[1] This is an appeal against the whole judgment of the High Court handed down on 17 July 2017 in which the court registered an arbitral award in favour of the respondents.

BACKGROUND

[2] Towards the end of 2010, the first appellant and the respondent entered into a written lease agreement. The first appellant was the tenant. The second appellant bound itself as guarantor and co-principal debtor with the first appellant.

[3] It was a specific term of the lease agreement that the lease would subsist from 7 November 2010 to 30 November 2015.

[4] On 29 January 2013, the respondent's legal practitioners wrote a letter to the appellants expressing concern over information reaching the respondent that the second appellant was disposing of its assets, including its shares in a subsidiary company. The respondent was concerned that the contemplated sale of assets by the second appellant had the effect of diminishing the value of the security that the second appellant stood for, which it now regarded as being worthless. It demanded that the appellants revert to it within a time specified in the letter, with fresh appropriate security proposals. It ended the letter by threatening to approach the High Court for a suitable restraining order in the event that its demand was not met.

[5] The appellants were clearly annoyed by this demand. They viewed the respondent's conduct and in particular the demand, as repudiation of the lease agreement. They quickly accepted the perceived repudiation and communicated this to the respondent in a letter dated 7 February 2013. In the letter, the appellants advised the respondent that first appellant would, in consequence of the repudiation, be vacating the leased property on 28 February 2013.

[6] On 28 February 2013, the first appellant moved out of the leased premises thereby effectively terminating the lease agreement.

[7] It was an express term of the lease agreement that all disputes between the parties excepting for rental disputes, would be resolved by referral to arbitration. In accordance with this provision, the respondent referred the matter to arbitration. The arbitrator found the appellants in breach of the lease agreement and awarded the respondent damages equivalent to the rentals and other charges payable over the remaining period of the lease.

[8] The respondent applied to the court *a quo* for the award to be registered. The appellants opposed the application. They argued that the award was contrary to the public policy of Zimbabwe in that the arbitrator had committed errors in fact and in law in two main respects. Firstly, they argued that the arbitrator failed to find that it was the repudiation by the respondent that terminated the contract and not their vacation of the premises in February 2013. In the circumstances no damages were payable to the respondents. Secondly, they argued that in the event that damages were due, the arbitrator erred in failing to find that the respondent had not mitigated its loss.

[9] The appellants also raised a technical objection relating to the filing of the application. They alleged that the respondent had failed to attach to its founding documents the original copy of the award, thereby rendering the entire application fatally defective.

[10] The court *a quo* dismissed these arguments and registered the award.

THE APPEAL.

[11] The appellant noted an appeal against the decision of the court *a quo* by raising two main issues. They argued firstly that the court *a quo* had erred in failing to find that the application before it was fatally defective for want of formality. They insisted that the application ought to have been dismissed because the respondent did not attach the original copy of the award to its founding affidavit. Secondly, they argued that the court *a quo* erred in failing to find that the award was in conflict with the public policy of Zimbabwe.

[12] To his credit, and for reasons that I will give shortly, Mr *Hashiti* for the appellants did not mount any serious argument on the basis of the above grounds of appeal. Instead, he sought to amend the appellants' grounds to introduce a new basis for challenging the award.

APPLICATION TO AMEND GROUNDS OF APPEAL.

[13] *Mr Hashiti* moved to amend the grounds of appeal by raising a point of law, which if successful, would dispose of the appeal without recourse to the grounds filed of record. He sought to argue that the arbitrator had no jurisdiction to arbitrate over the dispute.

[14] The application was opposed. It was contended that the application, coming as it did without prior notice, was ill made and its consideration would result in some unfairness to the respondent.

[15] Rule 32 (3) of the Supreme Court Rules 1964 provides that an application to amend grounds of appeal may be made at the hearing of the appeal. The rule does not however provide the factors that the court must take into account when considering such an application.

[16] Case authorities hold that a question of law may be advanced for the first time on appeal. This is however only permissible if the point is covered by the pleadings in the court *a quo* and if its consideration will involve no unfairness to the party against whom it is directed. (See *Cole v Government of the Union of SA* 1910 AD 263, *Ngani v Mbanje and Another* 1988 (2) SA 649 (ZSC); *Austerlands (Pvt) Limited v Trade and Investment Bank Ltd and Others* 2006 (1) ZLR 372 (H) and *Alexkor Ltd v the Richtersveld Community* 2004(5) SA 460 (CC).

[17] The rationale behind allowing the introduction of a point of law on appeal for the first time is that the appeal court is duty bound to always come to the correct position of the law on the issues that were before the court *a quo* as covered by the pleadings. It is therefore inimical or contrary to its very existence for such a court to overlook the application of a correct principle of law merely on the basis that it has been argued at a late stage in the proceedings. The correct position of the law remains the correct position of the law no matter how late in the day it is discovered. The pursuit of justice comparatively lies more in arriving at a legally correct solution and less in marching the parties along precisely defined pathways at defined times.

[18] In this appeal, it is common cause that the issue sought to be raised by the appellants is not covered by the papers that were filed in the court *a quo*. It was not raised before the arbitrator. As stated above, it was raised for the first time at the hearing of this appeal by way of an oral application. No papers have been filed with any court raising this issue.

[19] On the basis of the authorities, I should be slow in granting the application as the issue was not covered by any of the papers filed of record. However, if this was the only consideration, I would have been inclined to hold that it was not sufficient on its own to ground a denial of the amendment. Following the reasoning of KOSAH JA in *Ngani v Mbanje and Another* (*supra*), I would have been persuaded to hold that the issue of want of jurisdiction on the part of the arbitrator strikes at the very root of the award. As such, even if no papers were filed before the court *a quo* but it was proven that the arbitrator had no jurisdiction, it would create an intolerable situation to uphold the award in such circumstances.

[20] The fact that the issue of jurisdiction was not covered in the papers filed of record is not the only difficulty in this matter. What has exercised my mind in this application is whether or not it is fair to the respondent to allow an amendment of the grounds of appeal to introduce a ground that is clearly without merit.

[21] A reading of the decision in *Cole v Government of the Union of SA* (*supra*) seems to suggest that the permissible point of law being raised for the first time on appeal must be fatal to one or more of the contentions of the other party. Indeed, it would serve no purpose for the appellant to raise a point of law that does not meet the respondent's case in a material way. In other words, it would be pointless to raise a point of law that is not dispositive of the whole or part of the appeal.

[22] I gain this impression from what INNES J had to say at p272-3 of the judgement. This is what he said:

> "If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the court is bound to deal with it, and no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. **In presence of these conditions a refusal by a Court to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.**" (The emphasis is mine).

[23] Clearly, the court of appeal must not refuse to give effect to a point of law that will make it come to the correct position at law. By parity of reasoning and to the contrary, a court of appeal may or indeed must refuse to give effect to a point of law that will not lead it to the correct position at law on the pleadings that were before the court a quo. Thus, if the point of law raised is not fatal to any of the contentions of the respondent, or is incorrect in other respects, it has no adverse effect on the judgment appealed against which remains the correct

position at law. It therefore serves no useful purpose but to vex and cause unfairness to the respondent. This in my view is the effect of an unmeritorious point of law.

[24] On the basis of the foregoing and relying on the authorities, it is my finding that unfairness to the other party will exist if the ground of appeal sought to be raised is without merit.

[25] In *casu*, the appellants argued that the arbitrator did not have jurisdiction to arbitrate in the matter as the dispute between the parties was a rental dispute. I do not agree. The dispute between the parties was not over rent due or payable. The claim filed by the respondents before the arbitrator was for the payment of contractual damages for the unfinished part of the lease period following the first appellant's vacation of the premises. On the other hand, the appellants, whilst admitting that the first appellant had vacated the premises as alleged, argued that this was after the agreement had been terminated by the respondent. The issue that was before the arbitrator was whether or not in the circumstances, the appellants were liable to the respondents in damages and if so, the *quantum* thereof.

[26] Clearly, in terms of the agreement of lease, the arbitrator had jurisdiction to arbitrate over this dispute.

[26] I will therefore deny the amendment sought by the appellants on the grounds that it does not meet the requirements set out in case law on when a court of appeal may allow the introduction of a point of law for the first time.

[27] In the result, the application to amend the appellant's grounds of appeal is hereby dismissed.

ANALYSIS

[28] I now revert to the grounds of appeal filed of record.

[29] While counsel for the Appellants did not press on the first ground of appeal, for the completeness of the record, I will proceed to deal with it.

[30] In this ground, the appellants argue that the court *a quo* erred in failing to find that the application before it was fatally defective because the respondent did not attach to it the original copy of the award.

[31] The court *a quo* ruled that the requirement to attach the authenticated copy of the award was met by the attachment of the original copy to the respondent's answering affidavit. I agree.

[32] In arguing as they do in this ground of appeal, the appellants are conflating two formalities that are derived from two different sources.

[33] The requirement to supply a copy of the authenticated copy of the original award is provided for in Article 35 of the Model Law. This provides in part as follows:

(1) ……..
(2) The party relying on an award or applying for its
> enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof.

[34] The requirement that all material averments must be made in the founding affidavit of an applicant are on the other hand to be found in the High Court Rules 1971 and these govern all applications generally.

[35] There is therefore no provision in the Model Law or in the High Court Rules to the effect that in an application for the registration of an award, it is fatal not to attach the original copy of the award to the applicant's founding affidavit. Article 35 of the model law is silent as to how the original copy is to be supplied. The rules of the High Court permit the filing of answering affidavits to answer to issues raised in the opposing affidavit. Where therefore the required copy of the award is supplied to the High Court through the filing of an answering affidavit, in my view this constitutes substantial compliance with the provisions of Article 35.

[36] As was correctly observed by the court *a quo*, the mischief sought to be averted by the requirement in article 35 (2) of the model law is to ensure that the High Court is satisfied that it is registering an authentic award.

[37] On the basis of the above, it is my finding that there is no merit in the first ground of appeal. I accordingly dismiss it.

[38] Regarding the remaining grounds of appeal, the court *a quo* was correct in dismissing the arguments raised therein by the appellants. As stated above, the essence of the remaining grounds of appeal is that the award is contrary to the public policy of Zimbabwe.

[39] The test on whether or not an arbitral award offends against public policy is settled.

[40] An award is not contrary to public policy merely because the reasoning of the arbitrator is wrong in fact or in law. For an award to be viewed as being offending against public policy on the basis of an alleged error on the part of an arbitrator, the proven error must go beyond mere faultiness or incorrectness to constitute a palpable departure from justice. It must make justice and one's sense of justice spin on its head. It must be outrageous in its defiance of logic or moral standards that a sensible and fair minded person viewing the award would consider that it has the effect of intolerably hurting the conception of justice in the jurisdiction. (See *ZESA v Maphosa* 1999 (2) ZLR 452 (S); *Wei Wei Properties (Pvt) Limited v S & Export and Import (Pvt) Limited* 2013 (2) ZLR 358 (H) and *Decimal Investments (Pvt) Limited v Arundel Village (Pvt) Limited and Anor* 2012 (1) ZLR 581 (H)).

[41] The essence of the appellant's case against the arbitral award both before the court *a quo* and this Court is that the arbitrator erred in his reasoning. The appellants give the particulars of such alleged errors in detail.

[42] Even accepting that the arbitrator erred as alleged, such errors may have constituted valid grounds of appeal from one court of law to another but are completely ineffective in preventing the registration of an arbitral award made in terms of the Arbitration Act [*Chapter 7:15*], on the grounds that such an award is contrary to the public policy of Zimbabwe.

[43] Regarding the alleged first error, namely that the arbitrator erred in failing to find that it was the repudiation by the respondent that terminated the lease, the arbitrator was clearly faced by two mutually destructive contentions. The respondent claimed that at the time the first appellant vacated the leased premises, the lease agreement was still extant and binding on the

parties. The appellants on the other hand argued that by the time it vacated the premises, the lease agreement was no longer binding, having been terminated by the respondents. Logically, the arbitrator had to agree with one of the legal positions contended. He could not have found in favour of both. The mere fact that he upheld the respondent's contention is not sufficient to set aside the award on the basis of offending against the public policy of Zimbabwe. The appellants ought to have gone a step further to show that in coming to this decision, the arbitrator caused a palpable inequity, one that would make justice spin on its head, one that intolerably injured the concept of justice in Zimbabwe. This they have not done because they cannot. The arbitrator gave full reasons for his decision in choosing to side with the respondent. That is adequate at law to protect the award against an attack that the award is contrary to public policy. The fact that the arbitrator could have found differently but did not is not a consideration that the court *a quo* had to take into account in the matter that was before it. Put differently, the court *a quo* was not sitting as a court of appeal to correct the decision of the arbitrator. Neither is this Court.

[44] The analysis above applies with equal force to the second alleged error by the arbitrator. The issue of whether or not the respondent fully mitigated its loss is a question of fact. The arbitrator made his finding on it. Whether or not he was correct in arriving at this finding was an immaterial consideration before the court *a quo as long as his alleged error did not approach the outrageous dimensions set out in the authorities*. In the absence of a demonstration that the award approached such dimensions of hurting the conception of justice in Zimbabwe, the alleged error remains an immaterial consideration.

[45] The appellants' grounds of appeal are in my view no more than a thinly disguised appeal against the arbitral award, which at law is incompetent as arbitral awards are non-appealable.

[46] Finding no merit in the arguments by the appellants that the award was contrary to the public policy of Zimbabwe, I accordingly dismiss all their grounds of appeal in this respect. These are grounds of appeal numbers 2 to 7.

[47] Regarding costs, I do not see any reason why these should not follow the cause. Indeed, neither of the parties requested that there be any special order as to costs.

[48] In the result, I make the following order:

The appeal is dismissed with costs.

GWAUNZA JA I agree

BHUNU JA I agree

Mtetwa & Nyambirai, appellant's legal practitioners

Venturas & Samukange, respondents' legal practitioners.