CHARTPRIL ENTERPRISES (PVT) LTD
and
LEADWARD INVESTMENTS (PVT) LTD
and
SINO ELECTRICAL SYSTEMS (PVT) LTD
versus
ELNOUR UNITED ENGINEERING GROUP (PVT) LTD
and
HON ARBITRATOR GEORGE LESLIE SMITH N.O

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 27 May 2021 and 28 October 2021

Opposed Application

GRG Sithole with *F Nyamayaro*, for the applicants
AF Bimha, for the 1st respondent
No appearance for the second respondent

DUBE JP:

Background

1. This arbitration challenge involves a landlord tenant dispute. The first respondent seeks registration of an arbitral award whilst the applicants seek an order setting aside the award on the basis that the arbitrator's appointment was not proper and that he failed to deal with challenges to his jurisdiction.

2. It is common cause that in 2016, the respondent entered into lease agreements with Zilking Investments, the first and second applicants in respect of premises in the Gulf Complex, Harare, which expired in 2018. Clause 18 of the 2016 lease agreements is the arbitration clause and provides as follows:

> ''Where a dispute arises between the parties regarding the interpretation or application of this agreement the Landlord shall be entitled (where the dispute has not been resolved amicably by the parties within five (5) working days of it arising) to refer the dispute for arbitration by a single Arbitrator appointed by the Secretary or President for the time being at the Harare Commercial Arbitration Centre which appointment shall be binding on the parties''

3. The leases expired in 2018. Subsequent lease agreements were entered into between first and second applicants in 2019. Zilking Investments [Zilking], did not renew its lease. Sino Electrical Systems (Pvt) Ltd, entered into a lease with the first respondent in respect

of premises previously occupied by Zilking. The 2019 lease agreements did not have an express arbitration clause but contained a clause which stipulated as follows:

> "ADOPTATION AND INCORPORATION OF ALL PRIOR WRITTEN TERMS AND CONDITIONS AGREED UPON THE BETWEEN THE PARTIES.
> The parties to this agreement subject to the preceding Clauses concerning the new period of duration and rental to adopt and incorporate all the prior written terms and conditions of the previous lease which expired on 32 day of December 2018 as if those terms were set out herein''

4. The parties are agreed that clause 4 of the 2019 leases resuscitated previous terms in the 2016 leases in particular clause 18 (1) of the 2016 agreement which is the arbitration clause, by incorporating the terms and conditions of the expired leases to the extent that there was an arbitration clause in respect of leases entered into by the first and second applicants.
5. Upon expiry of the 2019 leases, the applicants were served with notices of termination of the leases on the basis that the first respondent required the premises for its own use. Retired Justice Smith was appointed as arbitrator and rendered an award in favour of the applicants in particular claims but ordered that they vacate the premises which are subject of the disputes between the parties.
6. Following the award, the first respondent made an application for registration of the award which was countered by an application to set aside the award brought by the applicants in terms of Art 34 (2) (b) (ii) of the Arbitration Act [*Chapter 7:15*], the Act, on the basis that it is contrary to public policy. The applications were consolidated with the consent of the parties who agreed that the court should take the approach that should it dismiss the application for setting aside of the award, the registration of the award would be automatic with the reverse being true. The grounds for challenging registration of the award are the same as those made in support of the application to set aside the award. Effectively, the application to set aside the award is the applicant's opposition to the application for registration of the award.

Applicants' submissions

7. The applicants did not dispute that there was in existence valid arbitration agreements in respect of the first and second applicants but challenged the manner in which the arbitrator was appointed. Their position is that there is no arbitration agreement with the third applicant. They submitted as follows: There is no arbitration agreement between the first respondent and third applicant who was wrongly dragged to arbitration. The first

respondent failed to produce an initial lease agreement between it and the third applicant and hence failed to demonstrate that the third applicant agreed to dispute resolution by way of arbitration. The respondent relied on an expired lease agreement it entered into with Zilking Investments (Pvt) Ltd (Zilking) to conduct arbitration involving the third applicant. The third applicant is not Zilking and it not being a party to the 2016 lease agreement cannot be said to have agreed to incorporate a clause in the 2016 agreement into the 2019 agreement as with the other applicants.

8. No link was shown to exist between Zilking and the third applicant except that the third applicant occupied premises previously occupied by Zilking. The respondent in its statement of claim to the arbitrator gives the impression in its citation of parties that the third applicant was formerly Zilking Investments. Zilking was incorporated as a company only in 2007 when the third applicant was incorporated in 1999. It has not been shown that the third applicant is a successor in title to Zilking or vice versa. No legal relationship has been shown to exist between Zilking Investments and third applicant. The directors of the companies are different. No factual basis was laid for the proposition that the third applicant and Zilking Investments form a single economic entity. The arbitrator was invited to speculate that the third applicant used to operate as Zilking. The third applicant was not a signatory to the agreement to arbitrate entered into between the respondent and the first and second applicants or even Zilking Investments in 2016. It did not consent to arbitration.
9. They submitted that the leases signed between the first applicant and the respondent had an arbitration clause which made it clear that an arbitrator would be appointed by the Secretary or President of the Harare Commercial Arbitration Centre. They contended that the appointment of the Arbitrator was done by Mr. Masunda who was the Chairman of the Centre, a function not ascribed to him by the arbitration clause rendering the appointment contrary to the dictates of arbitration clause and hence was improperly appointed.
10. The second applicant in opposition maintained that the lease agreement it purportedly signed was forged and did not sign it. It claimed that the one it signed does not have a provision requiring that disputes be referred to Rtd Justice Smith and therefore that the respondent's claim was improperly before the arbitrator.

11. The applicants submitted that once the arbitrator found that the applicants were now statutory tenants, the disputes ought to have been taken to the courts for resolution in terms of s22 (2) of the Commercial Rent Regulations. Essentially, they argued that the arbitrator proceeded to conduct arbitration when he did not have jurisdiction to do so and failed to rule on the all challenges to his jurisdiction thereby breaching rules of natural justice and rendering the award contrary to public policy. They abandoned the point on *lis pendens.*

Respondent's submissions

12. The second respondent did not defend the applications. According to the first respondent [the respondent], the arbitrator had the mandate to conduct the arbitration proceedings in respect of all applicants. Section 22 of the Commercial Premises Rent Regulations 1983 (Statutory Instrument 676 of 1983) does not provide that only courts of law can deal with disputes regarding statutory tenants. The procedure for appointment of the arbitrator was followed and the appointment accepted when the Commercial Arbitration Centre wrote to the parties advising them of the appointment and no objection was made to the Centre. The applicants submitted to themselves to the jurisdiction of the arbitrator and failed to challenge consolidation of the disputes before the arbitrator.
13. In its heads of argument, it submitted that the failure by the arbitrator to deal with the question of jurisdiction does not vitiate the proceedings and that such a failure is not material as it is common cause between the parties that the procedure adopted for appointment of the arbitrator was correct and that the failure to deal with the issue of jurisdiction must be seen as a tacit acceptance by the arbitrator that the matter was properly before him rendering the point taken bad in law. The respondent maintained that the award is not contrary to public policy there being no misdirection of law or violation of any rule of natural justice. In the alternative, it urged the court to activate the provisions of art 34 (4) and allow the arbitrator an opportunity to deal with the issue of jurisdiction.

Issues

14 The central issue is whether the award ought to be vacated on the basis that the applicants having raised preliminary points on arbitrability of the disputes and his appointment, the arbitrator failed to rule on his jurisdiction.

15. In their statement of opposition, the applicants challenged the jurisdiction of the court to determine the dispute between the third applicant and the respondent, referral of the dispute with first applicant to the arbitrator, his appointment in respect of second applicant, and jurisdiction to determine the dispute involving statutory tenants. The arbitrator did not render a ruling on these challenges and proceeded and dealt with the matter on the merits.

Failure to rule on challenges

16. In its heads of argument, the respondent seemed to accept that the jurisdictional challenges raised by the applicants were not resolved. The attitude of the respondent at the hearing was that the argument that the arbitrator did not consider certain submissions before him had no basis as the issue of jurisdiction was raised at a subsequent stage. The arbitrator's jurisdiction was raised and he failed to deal with the challenge. The arbitrator's award is silent on how the issues surrounding the challenges were dealt with. He did not say he was dismissing the challenges to his jurisdiction. He proceeded to deal with the merits of the matter and the award does not encompass his ruling on the preliminary points.

17. Article 16 (1) incorporates the competence- competence principle which entails that an arbitrator has inherent power to determine challenges related to his own jurisdiction and rule on them without premature interference from the courts. This includes the power to rule on any objections with respect to the existence or validity of the arbitration agreement either as a preliminary question or in an award on the merits. He is obliged to consider and rule on his jurisdiction by accepting or rejecting the challenge and giving reasons for his ruling. The inclusion in the model law of the requirement on the arbitrator to rule on his jurisdiction entails that it is essential that a ruling in that respect be made.

18. An arbitrator whose jurisdiction has been challenged is expected to rule on the challenges. He has a duty to decide all the challenges and issues raised before him unless disposal of one issue disposes of a claim rendering it unnecessary to decide all the issues raised. The arbitrator committed a procedural irregularity. Where an arbitrator commits a procedural

irregularity thereby deviating from the basic principles of procedural law resulting in a grave miscarriage of justice, the award will be set aside.

19. This approach is aptly captured in an article on procedural public policy titled, Public Policy as a Limit to Arbitration and its Enforcement a Paper by Karl-Heinz Böckstiegel Presented at the 11th IBA International Arbitration Day and United Nations New York Convention Day titled "The New York Convention: 50 Years" in New York, 1 February 2008, published in, IBA Journal of Dispute resolution, Special Issue 2008, The New York Convention – 50 Years, p. 123 seq. which defines the concept of procedural public policy and deals with situations where interference with an award is called for as follows:

> 'Nevertheless, the principle of procedural public policy has been recognized widely by national courts, if the proceedings deviate from basic principles of procedural law in such a way that they cannot any more be considered as a fair trial or due process, particularly in cases of a lacking valid submission to arbitration, of unequal treatment of the parties regarding the constitution of the arbitral tribunal or the submission of evidence, of violations of the right to be heard, of lack of impartiality of the tribunal, and of awards resulting from fraud…''

20. Whilst arbitration proceedings are by their nature informal, the approach is that the conduct of the arbitration proceedings must follow due process of the law. The proceedings ought to be guided by basic principles of procedural law in such a way that the proceedings are fair and just. The rules of natural justice must be followed and parties afforded an opportunity to be heard and a ruling or decision rendered based on the evidence and submissions of the parties. Justice must be done between the parties.
21. In *Gwaradzimba v C.J Petron &Company* SC 12/16 a court failed to determine whether an application was properly before it. On appeal, the Supreme Court said of the approach adopted by the court a quo, that in proceeding to determine the substantive issue that fell for determination before it, the court must have tacitly accepted that the application was properly before it. On p 7 of the judgment the court rejected that approach and held that the court was obliged to consider and decide whether the matter was properly before it and that it was improper for the court to determine the substantial and legal issues without first determining the propriety or otherwise of the application. The court held that if the court tacitly accepted that the matter was properly before it, then reasons for such tacit acceptance should have been given.
22. The court relied on sentiments in *S v Makawa & Anor*1991(1) ZLR 142 (SC at 146 D-E) , where the court stated as follows:

> "Although there are indications in this case that the Magistrate may have considered the case, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances this amounts to an omission to consider and give reasons. There is gross irregularity in the proceedings … *see R v Jokonya* 1964 RLR 236 …" .

23. In *Heywood Investments (Pvt) Ltd v Zakeyo* 2013 (2) ZLR (S) at p 20 E-G GOWORA JA stated;

> "…..it seems to me that the court a quo failed to appreciate the legal issue raised by the point *in limine*. It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to determine a matter on the merits without first determining the interlocutory application.''

See also *Grain Marketing Board* v *Muchero* 2008 (1) ZLR 216 (S) for the proposition that a court seized with a challenge to its jurisdiction ought to make a determination on the challenge.

24. In *Chinhoyi Municipality v Magwana & Partners Legal Practitioners* HH 403/16, the court dealt with a matter where an arbitrator failed to give a ruling to a challenge on his jurisdiction and stated as follows:

> "It was confirmed to me by the first respondent's counsel that the second respondent did not give a pronouncement or ruling on his challenged jurisdiction before hearing the merits of the matter…., the second respondent was required to rule that he had dismissed the challenge to his jurisdiction before proceeding further with the matter. He could however have reserved the reasons for his order of dismissal of the challenge and delivered the reasons as part of the main judgment."

The court held that the arbitrator erred in not pronouncing on his jurisdiction before proceeding to hear the merits of the matter.

25. *In casu*, what is clear is that the arbitrator tacitly accepted that the application was properly before it, went on to deal with the disputes on the merits and omitted to give reasons for his approach. A litigant has a right to be heard and corresponding to this right is the duty on a court or tribunal to render a ruling or decision on issues placed before him. An arbitrator has no luxury of keeping the ruling in his head. The rules of natural justice were breached. As stated in the *Gwaradzimba case*, justice and fairness must prevail and there must be a ruling premised on cogent reasoning and sound principles of law. There must be due process of the law which entails rendering a ruling on the challenge. Failure to render a ruling to a challenge which results in prejudice to one or more of the parties results in irregular proceedings. The arbitrator erred in failing to deal with the challenges to his jurisdiction.

Is the award contrary to public policy?

26. Generally, an award may only be set aside once the requirements laid down in art 34(2) (b) (ii) of the Act are met. Art 34(2) (b) (ii) stipulates as follows;

> "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…..
> (b) the High Court finds, that—
> (i) …….or
>
> (ii) the award is in conflict with the public policy of Zimbabwe.''

27. The purpose of art 34 is to regulate the setting aside of awards. One of the grounds for setting aside an award is that an award is contrary to public policy. The grounds for setting aside an award on the basis of public policy are very limited. An award is not contrary to public policy simply because the arbitrator was wrong in his conclusions of fact and law. The meaning of public policy is not defined in the Act or the model law, that responsibility having been left to the courts. The term public policy refers to the public policy of Zimbabwe. For an award to be said to be contrary to public policy, it must be contrary to fundamental policy of Zimbabwean law or public interest of Zimbabwe, justice, morality or be patently illegal. Public policy ought to be construed narrowly and is reserved for exceptional cases, where arbitral awards "shock the conscience" or "violate the forum's most basic notions of morality" (per the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597). A litigant seeking to set aside an award on the basis that it is contrary to public policy ought to specifically plead the public policy he alleges was breached and show how allowing the award to stand would be contrary to public policy.

28. The approach of our courts to setting aside of awards on the basis of public policy is well articulated in *Zesa V Maphosa* 1999 (2) ZLR 452(S), where the court said the following:

> "An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact and in law. Where, however, the reasoning or conclusions 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 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 ''See also *Ok Zimbabwe Ltd v Admbare Properties (Pvt) Ltd &Anor* SC 55/17; Alliance Insurance v Imperial Plastics (Pvt) Ltd SC 30/17; *Muchaka v Zhanje* 2009 (2) ZLR 9; *Beazely v Kabell* 2003 (2) ZLR 198 (S) at 201D-E."

29. An award is also contrary to public policy where it is capricious or arbitrary. Courts will not register awards that are contrary to public policy. The power to declare an award to be contrary to public policy should be sparingly exercised and be done only in clear cases.
30. It is contrary to public policy and against the rules of natural justice for an arbitrator to fail to adjudicate or determine issues referred to him, see *GMB V Erenel (Pvt) Ltd; Erenel (Pvt) Ltd v GMB HB 156/20; Longman Zimbabwe (Pvt) Ltd v Midzi 7 Ors* 2008 (1) ZLR 198.
31. Once the arbitrator's jurisdiction was challenged, the arbitrator ought to have rendered a ruling on the challenges. The rules of natural justice were breached by the failure of the arbitrator to rule on his jurisdiction. The arbitrator proceeded as if no preliminary points had been raised and did not render a ruling and erred in that respect. He simply ignored the objections and proceeded as if there was no such challenge. The appearance is that the arbitrator tacitly accepted that the challenges had no merit and went on to deal with the merits of the disputes between the parties.
32. The arbitrator failed to adopt a judicial approach to the matter rendering the proceedings unfair, infringing on applicants' right to a fair hearing and constitutes a grave procedural fault, misdirection and error of law. The failure to deal with challenge to jurisdiction of an arbitrator gives rise to a conclusion that the arbitral proceedings were capricious or arbitrary. Where the conduct of the proceedings is such that they call for the proceedings to be corrected, such proceedings offend the notion of public policy warranting interference by the courts.
33. Where an arbitrator fails to apply his mind to issues placed before him resulting in the proceedings being unfair to one party especially regarding questions of his jurisdiction and arbitrability of a dispute, the proceedings will be rendered contrary to public policy and be set aside. Such an award prejudices the applicants and renders the decision unfair resulting in failure of justice. The applicants are in a predicament that in that they cannot appeal the award. The award offends the notion of justice rendering the award contrary to public policy and liable to be set aside, see *City of Harare v Harare Municipal Workers Union* 2006 (1) ZLR 491 (H) at 493F-494D.

Can the award be revisited?

34. In the alternative, the respondent requested for the indulgence of the court and asked that the court to invoke the provisions of art 34(4), and suspend the setting aside of the award to enable the arbitrator to give his ruling on the challenges. At common law the

jurisdiction of the arbitrator ceases the moment he renders an award and he becomes *functus officio*. In terms of art 34(4), there are instances where an arbitrator is permitted to revisit his award. Art 34 (4) stipulates as follows:

> "The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."

35. Art 34(4) makes provision for the suspension of the setting aside proceedings and remital of an award to the arbitrator in order to give the arbitral tribunal an opportunity to cure a defect or omission by resuming the arbitral proceedings or to take such other action as in the court's opinion may eliminate the grounds for setting aside. It gives the court curative powers and allows remission of an award in order to cure defects in the award thereby disposing of the need to set aside the award. Suspension of set aside proceedings is available where the omission or defect complained of is capable of being cured and has the effect of avoiding setting aside of the award. The practice is to remit the award back to the same arbitrator.
36. Remission of the award for curative purposes is only available before the award is set aside. The application to set aside the award is consequently stayed to enable the arbitrator an opportunity to cure the defects or omissions in the award. The proceedings will only resume after an additional award has been rendered on terms specified by the court to allow the arbitrator to address the omissions or defects in the award before the court makes its decision on whether to set aside the award. Ultimately, suspension of the setting aside proceedings and remission of the dispute to the arbitrator is an alternative to setting aside the award.
37. Article 34(4) gives the court a discretion whether to set aside or to refuse enforcement, despite proof of a relevant ground. A suspension of the setting aside of proceedings is only ordered when appropriate and in circumstances where the omission or defect can be cured. Whether that course is suitable depends on the circumstances of each individual case.
38. In *TMM Division Maritime SA de CV v Pacific Richfield Marine Pte Ltd* [2003] 4 SLR 972 a decision of a Singaporean court, the arbitrator dealt with some claims and omitted to deal with all issues before it as well as a claim for wasted costs and misunderstood a point on interpretation of a clause in a contract. The court held that an issue can be resolved impliedly even in a case where the award does not expressly address it in the award. The court suspended setting aside of the award and allowed the arbitrator an

opportunity to consider the outstanding issues and eliminate the grounds raised for setting aside the award.

39. I am persuaded to take the same approach in this case. The court is alive to the fact that it cannot remit an award in terms of art 34(4) where the subject of the application relates to substantive merits of the dispute between the parties. This is not the case here as the grounds for setting aside the award do not deal with the merits of the actual dispute between the parties. The grounds for setting aside the award are limited to preliminary points raised before the arbitrator and are within the court's remit. The court has decided in its discretion, to follow the course of suspension of the award to give the arbitrator an opportunity to give his reasons for dismissal of the challenges raised after which the proceedings will resume after the arbitrator has made an additional award.
40. If the arbitrator is able to give a ruling and eliminate the grounds for setting aside the award, there may be no need to set aside the award thereby curing the award and eliminating the grounds for setting aside the award. This is a good case where the arbitrator, having omitted to give his reasons should be afforded an opportunity to do so.
41. The High Court has no general powers of supervision over arbitral awards. The approach to take in a matter such as this is not to approach the issues as if the court is sitting as an appeal court, rather, the court must test the arbitrator's approach and conduct of the arbitration. The court deliberately did not resolve the disputes regarding "the interpretation or application of this agreement" in terms of the arbitration agreement seeing that this is the question that the parties agreed should be dealt with by the arbitrator and one the arbitrator will be expected to deal with on remission. The arbitrator will be afforded an opportunity to deliver his ruling and only then, if there are still grounds for setting aside, will the court accede to the request of the applicants. This court must ensure that it does not undertake to resolve the challenges itself. Dealing with the challenges at this stage would amount to the court predetermining the issues.
42. Consequently, the proceedings will be stayed to afford the arbitrator an opportunity to give his ruling on the challenges raised. As regards costs, the court has considered that both applications are being heard together and have both not been finalized as one depends upon the other. Costs shall be in the cause.

Consequently, it is ordered as follows:

1. The application for setting aside of the award of Rtd Leslie George Smith J be and is hereby suspended in terms of art 34 (4) of the Model Law.
2. The second respondent shall rule on the challenges raised in the arbitration proceedings and render an additional award within 90 days of service of this order on him.
3. The first respondent shall apply for set down of the applications under HC 4419/20 and HC 4450/20 to enable the court to further consider the said applications within 30 days of the additional award referred to in paragragh 2 of this order.
4. Costs shall be in the cause.

Farai Nyamanyaro Law Chambers, Applicants' legal practitioners
Honey and Blankenberg, 1st respondent's legal practitioners