FRANCINA ZIMAYI
versus
BURDOCK INVESTMENTS (PRIVATE) LIMITED
and
AUXILLIA DANAYI MUNYEZA
and
WILLIAM KENNETH LUNT

PATEL J
HARARE, 11 May 2006 and 17 September 2007

Opposed Application

Mrs. Nyemba, for the applicant
Mr. Pundu, for the 1st respondent
Ms. Sande, for the 2nd respondent

PATEL J: The applicant seeks an order setting aside an arbitration award made by the 3rd respondent in September 2004 and compelling the transfer of Stand No. 2950, Bluff Hill, Harare, into her name. In the alternative, in the event that the property cannot be so transferred, she seeks an award of damages for the difference between the original purchase price paid by her and the prevailing market value of the property. At the hearing of this matter, counsel for the applicant accepted that the applicant's claim should be confined to the alternative claim for damages.

At the end of the hearing, counsel for the parties were directed to file further Heads of Argument on specific legal issues. These further Heads appear to have been filed timeously but, due to administrative inadvertence, were only availed to the Court over 15 months later.

The Facts

In December 2000 the applicant purchased the disputed stand from the 1st respondent who later sold the same to the 2nd respondent. The 1st respondent argued that the applicant failed to pay the full purchase price timeously and that, therefore, the first agreement of sale lapsed automatically. The applicant's deposit was duly refunded and the property was then sold to the 2nd respondent

in November 2001 for the sum of $4.8 million. The applicant did not make any improvements to the property, whereas the 2nd respondent has effected significant improvements on the stand. The 2nd respondent avers that she was an innocent and *bona fide* purchaser of the stand who paid the full purchase price therefor.

The dispute was referred to an arbitrator, the 3rd respondent, who upheld the validity of the first sale agreement. However, he found that the 2nd respondent was a *bona* fide purchaser who had effected all the improvements on the stand. He accordingly awarded to the applicant the sum of $4.8 million as damages in lieu of restitution, together with interest thereon at the asset management rate for 30 day deposits, calculated from the 4th of October 2004 to the date of full payment. The applicant challenges this award as being contrary to public policy on the basis that it is grossly unreasonable.

The Issues

Having regard to the submissions and concessions made on behalf of the parties, there are two principal issues to be determined in this matter. The first is to ascertain the proper date for calculating the damages awarded to the applicant, viz. the date when the property was sold by the 1st respondent to the 2nd respondent (November 2001) or the date when the award of the arbitrator was handed down (September 2004). The second is to determine whether or not the amount awarded by the arbitrator is so grossly unreasonable as to constitute a palpable inequity contrary to public policy.

Date for Calculating Damages

The facts in this case are broadly similar to those in *Parish v King* 1992 (1) ZLR 216 (S). In that case the respondent had sold a house to the appellant. The price had been paid and transfer had been effected. The respondent, however, maintained that the full purchase price had not been paid by the appellant as well as other

amounts owing to him by her. He then obtained a default judgement against the appellant in which the sale of the house was cancelled and the property was transferred back to him. After the retransfer to him, he sold the house to a third party. By the time the appellant obtained a rescission of the default judgement the house had already been transferred into the name of the third party to whom it had been sold. As this third party was an innocent purchaser his real right to the property could not subsequently be disturbed. It was held that as the deprivation of ownership occurred after the contract was complete, the wrong had nothing to do with contract. Instead, it was a delictual wrong and damages were therefore claimable in delict. It was further held that in a claim in delict for wrongful deprivation of ownership of immovable property delictual damages are to be calculated as at the date of the delict. As observed by McNALLY JA, at 227:

> "…….it is not equitable for a plaintiff to delay the institution of proceedings and then seek to benefit from the fact that the value of the disputed property has been considerably enhanced by the passage of time."

In *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 420 (A), at 428-429, HOLMES JA stated that:

> "The time at which to measure the delictual damage is ordinarily the date of the delict, because that is when the owner's patrimony is reduced.
>
> …….I would add that the present case is distinguishable from a vindicatory action claiming restoration or value where the defendant is in possession or can acquire possession. In such actions the value is determined as at the date of trial or judgement."

In the present matter, it is accepted by the parties that the applicant's claim is one founded in delict. It is also common cause that the 2nd respondent was an innocent and *bona fide* purchaser of the property and that it is the 1st respondent that is liable to the applicant for delictual damages. As the 1st respondent is no longer in possession of the property, the exception to the general rule

referred to in the *Philip Robinson Motors* case, *supra*, does not apply and cannot assist the applicant.

As for the passage of time, the dispute herein first arose in early 2001 but was only referred to the 3rd respondent for arbitration towards the end of 2002. In her founding papers, the applicant does not explain the reason for the delay in having the dispute arbitrated at the earliest opportunity. Moreover, her initial claim was solely for the transfer of the property into her name and the alternative claim for damages was only formulated at a much later stage.

On the foregoing facts and notwithstanding the ravages of rampant hyperinflation, I see no reason for departing from the general rule that delictual damages for wrongful deprivation of immovable property must be assessed as at the date of the delict and not as at the date of judgement. It follows that the damages claimable by the applicant *in casu* are properly calculable as at the date when the property was sold by the 1st respondent to the 2nd respondent and not when the award of the arbitrator was handed down.

Whether Arbitral Award Contrary to Public Policy

In terms of the relevant portions of Article 34 of the Model Law, viz. the First Schedule to the Arbitration Act [*Chapter 7:15*]:

> "(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) ……; or
>
> (b) the High Court finds, that—
>
> (i) ……; or
>
> (ii) the award is in conflict with the public policy of Zimbabwe.
>
> (3) ……
>
> (4) ……
>
> (5) 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—

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

The approach to be followed in applying the above-cited provisions was aptly set out by GUBBAY CJ in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 465-466, as follows:

> "In my opinion, 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 arbitrations; and to hold such defence applicable only if some fundamental principle of the 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. 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. 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.
>
> The same consequence applies 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 above."

It must be emphasised that Article 34(2) of the Model Law sets out the sole grounds on which the High Court may set aside an arbitral award. As observed by SANDURA JA in *Catering Employers Association of Zimbabwe v Zimbabwe Catering and Hotel Workers Union* 2001 (2) ZLR 388 (S) at 392:

> "The suggestion by the learned judge is that, in addition to the grounds set out in Art 34(2) of the Model Law, an

> arbitral award may be set aside by the High Court on review on the grounds set out in s 27 of the High Court Act [*Chapter 7:06*]. I respectfully disagree. In my view, Art 34(2) of the Model Law sets out the sole grounds on which an arbitral award may be set aside by the High Court. That is what Art 34(2) says and that is what this court said in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 458F."

Turning to the arbitral award *in casu*, the 3rd respondent concluded his determination as follows:

> "The examination above of all the factors and consequences of different approaches to the problem satisfies me that the correct approach to this unhappy affair is to ensure that the Claimant gets the full value of the house at the stage that it was unlawfully sold to Mrs. Munyeza, because to order the delivery of the house to her would be to enrich her far beyond any realistic compensation at the expense of an innocent third party who has herself contributed most to the present value of the property in dispute.
>
> Claimant or her agent appears to have received a refund of the amount which was the subject of the correspondence with Unibank and the amount of the deposit and the $34 691 towards the infrastructure costs is part of the cost of bringing the building to the stage it had reached when bought by Mrs. Munyeza.
>
> I believe, therefore, that the justice of the case will be met by an Award against the Respondent in favour of the Claimant in the amount of $4 800 000 .....together with interest thereon at the rate offered by Imara Asset Management for deposits of 30 days, such interest to run from and including Monday 4 October 2004 until the date of payment, and it is so awarded."

It is clear from this determination that the 3rd respondent adopted the correct approach in assessing the quantum of delictual damages due to the applicant, viz. the value of the house at the date of the 1st respondent's delict. The only difficulty with the award is that the interest element is to be reckoned from the date of the award rather than from the date of the delict. In my opinion, the interest on the amount of damages granted should have been awarded at the prescribed rate (not at the asset management rate) and made to run from the date of the delict, i.e. November 2001. As things stand at present, the award remains unpaid by the 1st

respondent and the applicant will in fact benefit from the application of the considerably more generous rate of interest fixed by the award.

In the event, the view that I take of this matter is that the 3rd respondent's errors vis-à-vis the rate of interest and the date of commencement thereof are relatively negligible in the circumstances of the case. As such, they do not 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.

In the result, I hold that that the 3rd respondent's award does not conflict with the public policy of Zimbabwe and that, therefore, there is no valid reason for setting it aside or otherwise interfering with it. The present application is accordingly dismissed with costs.

Nyemba & Associates, applicant's legal practitioners
Pundu & Associates, 1st respondent's legal practitioners
Mapondera & Company, 2nd respondent's legal practitioners