

OLD MUTUAL INVESTMENT GROUP
versus
M AND S DRIVING SCHOOL
and
MARKO CHINGOMA

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 18 October 2012 and 30 April 2014

Opposed application

E Jori, for the applicant
E Samukange, for the respondents

MAKONI J: The applicant applied under case numbers HC 1010/12, HC 4009/12 and HC 4008/12 for the registration of arbitral awards in terms of Article 35 of the United Nations Commission of International Trade Law (UNIC TRAL) Model Law (Schedule to Arbitration Act [*Cap 7:15*]) against the respondents.

The respondents, in turn, and in case numbers HC 5351/12, 5418/12, 5549/12 and 5350/12, applied for the setting aside of the awards, in terms of Article 34 (2) (b) (ii) of the Act.

At the hearing of the matters, and by consent of all the parties, the matters were consolidated with the applications by Old Mutual being the main applications and the applications by the respondents being counter-applications. At the conclusion of the hearing, I gave an order in favour of the applicant with reasons to follow later. These are they.

The brief background to the matter is that the applicant is the landlord and the respondents are tenants, in terms of a written lease agreement, at applicant's premises at Metro Centre. In terms of clause 42 of the lease agreement, the applicant gave 6 months notice to the respondents to vacate the premises to pave way for demolitions of the premises and redevelopment of the site. The respondents did not comply with the notice. Consequently, the applicant commenced arbitration proceedings in terms of clause 41 of the lease agreement. The matter was determined by the Honourable Justice C.G SMITH (retired), who made an award in favour of the applicant. It is these awards that is at the centre of the dispute between the parties. The applicant applies in terms of Article 35 of the Model Law

that the award be registered. The respondents counter-apply for the setting aside of the awards.

It is applicant's contention that once a party has made an application in terms of Article 35, he or she is entitled, as a matter of right to have the award registered unless the respondent shows sufficient cause for the court to decline same. In order to discharge the onus upon him, the respondent, resisting registration of an arbitral award, should establish one or more of the defences prescribed in the Article 36. It is applicant's submission that the respondents *in casu*, have failed to sufficiently set out grounds warranting refusal of recognition of the award.

The respondents resist the registration of the award on the basis that the award is against public policy for two main reasons *viz*;

- (i) Bias on the part of the Arbitrator
- (ii) That the Arbitrator did not make a finding on a fundamental issue whether the notice to terminate the lease agreement was valid.

Article 35 provides that:-

“(1) An arbitral award, irrespective of the country in which it is made, shall be recognised as binding and upon application to the High Court, shall be enforced subject to the provisions of this Article and of Article 36.”

Article 36 provides grounds for refusal of recognition or enforcement of an award. In s 1(b) it provides:-

“(b) if the court finds that:-
(i) -----
(ii) The recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.”

Article 34(2) provides the basis upon which and arbitral award can be set aside. It provides:-

“2 (a) An arbitral award may be set aside by the High Court only if-

- (i) -----
- (ii) -----
- (iii) -----
- (iv) -----

Or

b) the High Court finds, that-

- (i) -----
- (ii) the award is in conflict with the public policy of Zimbabwe.”

From the above it is clear that the High Court can refuse to recognise an award or can set aside an award on the basis that it is contrary to public policy.

The doctrine of public policy was defined in the following terms by GUBBAY CJ (as he then was) in *ZESA v Maposa* 1999(2) ZLR 4522 at 453 C-E.

“The approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitration, and to hold such defence applicable only if some fundamental principle of law or morality or justice is violated. 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 constitute 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. The same consequences apply 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”.

Bias

The respondents content that the Arbitrator was biased when he determined their matters as he had issued arbitral awards in default, for the eviction of other tenants from Metro Centre. This factor was not brought to their attention by either the Arbitrator or the applicant. The Arbitrator determined their matters with existing negative awards he had made on the same facts. There was need for the Arbitrator to be consistent as the respondents were in the same category with the other tenants for which awards in default had been issued.

It was submitted on their behalf that in terms of Article 18 of the Model Law, there should be equal treatment of parties and each party should be given a full opportunity to present its case before an Arbitrator. By not advising the respondents that he had issued default judgements, the Arbitrator did not treat the parties equally and fairly. It was further submitted that there where bias is alleged, one does not need to prove actual existence of malice. The court is simply concerned with the honest view of the bystander.

The applicant’s position is that it is not correct that the Arbitrator had already taken a position before hearing this matter. At the commencement of the hearing it was established that two of the tenants were in default. This was in the presence of the respondents. The Arbitrator did not make any substantive awards against those in default, prior to the hearing of this matter. This matter was heard on 2 March 2012 and the awards in default were only made on 13 March 2012.

The test as to when a person performing a judicial function should be disqualified to act on the grounds of interest or bias was discussed in *Leopard Rock Hotel Co (Pvt) Ltd and Anor v Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255(S) at 273G-H and 274 A-C where KOSAH J reviewed a number of cases on this issue. At p 273 G-H he quotes LORD GOFF in *R v Gough* (1993) 2 ALL ER 724 (HL) at 130 e-g where he said.

“I turn next to the broader question of bias on the part of a member of the relevant tribunal. Here it is necessary to put on one side the very rare case where actual bias is shown to exist. Of course, if factual bias is proved, that is an end of the case: the person concerned must be disqualified. But it is not necessary that actual bias be proved; and in practice the enquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include, but are by no means limited to, cases in which a member of the tribunal has an interest in the outcome of the proceedings which falls short of direct pecuniary interest. Such interests may vary widely in their nature, in their effect and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of a pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts”.

KOSAH JA then continued at p 274 C and stated

“As the court always adopts the standard of the reasonable man in resolving factual issues, I understand the words: “the court will not allow the decision to stand” to imply that: “nothing is to be done which will create a suspicion **in the mind of the reasonable man** that there has been an improper interference with the course of justice”.

He then concluded at p 275 A by stating:

“A common theme which runs through the authorities is, therefore, that the test to be applied is an objective one. One does not enquire into the mind of the person challenged to determine whether or not he was or would be actually biased. Thus the character, professionalism, experience or ability as to make it unlikely, despite the existence of circumstances suggesting a possibility of bias arising out of some conflict of interest, that he would yield to infamy, do not fall for consideration”.

Applying that test to this matter, the question would be are there any circumstances which may engender a belief in the mind of reasonable litigant that in the arbitral proceedings he would be at a disadvantage.

My view is that the answer to the above should be in the negative. To suggest that the Arbitrator’s mind would have been influenced by awards he made in default is to slight the

Arbitrator's intelligence and experience. Regard to the award itself will show that the Arbitrator applied his mind and considered the submissions made before him by the parties before arriving at a decision. I do not understand why the Arbitrator could not have arrived at a different conclusion, to the awards in default, if the circumstances warranted. No "precepts of natural justice" were offended as claimed by the respondents.

Notice to vacate

It is the respondents' contention that the Arbitrator did not make a finding on the issue of whether the notice to terminate the lease agreement was valid. It was submitted on behalf of the respondents that award envisages stay of the respondents on the premises as being unlawful for the reason that the applicant had redevelopment plans. The view is erroneous as the lease agreement between the parties was binding at the material time. The applicant gave as its reasons for terminating the lease, as non compliance with municipal by-laws as well as failure to meet minimum health standards. The notice is therefore invalid and respondents had no obligation to comply with same.

I do not understand the basis of the respondents' position. The notice given by the applicant and which is on p 41 of the record, has given in terms of clause 42 of the Lease Agreement. The clause among other things, authorizes the premature termination of the agreement if the landlord wishes to demolish the premises and redevelop the site. The Arbitrator applied his mind to this issue on p15 of the award, which is p154 of the record whereby he makes a finding that the requisite six calendar months notice was given to the respondents. He further went on to give the meaning of clauses 41 and 42 of the Lease Agreement and concluded by saying that the respondents had failed to establish their allegations that the applicant was acting in bad faith.

The Arbitrator might have been wrong in arriving at that decision in the respondent's view. The position is settled in our law regarding wrong decision by Arbitrators. See *Catering Employers Association of Zimbabwe v Deputy Chairman, Labour Relations Tribunal & Anor* HH206/00 where it was stated

"Even where the Arbitrator made a finding that was erroneous or unreasonable the court should not interfere but it could only interfere if the decision was attended by a gross irregularity or it resulted in a failure of justice."

See also *ZESA v Maphosa supra* where GUBBAY CJ stated

"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 *casu*, I am satisfied that the Arbitrator exercised his powers judiciously in arriving at the award in question. He did apply his mind to the question, before him. I will make a finding that the award is not contrary to public policy.

The applicant in its papers also raised a point regarding the Arbitration Clause in the lease agreement which the respondents did not respond to. I take it that they agree with the applicant's position.

The Arbitration Clause provides:-

“41.6 The decision of the Arbitrator shall be final and binding on the parties to the dispute and may be made an order of court at the instance of the parties to the dispute.”

The effect of such a clause was dealt with in *Ropa v Reosmart Investments (Pvt) Ltd and Anor* 2006 (2) ZLR 283 at 286 B-C where GWAUNZA JA quoted the following passage by Butler and Trisen in *Arbitration in South Africa (Law and Practice, 1993)* at p 271 where the authors explain the legal consequences of an arbitral award thus

“The most important legal consequences of a valid final award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless their arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action”.

GWAUNZA JA then went on to state that the above position applied with equal force in Zimbabwe.

This court should always be reluctant to interfere with an award where the parties have agreed on an arbitration clause and this court will not do so.

The applicant prayed for costs on a legal practitioner and client scale *de bonis propriis*. Its basis is that the respondents' case, not only lacked merit but is a classical abuse of court process which the court should frown upon. Whilst I agree with the applicant's position that the respondents' opposition to the application amounts to an abuse of court process with the aim of delaying the finalisation of this matter whilst they continued to enjoy the use of applicant's premises, I do not agree with the proposition for costs *de bonis propriis*. I will therefore award costs on a higher scale. In the result, I will make the following order

- 1) The counter applications are dismissed.

- 2) The Arbitral Awards made in favour of the applicants as against the respondents by Honourable Justice L.G SMITH be and are hereby registered as an order of this court in terms of Article 35 of the Arbitral Law (Schedule to the Arbitration Act) [*Cap* 7:15).
- 3) The respondents to pay costs on a higher scale to the applicant.

Wintertons Legal Practitioners, applicant's legal practitioners

Venturas & Samukange, respondents' legal practitioners