MINISTER OF PUBLIC SERVICE, LABOUR & SOCIAL WELFARE
versus
DIGICARD ZIMBABWE [PVT] LTD
and
JUSTICE NOVEMBER TAFUMA MTSHIYA [RETIRED]

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 10 July 2023

Date of written judgment: 13 March 2024

Opposed application

G. Madzoka, for the applicant
L. Uriri, for the first respondent
No appearance for the second respondent

MAFUSIRE J

[a] **Introduction and background**

[1] The applicant is a Minister of Government in Zimbabwe. He is in charge of, among other things, social welfare. Evidently not wanting to be left behind in this digital era, he contracted the first respondent to supply both the hardware and the software for a biometric or card-based platform to facilitate the administration of social welfare programmes to vulnerable groups in society across the country.

[2] The first respondent is a duly registered company in Zimbabwe. Apparently, it is an operator in the sphere of information and communication technologies. The contracts between the parties were incepted after due tender procedures. They were in writing and reasonably detailed in regards to, among other things, the nature, scope and duration of the agreements; the delivery time lines; the cost of the project; the rights of ownership of the materials to be supplied; the copyrights in the intellectual property; the dispute resolution mechanisms, and so on. For the moment, the details are unimportant, save to say that the parties opted for arbitration in the event of a dispute.

[3] The execution of the contract did not pan out as agreed in the written documents. In a nutshell, the first respondent accused the applicant of having failed or refused to pay some contract amount in the sum US$1 610 364-00 [one million six hundred and ten thousand three hundred and sixty-four United States dollars]. In turn, the applicant accused the first respondent of malperformance. The dispute was referred to arbitration at the behest of the first respondent. The second respondent, then a retired judge of this court, but regrettably now deceased, was the arbitrator.

[4] The arbitrator ruled in favour of the first respondent, the claimant in the arbitration proceedings. In paraphrase, he found the applicant, the respondent in the arbitration proceedings, to have breached the written agreements by having failed or refused to pay the invoice submitted by the first respondent in the sum of US$1 610 364-00 aforesaid. The arbitrator held that the applicant's failure to pay not only incapacitated the first respondent from performing its own side of the contract, but also that it caused it to suffer damages for the loss of profits anticipated from the project. The amount of damages in this regard was awarded in the sum of US$17 783 863-00 [seventeen million seven hundred and eighty-three thousand eight hundred and sixty-three United States dollars]. Each party would bear their own costs but would meet each other halfway in regards to the arbitrator's fees.

[b] **This application**

[5] The applicant was aggrieved by the arbitral award. He has approached this court for its setting aside on the ground that it is in conflict with the public policy of Zimbabwe as contemplated by *Art* 34[2][b] of the United Nations Commission on International Trade Law [UNCITRAL] Model Law, an annexure to our Arbitration Act [*Chapter 7:15*] ["***the Model Law***"].

[6] The applicant alleges that the arbitrator misconducted the arbitration proceedings in that he breached the rules of natural justice, more particularly in that he did not accord equal treatment to the parties. This accusation hinges on the allegation that whilst the parties had agreed in advance that they would dispense with a formal hearing and that he would determine the matter on the basis of the documents before him, the arbitrator failed or neglected to consider certain crucial submissions made in the

applicant's papers and that the quantum of damages aforesaid was based on a one-sided assessment by, or on behalf of the applicant, without regard to the terms of the contract.

[7] The first respondent has opposed the application. Its major ground of opposition is that the application is no more than a disguised appeal against the arbitration award, something that is an anathema to the Model Law. The first respondent supports the award and sees no irregularity in the conduct of the proceedings. In particular, but briefly, it is argued that the applicant cannot complain of not having been heard when the parties had dispensed with the need for an oral hearing; that at no stage prior to the matter being referred to arbitration had the applicant complained about any breach of contract; that in fact, but for the intervention or interference by the Ministry of Finance and Economic Development ["***the Ministry of Finance***"], a complete alien to the contractual relationship between the parties, the applicant itself had evidently been satisfied with the first respondent's performance because it had engaged Treasury to pay the first respondent's invoice for US$1.6 million odd aforesaid. It is argued that it was the Ministry of Finance, through certain correspondence, that had obliquely inferred a breach of contract by the first respondent.

[8] It is further argued on behalf of the first respondent in regards to the award of damages in an amount of US$17 783 863-00 aforesaid that the arbitrator could not be faulted because the applicant had in its statement of defence mounted no challenge to the applicant's assessment of the damages. It is said that any such challenge had only been formulated by counsel in his heads of argument, yet heads do not constitute pleadings, but are mere opinions.

[c] **The legal position**

[9] *Art* 34[2][b][ii] of the Model Law empowers this court to set aside an arbitral award on the ground that it is in conflict with the public policy of Zimbabwe. *Art* 34[5] then states that for the avoidance of doubt, breach of the public policy of Zimbabwe is when, among other things, a breach of the rules of natural justice has occurred in connection with the making of the award.

[10] Arbitration is a voluntary and private dispute resolution mechanism chosen by the parties. It is an alternative process to the determination of disputes through the State courts. The parties formulate the nature and extent of their differences. They chose their own judge. They lay down the rules of procedure. They agree on the terms of reference for the judge. They pay the judge. Everything is governed largely by the private bilateral agreement. Arbitral awards are final and binding. In *Zimbabwe Educational, Scientific, Social and Cultural Workers' Union v Welfare Educational Institutions' Employers' Association* 2013 (1) ZLR 187 (S), the Supreme Court, per MALABA DCJ, as he then was, said, at p 192E:

> "It is trite that where parties make submissions to arbitration on the terms that they choose their own arbitrator[s], formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the court of law will proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. See *ZESA v Maposa* 1999 (2) ZLR 452 (S). Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The standard is high."

[11] No appeal lies against the decision of the arbitrator: see *Holmes Oil Co v Pumpherston Oil Co* (1891) 28 SLR 940; [1891] UKHL 940. The role of the courts is peripheral. They do not intervene except in those exceptional circumstances contemplated by the Model Law. MALABA DCJ, in *Alliance Insurance v Imperial Plastics [Pvt] Ltd & Anor* SC 30-17, said, at p 5:

> "The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are followed. The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34(2)."

[12] In the same vein, MATHONSI J, as he then was, in *(1)Harare Sports Club v Zimbabwe Cricket (2) Zimbabwe Cricket v Harare Sports Club & Anor* 2019 (2) ZLR 421 (H) said, at p 428E – F:

> "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."

[13] The provisions of *Art* 34 and *Art* 36 of the Model Law are interpreted restrictively. In the *Maposa* case above, the appellate court stated as follows, at p 466E – G:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or law. In such a situation the court will not be justified in setting the award aside.
>
> Under article 34 or 36, the court does not exercise an appeal 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 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."

[14] Expressed in another way, an arbitral award is contrary to the public policy of Zimbabwe, if it 'shocks the conscience' or 'is clearly injurious to the public good or [is] wholly offensive to the ordinary reasonable and fully informed member of the public' as stated by the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia [Persero] v Dexia Bank SA* [2007] 1 SLR(R) 597, at para 59. Only in the most glaring instances of illogicality, injustice or moral turpitude will the court invoke the power to set aside an arbitral award: see *Peruke Investments [Pvt] Ltd v Willoughby's Investments [Pvt] Ltd & Anor* 2015 (1) ZLR 491 (S), at 499H – 500A.

[15] The *audi alteram partem* principle is a rule of natural justice. It is founded in public policy. It is all about justice and fair play. In its elementary form the rule holds that a man shall not be condemned without having been given a chance to be heard in his own defence. In the *Maposa* case above, it was said, at p 464G, that natural justice embraces the requirement that there must be fairness in the procedure.

[d] **Whether the arbitral award is impeachable**

[16] The conditions required to be met before the court can set aside an arbitral award are demonstrably quite stringent. However, I consider that in this matter the applicant has a strong case. In one's view, the arbitral award makes justice turn on its head. It shocks the conscience. It is injurious to the public good. It is a palpable inequity. It

defies logic. Admittedly, and with all due respect, these are very strong words. But they are not an original coinage by oneself. They are an integral part of the test for impeachment. This only goes to show the lofty height at which the threshold for impeachment is perched. But notwithstanding all this, I consider that the applicant's case satisfies the test. I proceed to demonstrate how.

[17] At arbitration, the parties agreed they would dispense with *viva voce* evidence and argument. The arbitrator would determine the dispute on the basis of the material supplied to him. The applicant's complaint herein is that he was not heard, not in the sense of not having been afforded the chance to present oral argument, but in the sense of the arbitrator having consciously refrained from considering his submissions on some crucial aspect of the dispute, namely his challenge to the first respondent's computation of the damages in the sum of US$17 783 863-00 aforesaid.

[e] **Award of damages in the sum of US$17 783 863-00**

[18] What happened was this. In support of the damages claim for US$17 783 863-00 aforesaid, the first respondent attached some schedule, Annexure 13, showing its own computation. Unquestionably, the arbitrator did not scrutinize it. The first respondent had submitted that the applicant had not controverted that assessment. The arbitrator agreed. He said in his award:

> "I fully agree with the claimant's above submission and to that end I reject the respondent's argument that the damages claimed by the claimant were not proved. The respondent did not find it necessary to go through Annexure 13 presented by the claimant justifying its claim in the amount of US$17 783 863.00. There was no specific rejection of annexure 13 as presented by the claimant to justify its damages claim. I therefore have no reason to reject the claimant's claim for damages." [*emphasis added*].

[19] The arbitrator's finding above was a patent misdirection. The applicant expressly challenged Annexure 13, both in his statement of defence and the heads of argument. In para 29 of his statement of defence was this averment:

> "The 50 000 delivered cards cannot be used as they are non-functional. It is denied therefore that the claimant lost US$17 783 863.00 or any amount at all. Claimant has not performed under the contract and in any case how is the amount of US$17 783 863.00 arrived at[?] Claimant is seeking to benefit from public funds which is tantamount to corruption and fraud."

[20] In submissions filed on behalf of the applicant, it was pointed out that the onus had been on the first respondent to provide evidence probative of the damages claimed; that such evidence had been non-existent; that Annexure 13 was a self-validation exercise without factual foundation. The submission went on to try and demonstrate the respects in which the calculation in Annexure 13 was inconsonant with the contracts between the parties in regards to the first respondent's right to damages. I shall come back to this particular point shortly.

[21] Mr *Uriri*, for the first respondent, argues that the arbitrator was entitled to disregard the submission by the applicant's counsel on the issue of damages because heads of argument are not facts but merely an opinion of counsel. That cannot be correct. The arbitrator was obliged to consider the heads of argument filed on behalf of the applicant. They were part of the material before him upon which he would base his decision. The applicant is justified in complaining that it was not accorded the same treatment as the first respondent. It was not heard. The arbitrator considered the submissions filed on behalf of the first respondent but not those filed on behalf of the applicant. That on its own would hurt intolerably, the conception of justice in Zimbabwe.

[22] Furthermore, as pointed out above, Annexure 13 had indeed been challenged in the statement of defence. The challenge may not have been elaborate or exquisite. However, it had touched on that intrinsic and contentious issue of the proof of damages. The onus to prove damages was on the first respondent. It was incumbent upon the arbitrator to interrogate Annexure 13. He did not.

[23] Annexure 13 was a speculative projection of what the first respondent hoped to earn from the project for a period of five years from the date of inception of the agreements. But there were serious flaws with that computation. Among other things, it was common cause that after the procurement of the hardware and software necessary for the inception and management of the programme, the ownership in the products would vest with the applicant. The first respondent would retain the right of access to facilitate the continued use of the facility.

[24] The first agreement in February 2017 was for the provision of the hardware and software. Under it, the first respondent would be entitled to no more than $2-00 per card issued. The second agreement in September 2017, called the distribution service agreement, was to facilitate the distribution of social programmes by the applicant in regards to, among other things, drought relief food, Basic Education Assistance Module [BEAM], social cash transfers, and the like, using the biometric card-based system. Under it, the first respondent was entitled to be paid a distribution service charge of 3.5% as well as $2-00 per card issued. Both contracts had an initial tenure of sixty months after which they would remain in force until duly terminated in accordance with the laid down procedure. The details are not relevant.

[25] Annexure 13 did not show in what way the assessment of damages thereon was related to the specific terms of the contract. The projection of the damages for a period of five years probably hinged on the 60-month tenure aforesaid. However, not only is this uncertain, but also, and most importantly, the assessment is manifestly clogged or saturated with some line items that had no foundation in the contracts. For example, under "Revenue" was an item described as "Card replacement fees". Then a great deal of costs was weighted into the computation. These included such costs as licence fees, contribution to fixed assets, hardware and software maintenance and support, data centre maintenance, user technical training, outsourcing of management back-end service, and so on. Below those was an innumerable number of other costs under the rubric "Fixed Administration Costs". They were itemised as salaries, travel and accommodation, fuels and oils, insurance, security, etc. The list was endless. The computation was for every single year for five years. The net amount was the phenomenal US$17 783 863-00 aforesaid.

[26] Even if the applicant had not challenged Annexure 13, which is not correct, it was still necessary for the arbitrator to interrogate it. Damages must be proved. The onus is on the claimant. The arbitrator did not consider Annexure 13 at all because of his belief that the applicant had not challenged it. The net result was an award that, in the words of the Supreme Court in *Peruke Investments [Pvt] Ltd v Willoughby's Investments*

[Pvt] Ltd & Anor above, at 499H – 500, was most glaringly illogical, unjust and lacking moral turpitude.

[27] Lastly, in projecting the first respondent's notional losses over the next five years, Annexure 13 did not take into account deductions for contingencies such as premature termination of the contracts, *vis majeur*, defunct equipment by reason of technologies becoming defunct, procurement challenges, and so on, which are assessed actuarially. Instead, Annexure 13 was a straight mathematical calculation of notional income and profits for five years. That was a serious misdirection.

[g] **Award of specific performance in the sum of US$1 363 610-00**

[28] The arbitrator's award of damages in the sum of US$17 783 863 was in satisfaction of the first respondent's alternative claim for specific performance in the sum of US$1 610 364-00. The first respondent alleged that the applicant had failed or refused to pay its invoice in that amount and that the payment would have enabled it to perform its own side of the contract. It was common cause that in advance of any performance by the first respondent, the applicant had paid it an amount in the sum of US$500 000-00 for the production of 250 000 pilot cards. It was also common cause that the first respondent had only delivered 50 000 cards and that the balance of 200 000 cards had never been delivered. The applicant alleged that even those 50 000 were not usable.

[29] The arbitrator found the applicant liable on the main claim for specific performance. His reasoning was that but for the intervention of the Ministry of Finance, the applicant had had no issue with that invoice since he had been quite prepared to pay the amount on it.

[30] However, I consider that the arbitrator's reasoning on this aspect was patently faulty and that the faultiness reached such levels of palpability as described in the *Maposa* case above. In my view, the arbitrator did not consider the real dispute before him in its totality. The contracts between the parties did not provide for any kind of advance payment. All that the first respondent was entitled to in the initial instance was $2-00

per card **issued** [*my emphasis*]. Thus, it was itself obliged to first perform before it could become entitled to any payment.

[31] That the applicant may have made an advance payment of $500 000-00 to facilitate the production of the pilot cards earmarked for the first phase of the project could not have created an entitlement for the first respondent to receive any further advance payments, especially in circumstances in which the entire US$500 000-00 had practically given no benefit to the applicant. To further require another advance payment of such a staggering amount should shock the conscience. By such an award, the arbitrator was not enforcing the contract between the parties, but creating his own.

[32] But having found the first respondent entitled to the remedy of specific performance in the sum of US$1 610 364-00, the arbitrator did not direct the applicant to pay this amount. Instead he ordered damages in a staggering US$17 783 863 aforesaid. The basis of such an order was that specific performance was no longer an appropriate remedy given that the relationship between the parties had so completely broken down. He pointed out that specific performance was in the discretion of a court or a tribunal.

[33] The arbitrator's exercise of discretion in the manner he did, that is, purporting to relieve the applicant of the relatively smaller amount of US$1 610 364-00 but instead, ordering him to pay a humongous US$17 783 863-00 was manifestly capricious. It defies logic. Firstly, $17 783 863-00 would obviously be more onerous on the applicant than the US$1 610 363-00 even if it were to be justified. Secondly, having considered closely the first respondent's claim and submissions before the arbitrator one finds that, contrary to the arbitrator's findings, the first respondent required payment of the invoice amount in order to carry on with the project. The damages were only claimed in the alternative, in fulfilment of the rule on pleadings. There was no evidence before the arbitrator, or even a suggestion to that effect, that specific performance was no longer possible or feasible.

[34] For the reasons set out in this judgment, the applicant is entitled to the relief sought. However, there is no justification for costs on the higher scale. In the premises, the following order is hereby made:

i/ The arbitral award by the second respondent on 6 September 2022 in respect of the applicant and the first respondent is hereby set aside.

ii/ The first respondent shall pay the costs of suit.

13 March 2024

Civil Division of the Attorney-General's Office, applicant's legal practitioners
Samukange Hungwe Attorneys, first respondent's legal practitioners