RONALD TONDERAYI MUCHAKA
versus
DONALD DERECK ZHANJE
and
THE HONOURABLE JUDGE GEORGE SMITH (RETIRED) N.O.

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 26 March and 7 July 2009

Mr. Madya, for the applicant
Mr. Mundiye, for the 1st respondent

PATEL J: The background to this case is as follows. The applicant and 1st respondent ran a real estate business in partnership for approximately 2 to 3 years until a dispute arose between them. The applicant then instituted proceedings in this Court in Case No. HC 2521/05. In order to expedite the resolution of the matter, the dispute was referred to the 2nd respondent (the arbitrator) for determination. The arbitrator delivered his award in January 2007. The applicant now challenges that award under Article 34(2)(a)(iii) and 34(2)(b)(ii) of the First Schedule to the Arbitration Act [*Chapter 7:15*] (the Model Law).

The Law

Article 34(2) of the Model Law, in its relevant portions, provides as follows:

"An arbitral award may be set aside by the High Court only if —

(a) the party making the application furnishes proof that—
  (i) .....; or
  (ii) .....; or
  (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

(iv) ……; or

(b) the High Court finds, that—

(i) ……; or

(ii) the award is in conflict with the public policy of Zimbabwe."

The circumstances in which an award may be held to be in conflict with public policy were considered in *ZESA v Maphosa* 1999 (2) ZLR 452 (S) at 465-466. It was held, per GUBBAY CJ, that:

> "The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe.
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> 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.
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> 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."

In *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) it was noted that an award of damages for breach of contract is intended to put the parties in the position they would have been had the contract been properly performed. Accordingly, MAKARAU J held that to grant full damages to a party in spite of its own failure to meet all its obligations under the contract would violate elementary notions of justice and would thus be contrary to public policy.

The Challenged Award

Having found that the applicant had not brought any assets into the partnership, the arbitrator proceeded to make his award. In essence, taking into account the 1st respondent's material contribution to the partnership, he awarded the remaining assets of the partnership in a manner that was more favourable to the 1st respondent. He also issued specific directions to the liquidator in drawing up the accounts of the partnership. Each party was ordered to bear its own costs in connection with the arbitration and each party was to pay half of the arbitration fee.

Submissions

Mr. Madya for the applicant submits that the arbitrator's award must be set aside for two reasons. Firstly, the arbitrator went beyond the issues referred to him for determination, as set out in the applicant's Statement of Claim, in that he proceeded to apportion the assets of the partnership as between the parties. Secondly, in apportioning the assets, he acted without the benefit of any valuation of the partnership assets or partnership accounts or submissions on apportionment and also disregarded the law of partnership. In so doing, he acted in a manner that was grossly unreasonable and therefore contrary to public policy.

Mr. Mundiye for the 1st respondent submits that the dispute between the parties is properly reflected in the pleadings filed in

Case No. HC 2521/05. It is the issues in that case that were referred to the arbitrator, as appears in a letter dated the 5th of December 2005 from the 1st respondent's lawyers to the applicant's lawyers, and as amplified in the applicant's Statement of Claim and the 1st respondent's Response thereto. The arbitrator was therefore at large to resolve the dispute in whatever manner he considered fair, reasonable and lawful and to apportion the assets of the partnership.

Disposition

The relief sought by the applicant in Case No. HC 2521/05 was an order dissolving the partnership and an order appointing a liquidator to realise the assets of the partnership, to liquidate its liabilities, to prepare a final account and to distribute the net assets of the partnership. In their letter of the 5th of December 2005, the 1st respondent's lawyers proposed a possible settlement of the dispute, failing which the matter should be referred to arbitration. The applicant's lawyers responded on the 3rd of January 2006, rejecting the proposed settlement and agreeing to the referral of the matter to arbitration by the 2nd respondent. Thereafter, there was no formal submission by the parties of the specific issues to be determined by the arbitrator.

Given this background, I find it difficult to discern how it can be said that the arbitrator dealt with a dispute not contemplated by or not falling within the submission to arbitration, or that his award contained decisions on matters beyond the scope of the submission to arbitration. In short, I am unable to accept the applicant's contention that the arbitrator's award went beyond his remit under the broad submission to arbitration.

Turning to the substance of the award, it is clear that the essential purpose of the reference to arbitration was to resolve the dispute between the parties as to the assets of the partnership and the respective rights and interests of the parties in those assets

upon the dissolution of the partnership. Therefore, given that the partnership was not intended to continue but was to be dissolved, the apportionment of assets at that stage cannot logically be contrary to the law of partnership. In any event, even assuming the correctness of the applicant's contention in that regard, I cannot see any justification for setting the award aside *in casu*.

As the case authorities show, the public policy argument under Article 34(2)(b)(ii) of the Model Law is to be restrictively construed so as to preserve and recognise the basic objective of finality in the arbitration process. An award cannot be held to be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Moreover, even if it were to be found that the arbitrator's decision was erroneous as contended by the applicant, I am not persuaded that his reasoning or conclusions were so flawed as to violate some fundamental principle of the law or morality or justice. In my view, the challenged award does 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.

Accordingly, the applicant has not succeeded in justifying either of the grounds of challenge that he has mounted *in casu*. In the result, this application is dismissed with costs.

Wintertons, applicant's legal practitioners
Gill Godlonton & Gerrans, 1st respondent's legal practitioners