WEI WEI PROPERTIES (PVT) LIMITED
versus
S &T EXPORT AND IMPORT (PVT) LIMITED

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 24 September 2013 & 09 October 2013

*T.A. Tavenhave,* for the applicant
*C. Mcgown,* for the respondent

**Opposed application**

MATHONSI J: This is an application for the registration of an arbitral award made by Retired Justice Smith on 31 May 2012 in terms of which he confirmed as valid, the termination of a lease agreement between the parties, directed the respondent to vacate the leased premises, namely 1st and 2nd Mezzenine Floors Century House West, 36 Nelson Mandela Avenue Harare, (the premises), or face eviction and directed the respondent to bear the applicant's costs on the scale of legal practitioner and client.

The application is opposed by the respondent which has also filed a counter application seeking the setting aside of the arbitral award which counter application is also opposed by the applicant.

The applicant is the owner of the premises which it leased to the respondent by lease agreement signed on 6 July 2010. The said agreement was due to expire on 31 December 2012. In terms of Clause 1 of the lease agreement;

"1. DURATION

1.1. Notwithstanding the date of signature here of this agreement shall commence on 1 January 2010 and shall continue for a period of 3 years terminating on 31 December 2012 (here-in after referred to 'the terminal date') and the agreement shall continue in full force as a periodic lease, terminable by either party on three calendar months written notice.

1.2. Operating Costs Attributable share shall be based upon the ratio which the floor areas of the leased premises bears to the total lettable areas of the building.

1.3. Notwithstanding the terms of sub-paragraph 1.1 above, this agreement shall continue in full force and effect after the terminal date as a periodic lease, terminable by either party on three calendar months written notice to the other

unless notice to the contrary has been given by either party to the other not less than three calendar months prior to the terminal date.

1.4. Notwithstanding sub-paragraph 1.1 and 1.3 either party may terminate this agreement by providing 3 months notice"

The lease agreement also contained an arbitration clause, providing for reference of any disputes arising between the parties to arbitration. The applicant gave the respondent 3 months written notice of termination of the lease on 31 March 2011 on the ground that it required the premises for its own use. The respondent contested the applicant's right to terminate the lease in terms of Clause1.4 of the lease agreement arguing that a lease for a fixed period cannot be terminated on the giving of 3 months notice. The respondent also alleged the existence of an oral lease agreement the parties allegedly entered into on 7 July 2011 in terms of which it was entitled to remain in occupation, notwithstanding the notice.

In accordance with the lease agreement, the dispute was referred to arbitration and Justice Smith issued an award aforesaid. In arriving at the decision he made, Justice Smith reasoned that:

> "The fact that paragraph 1.4 does not impose any conditions or restrictions is a very clear indication that the parties intended that either party could at anytime terminate the lease agreement on giving 3 months notice, without having to give any reason or justification for the termination. Accordingly I find that the claimant was within its rights to terminate the lease agreement and, that being the case, that it is entitled to an order of eviction of the respondent."

As I have already stated the applicant seeks registration of the award for enforcement which is opposed by the respondent on the basis that the award offends the established precepts of law and natural justice in that it is not competent at law to terminate a lease agreement when there has been no breach on the part of the tenant. For that reason the interpretation by the arbitrator "is wrong". The respondent also attacked the arbitrator's conclusion that there was no oral agreement as "not correct".

In its counter application filed on 11 October 2012 the respondent seeks the setting aside of the award on essentially the same grounds used to oppose registration. Other than to say that the arbitrator was wrong in concluding that the applicant was entitled to terminate the lease on notice, the respondent did not advance any other discernable ground for seeking to set aside the award. Registration of an arbitral award or its recognition for purposes of enforcement can only be refused upon the person against whom it is invoked satisfying the

court of the existence of grounds of refusal set out in Article 36 of the mode law in the Arbitration Act [Cap 7:15]: *Tapera &ors* v *Fieldspark investments (Pvt) Limited* HH103/13.

Article 36 sets out the grounds for refusal of recognition or enforcement of an arbitral award and states that the party against whom it is invoked must show the court proof that;

1. A party to an arbitration agreement was under some incapacity or the agreement was invalid under the law to which the parties subjected it to or under the law of the country where the award is made.
2. The party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case.
3. The award deals with a dispute not contemplated or not falling within the terms of reference to arbitration.
4. The composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.
5. The award has not yet become binding on the parties or has been set aside or suspended by a court of law.
6. The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe or recognition or enforcement will be contrary to the public policy of Zimbabwe.

The respondent has not set out any of the grounds for refusal of recognition or enforcement set out above. The closest the respondent has come to setting out grounds is its challenge on the correctness of the interpretation accorded to the lease agreement by the arbitrator. Mr *Mcgown* for the respondent submitted that the award is against the law and the public policy of this country because a lease agreement for a fixed period cannot be terminated by notice given by either party as it only expires by effluxion of time. As I said this is the same ground relied upon for seeking to set aside the award.

Accordingly, a resolution of that issue will also resolve the propriety of the counter application. What is crystal clear from the papers is that the respondent takes issue with the award on the basis that the interpretation of the lease agreement done by the erstwhile arbitrator is wrong, faulty and incorrect. In that regard the seminal pronouncement of Gubbay CJ in *Zesa* v *Maposa 1999(2)* ZLR 452 (S) 466E-G is salutary.

He remarked:

> "Under articles 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."

See also *Decimal Investments (Pvt) Limited* v *Arundel Village (Pvt) Limited and Anor* HH262/12, *Delta Operations* v *Origen Corp (Pvt) Limited* 2007(2) ZLR81 (S)85 C-D.

I am unable to say that the reasoning or conclusion in the award constitutes a palpable inequity that defies logic as to offend our conception of justice. Quite to the contrary, the arbitrator gave effect to the wishes of the parties, for it is them who contracted to the exclusion of any protection they may have enjoyed under the law. They agreed that the lease would be terminable on the giving of 3months notice. The arbitrator did not go outside the contract. He did not make a contract for the parties but merely respected the sanctity of contract. Indeed his conclusion cannot be faulted.

In any event, even if the arbitrator's conclusion was faulty, I cannot substitute my own conclusion, as I am not exercising an appeal power. Clearly therefore the inescapable conclusion is that both the opposition to the application for registration and the application for setting aside the arbitral award are completely devoid of merit.

As if that was not enough, the respondent has the unenviable task of proving that the counter application was filed timeously. In terms of article 34(3) of the model law, an application for setting aside an award must be made within 3 months from the date the award was delivered. The applicant objected to the application in its opposing affidavit pointing to the fact that the award having been delivered on 31 May 2012, the application to set it aside should have been made no later than 31 August 2012. As this application was file on 11 October 2012 it was filed out of time and should fail on that basis.

The respondent had an opportunity to disprove that allegation in its answering affidavit but failed dismally to do so. In the answering affidavit of John Stouyannides, the respondent's managing director could only say in para 4:

> "This is denied. The counter application is properly before the court. The award was received sometime the end of July 2012 and the application has been made well in time."

In my view this is not only vague in the extreme but disarmingly inadequate. It is not clear why the respondent chose to be vague about the date of receipt of the award. It is improbable that the award could only be delivered to the respondent two months after it was handed down. The only inference to be drawn from the respondent's vagueness is that indeed the award was received immediately after it was handed down on 31 May 2012. I can conceive of no reason why it was not. For that reason the counter application was filed out of time.

I am satisfied that this is a matter in which the respondent should be penalised with an award of punitive costs. Not only was the opposition demonstrably without merit, even the feeble attempt to set aside the award, coming as it did well out of time and without any merit whatsoever, should not have been undertaken at all. In pursuing that ill –conceived misadventure right up to the end even after the life span of the lease agreement had expired on 31 December 2012, the respondent was abusing the process of the court. It should therefore pay for that as it unnecessarily put the applicant out of pocket.

In the result, it is ordered that;

1. The arbitral award handed down on 31 May 2012 by Honourable Justice L.G. Smith (Retired), be and is hereby registered as an order of this court.
2. The respondent and all those claiming occupation through it should vacate stand 2551 Salisbury Township Harare also known as Century House West, 36 Nelson Mandela Avenue, Harare upon service of this order.
3. The respondent's counter application for setting aside the award hereby dismissed.
4. The respondent shall bear the costs of both applications on a legal practitioner and client scale.

*Tavenhave & Machingauta*, applicant' legal practitioners
*Messrs Venturas & Samukange*, respondent's legal practitioners