FARAI MASHONGANYIKA
versus
JUSTICE GEORGE SMITH (RETIRED) N.O
and
TRIBAC (PVT) LTD
and
BRIAN COCKER
and
ROY MANUEL

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 17 July and 3 October 2018

Opposed Matter

W. Chinamora, for applicant
D Ochieng, for 2nd respondent
J Wood, for 3rd and 4th respondent

TAGU J: This is an application for the setting aside of an Arbitral Award that was handed down by the first respondent which Arbitral Award is dated the 7th of August 2017 and was only availed to the applicant's legal practitioners on 12 September 2017. The application is based on the applicant's view that the afore-said award offends the public policy of Zimbabwe.

It is settled law that an arbitral award ought to be set aside if its enforcement would offend the public policy of the land. See *ZESA* v *Maphosa* 1999 (2) ZLR 452 at p 466 where it was held that if an arbitral award that constitutes an affront to the conception of justice of a fair-minded person, then such award must be set aside. See also the seminal case of *Delta Ops (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007 (2) ZLR 81 (S) at p 88E.

The facts of the matter are that the second respondent funded the growing of tobacco by the applicant and the forth respondent through a vehicle named Farm Track (Pvt) Ltd in which both the applicant and forth respondent are directors and shareholders in equal shares. The

funding was disbursed pursuant to three agreements signed between applicant and the said Farm Track (Pvt) Ltd. Of the three agreements the third and fourth respondents bound themselves jointly and severally as surety and co-principal debtors for the monies owed to the second respondent by the said Farm Track. In respect of the third agreement the applicant bound herself as surety and co-principal debtor together with the fourth respondent. Funds were duly disbursed. However, pursuant to a failure to pay back the disbursed funds the first respondent instituted arbitration proceedings against the said Farm Track (Pvt) Ltd and the third and fourth respondents in respect of the first two agreements and against Farm Track (Pvt) Ltd together with applicant and fourth respondent in respect of the third agreement. During the arbitration proceedings the third and fourth respondents raised a preliminary point that they ought to be removed from the proceedings on the basis of vis major. Their allegation was that because they were allegedly excluded from all the farming activities of the said Farm Track (Pvt) Ltd by the applicant the alleged exclusion constituted a vis major. They alleged that by virtue of the conduct of Mrs Farai Mashonganyika, (the applicant), firstly, forcing Mr Roy Manuel, the fourth respondent to resign as a director of the Farm Track (Pvt) Ltd and excluding him from all farming operations, and secondly, forcibly evicting the third respondent Brian Cocker, under threat, and taking complete control of Farm Track (Private) Limited and all farming activities , it is the Farm Track (Pvt) Ltd and the applicant Farai Mashonganyika alone who should be held liable to the Claimant Tribac (Private) Limited. The acts of Mrs Farai Mashonganyika the applicant constituted a vis major since they were entirely dependent on the farming activities of Farm Track (Pvt) Ltd to service the loans and this was accepted by all the parties to the agreement. The learned Honourable Arbitrator (first respondent) issued an interim arbitral award wherein he upheld the preliminary point and ruled that the sureties signed by the third respondent and the fourth respondent in respect of a loan made by the Claimant to the then first respondent (Farm Track (Pvt) Ltd are abolished and are therefore null and void.

It is the arbitrators finding that is now being said by the applicant to offend the public policy of Zimbabwe and ought to be set aside.

At the hearing of the matter three points *in limine* were raised by the respondents. The first preliminary point was that the matter was raised out of time. The second point was that there is non-joinder of Farm Track (Pvt) Ltd the principal debtor which makes the application fatally

defective and the last point was that the applicant lacked locus standi as she is only a surety. It was argued that the second respondent is the one which has the locus standi.

WHETHER MATTER WAS RAISED OUT OF TIME

The applicant opposed the first point *in limine* and relied on the case of *Peruke Investments (Private) Limited* v (1) *Willoughby's Investment (Private) Limited* (2) The Honourable Mr Justice (Retired) A.R. GUBBAY SC 11/ 2015 at p 8 of the cyclostyled judgment where PATEL JA said:

> "Secondly, as I have already noted, although the award *in casu* was said to have been ready for collection on 25 February 2011, it was only released and availed to the first respondent on 14 March 2011, after the question of payment of the arbitrator's fees had been satisfactorily resolved. Thus, the intervening delay of two and a half weeks was not solely attributable to the first respondent; nor can this delay be regarded as having been unduly lengthy. On these particular facts, it seems to me churlish to penalize the first respondent for having disregarded that short period in computing the prescribed three month period for challenging the award. I would however add that it might be necessary and appropriate to adopt a different approach on a different set of facts, where the delay in securing a copy of the award is significantly inordinate and is entirely due to the supine or calculated dilatoriness of the party concerned."

In *casu* the award is dated the 7th of August 2017 and was availed to the applicant's erstwhile legal practitioners on 12 September 2017. The matter was filed on 12 December 2017. Calculating the period from date of delivery to applicant's erstwhile legal practitioners and the date of filing the period is exactly three months. In my view if there was any delay it cannot be said to have been an inordinate delay. I will dismiss the first point *in limine*.

As to the second point *in limine* of non-joinder of Farm Track (Pvt) Ltd, this is not fatal to the application. Order 13 Rule 87 (1) of the rules of this Honourable Court, 1971 says:

> "No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The fact that another party was not joined in the proceedings does not disable the court from determining the issues in question as they affect the rights and interests of persons who are parties to the cause. I therefore found no merit in the second point *in limine* and I will dismiss it.

The last preliminary point was that the applicant lacks locus standi. In this case the applicant is one of the sureties. Sureties interpose and bind themselves unto and on behalf of the Grower, its successors and assigns jointly and severally as sureties and co-principal debtors for due and punctual payment of any and all amounts due to Tribac and the due and punctual

fulfilment by the Grower of all the Grower's obligations in terms of the agreement they entered. To that extent the applicant has locus standi in this matter. The last point *in limine* is dismissed.

AD MERITS

This is an application for the setting aside of an Arbitral Award that was handed down by the first respondent which award is dated the 7th of August 2017 and which was availed to the applicant's erstwhile legal practitioners on 12 September 2017 which award exonerates the third and fourth respondents who were sureties together with the applicant. The applicant says the award offends the public policy of Zimbabwe.

The third and fourth respondents opposed the application while the second respondent indicated that it will abide by the decision of the court. While the applicant did not state in terms of which statutory provision the application is being made, it is trite that an arbitral award may be set aside on the grounds of offending public policy. However, for it to be set aside on the grounds of public policy there must be an allegation that the award was induced by corruption or fraud or that a breach of the rules of natural justice occurred, or that the reasoning or conclusion of the arbitrator 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. Or alternatively, the applicant needs to show that 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 *casu* the applicant's contention is that the award is palpably iniquitous and offends the mind of a fair-minded person in that the applicant is now being forced to defend and possibly bear a massive debt by herself. The applicant bound herself in the same manner as the third and fourth respondents. It would therefore be manifestly iniquitous for the aforementioned parties to then face different fates. In order to address this injustice the applicant approached this Honourable Court in terms of Article 34 (2) (b) (ii) of Arbitration Act [*Chapter 7.15*].

Whether the arbitrator was right or wrong in his or decision in the celebrated case of *ZESA* v *Maposa supra*, which was quoted with approval in *Beazely* v *Kabell* 2003 (2) ZLR 198 (S) at 201D-E it was said:

> "Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognize 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 inequality 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."

As to what constitutes an award to be viewed as being contrary to public policy has been decided in a number of cases as I outlined above. In *Delta Operations (Pvt) Ltd* v *Origen Corporation (Pvt) Ltd* SC-86-06 the superior court stated that:

> "An award cannot be held to be contrary to public policy merely because the reasoning or conclusion 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 law or morality or justice. In my view, the challenged award does not constitute a palpable inequality 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 *casu* the arbitrator's finding that there was vis major, given the fact that the applicant herself had caused the third and fourth respondents to be summarily and forcibly evicted from the farming operations from which they were to live and grow tobacco, for purposes of ensuring repayments, which caused them to sign as sureties, cannot be said to offend the public policy of Zimbabwe. For these reasons the application will fail.

IT IS ORDERED THAT

1) The application is dismissed
2) The applicant to pay costs on a legal practitioner and client scale.

Atherstone & Cook, applicant's legal practitioners
Kantor & Immerman, 2nd respondent's legal practitioners
Venturas & Samkange, 3rd and 4th respondents' legal practitioners