ZIMBABWE MANPOWER DEVELOPMENT FUND

Versus

ZIMBABWE JIANGSU INTERNATIONAL COMPANY (PVT) LTD

And

CLASSIQUE PROJECT MANAGEMENT (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION +
CHIRAWU-MUGOMBA J
Harare, 19, 25, 27, 30 and 31 October 2023

OPPOSED MATTER

HCHC 328/23

T. M Kanengoni for the Applicant
T. Mpofu for the 1st Respondent

HCHC 188/23

T. Mpofu for the applicant
T. M Kanengoni for the 1st respondent

CHIRAWU-MUGOMBA J: This is a composite judgment in respect of an arbitral award. For the sake of consistency, the parties will be cited as they appear in HCHC 328/23 which is the application for the setting aside of the award. HCHC 188/23 is an application for the registration of the award. It goes without saying that the decision in HCHC 328/23 will influence that in HCHC 188/23. Essentially the same arguments for and against registration have been advanced by the parties depending on whether it's the application for registration or for setting aside.

By way of background, the applicant and the first respondent entered into a contract in November 2000 for the construction of a nine -storey building. Completion was expected

by the 31st of August 2002 but there was considerable delay caused by many factors including inflation. It seems that the contract was thus varied many times. Certain disputes arose between the parties which resulted in the dispute being placed before an arbitrator. For reasons known to the parties, the arbitrator was not cited. I solicited submissions on this fact but none of them took this point any further. I also noted that in the leading case of *Zesa vs. Maposa*, 1999 (2) ZLR 452(S)the arbitrator was not cited.

The applicant propagated four main grounds for seeking the setting aside of the arbitral award. These are in *seriatim* (1) That the applicant was suffering from an incapacity thus rendering the whole agreement giving rise to the award invalid in terms of Article 34(2)(a)(i). Applicant averred that it is a creature of statute initially in terms of the Manpower Planning and Development Act, number 36/84. The applicant has no separate juristic personality and its sole trustee, the Minister is responsible for the administration of the main act, i.e. the Manpower Planning and Development Act, [Chapter 28:02] part V. At the time of contracting, the applicant lacked legal capacity to contract. It could not therefore enter into a valid and binding arbitration agreement with the first respondent. This is a mistake that is common to both parties. (2) Alternatively, that the arbitral procedure was not in accordance with the agreement of the parties in terms of Article 34(2)(a) (iv). The applicant averred that the dispute resolution procedure that was in the agreement between the parties was not followed. (3) Alternatively, that the award dealt with a dispute that was not contemplated by or falling within the terms of submission to arbitration. The applicant averred that the architects that were first selected for the project were Vengesayi Architects who then ceased to be so at some stage. No replacement was appointed in their stead. All matters that were supposed to be done by the architects were not done including the issuance of certificates of payment. The subject matter of the dispute relates to two certificates of payment these being number 19 and 20. The 2nd respondent could not issue any payment certificates without an architect. These two certificates could not validly arise from the agreement. The referral of the dispute on the basis of the certificates was therefore invalid(4) Alternatively, that the dispute is in conflict with public policy as per Article 34(2)(b)(ii).

The first respondent strenuously opposes the application and made the following averments. A point in *limine* was taken that the applicant was out of court. It was not persisted with. On the merits, the first respondent submitted that the applicant cannot

approbate and reprobate. It calls itself the Zimbabwe Development Fund set up in terms of the Manpower Planning and Development Act. The parties contracted and there were variations mostly influenced by inflation. However, the subject matter of the contract, that is, a building was delivered to applicant on the 22nd of September 2014.

The issue of the arbitrator having no jurisdiction was raised for the first time in the application. The applicant agreed to the appointment of the arbitrator as well as the institution of the proceedings as borne by the minutes dated the 28th of June 2022 appearing as annexure J3. The parties also agreed on the issues for determination as amplified in the statements of claim and defence. The applicant also raised before the arbitrator, a claim –in-reconvention. It cannot now be heard to claim that the arbitrator had no jurisdiction.

It is disingenuous for the applicant to plead that it had no capacity to contract after it received a building that it is using as its head office. The question should be asked why applicant filed a claim-in-reconvention before the same arbitrator.

With respect to the arbitrator dealing with issues not before him, the first respondent averred that the parties drew up the issues for determination and they also filed their statements of defence and claim respectively. This is what the arbitrator dealt with.

With respect to the averment that the award is contrary to public policy, the first respondent submitted that what is actually contrary to public policy is the fact that the applicant took possession of a building that it is using but is refusing to pay for. There is nothing amiss in the award made by the arbitrator. There is nothing at law that prohibits the determination being made in United States dollars. The certificate for payment was made after the 22nd of February 2019. The first respondent therefore moved for the dismissal of the applicant's claim.

The first respondent in its heads of argument cited the case of *Gwanda Rural District Council vs. Botha (snr)*, SC-174-20. BHUNU JA stated as follows:-

> "Before delving into the merits or otherwise of the grounds of appeal, I pause to observe that when presiding over the registration of an arbitral award, the court *a quo* had very limited jurisdiction. This is mainly because its function was merely to register the arbitral award for purposes of enforcement. To that end, it did not in the main exercise its appellate or review jurisdiction".

The applicant has based its case largely on Article 34 which reads as follows:-

Article 34 provides as follows:

"ARTICLE 34
Application for setting aside as exclusive recourse against arbitral award

(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*) the party making the application furnishes proof that—

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of *Zimbabwe*; or

(ii) …….

(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 [Subparagraph amended by Act 14/2002]

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law;

or

[Subparagraph amended by Act 14/2002]

(*b*) the *High Court* finds, that—

(i) ……..or

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received **the award** or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The *High Court*, **when asked to set aside an award**, may, where appropriate and so requested by a party, suspend the setting aside 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.

(*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 applicant and its counsel, *T Kanengoni* went to great lengths to show that applicant has no corporate status and hence anything that it did including the contract with the first respondent was invalid. Reference was made to the decision in *Masiya vs District Development Fund and Anor,* HH-119-16. To their credit, reference was also made to a decision which expressed a contrary view on the legal status of applicant in *Twenty Third Century and Ors vs. ZIMDEF,* HH-506-22. What went on in the heads was an attempt by

applicant to ‘select’ a better judgment between the two. In my view, the onus is on applicant to show that it suffered from legal incapacity. It cannot pick and choose when it lacks capacity or when it does not. This issue was raised for the first time in court and not before the arbitrator. It is in my view, an attempt to turn this court into a review or appellate one. The applicant as pointed out by the first respondent went on to file a counter-claim for which it was partially successful. It cannot now be heard to claim contractual incapacity. From the time of contracting and making some payments and even varying the terms due to inflation, the applicant never claimed incapacity. It cannot do so now.

The parties as submitted by the first respondent laid out the issues that it wanted the arbitrator to decide on. They filed statements and in my reading of the award, there is nothing amiss in what the arbitrator did. He was guided by the agreed issues.

The applicant challenges the jurisdiction of the arbitrator in relation to the procedure followed. Apart from the fact that the parties agreed to the appointment and the issues, there is something to be said about that challenge. It was never brought to the attention of the arbitrator. In *Chartpril Enterprises(Pvt) Ltd and Ors vs. Sino Electrical Systems (Pvt) Ltd and Ors*, HH-602-21, DUBE J.P when considering the registration of an award stated as follows,

> “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”.

In my view, the applicant ought to have laid this challenge squarely before the arbitrator to say, “Wait a minute, you have no jurisdiction because the wrong procedure has been followed’’. Asking this court to consider that aspect is once again tantamount to seeking a second bite of the cherry. This conduct is cleared frowned upon as amplified by MATHONSI *Harare Sports Club vs Zimbabwe Cricket,* HH-398-19 as follows,

> “In a line of cases, the courts have been very careful to interpret that provision narrowly cognisant of the need to protest the principle of sanctity of contract. After all, it is the parties who voluntarily submit to arbitration as an instrument for the speedy and cost-effective means of resolving their dispute. The courts are therefore more inclined to deprecate conduct of a party intent on disrespecting the agreement by undermining the process of arbitration agreed upon by the parties. Fanciful defences against registration of arbitral awards and frivolous applications seeking to set aside an award by inviting the court to plough through the same dispute which has been resolved by an arbitrator in the forlorn hope of obtaining a different outcome will not be entertained.”

The applicant further implores this court to consider that the award is contrary to public policy. It amplifies this factor by submitting that the award was made in United States dollars, contrary to the provisions of SI33/19 and SI 142/2019. The courts have dealt at length in many cases on the meaning of public policy. In the *Chartpril Enterprises (Pvt) Ltd* matter (supra), the court dealt at length with the meaning and import of the phrase, public policy as follows:-

> 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.

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."
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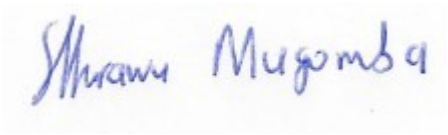
> An award is also contrary to public policy where it is capricious or arbitrary. Courts will not register awards that are contrary to public policy. The power to declare an award to be contrary to public policy should be sparingly exercised and be done only in clear case

The applicant and the first respondent both made substantial submissions to the arbitrator on the issue of the currency and the applicable laws. The arbitrator took all this into account. I must say that in all my years on the bench so far, I have never come across a more thorough award as the one in this matter. The award itself states that the money awarded is payable in Zimbabwe dollars. This puts paid to the applicant's assertion that it is contrary to public policy. The applicant was also even partially successful and the arbitrator did not

accept the sums claimed wholesale. He went through a meticulous process of considering the figures claimed.

On costs, in my view this application was a belated attempt to thwart the application for registration of the arbitral award under HCHC 188/23. As already stated, the fate of that matter lies with the decision in HCHC 328/23. Both parties stood by the papers filed of record. The application for setting aside the arbitral award clearly has no merit and ought to be dismissed. It follows that having dismissed the application, the order for registration of the arbitral award in HCHC 188/23 should be granted.

On costs, in my view it would have been prudent for the applicants to file a counter application under HCHC 188/23 rather than file a separate application. The applicant was also not sincere in seeking to have the award set aside. For those reasons, the applicant shall pay costs under both HCHC328/23 and as first respondent in HCHC 188/23. I however do not perceive of any reasons why costs should be awarded on a higher scale in both applications. I have always also frowned upon draft orders that state that if any party opposes an application, they must pay costs on a higher scale. Every person natural or juristic in Zimbabwe has the right to defend themselves. It is only in exceptional circumstances that costs should be awarded on a higher scale. None exist in these two matters.



DISPOSITION

HCHC 328/23

1. The application be and is hereby dismissed.
2. The applicant shall pay costs.

HCHC 88/23

1. The application for registration of the arbitral award be and is hereby granted.

2. The arbitral award made by James McComish dated the 11th of January 2023 be and is hereby registered as an order of this honourable court.

3. The first respondent shall pay costs.

Nyika Kanengoni and Partners, applicant's legal practitioners

Gill, Godlonton and Gerrans, first respondent's legal practitioners