

REPORTABLE (9)

PERUKE INVESTMENTS (PRIVATE) LIMITED
v
(1) WILLOUGHBY'S INVESTMENTS (PRIVATE) LIMITED
(2) THE HONOURABLE MR JUSTICE (RETIRED) A.R.
GUBBAY SC

SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & PATEL JA
HARARE, OCTOBER 10, 2014 & MARCH 19, 2015

E.W.W. Morris, for the appellant

L. Uriri, for the first respondent

PATEL JA: This is an appeal against the decision of the High Court setting aside an arbitral award rendered by the second respondent on 25 February 2011. The grounds of appeal relate to the period allowed for contesting an arbitral award and the substantive correctness of the decision of the court *a quo*.

FACTUAL BACKGROUND

The appellant and the first respondent purchased two adjoining stands (nos. 894 and 895) respectively, with a building (Lonrho House) straddling both stands. The two properties are held under separate deeds of transfer. The greater portion of the

building rests on stand no. 894. It is common cause that the appellant paid 70 per cent of the total purchase price while the first respondent paid 30 per cent of that price.

Lonrho House was let to a third party as a single unit. The expenses for the building were shared equally by the parties. The appellant received the rentals and apportioned the net rentals in the ratio of 70 per cent and 30 per cent. There was no agreement between the parties that the net rentals would be shared in that proportion.

The first respondent's claim that the rentals be shared equally was referred for arbitration to the second respondent (the arbitrator). The latter held that the income derived from the two stands as one indivisible unit should be in proportion to the specific contributions made by the parties towards the total purchase price. The first respondent's claim for 50 per cent share of the rentals was dismissed. Aggrieved by the arbitral award, the first respondent challenged the award as being contrary to public policy.

The High Court held that the first respondent's challenge was not filed out of time but was filed within the prescribed three months of receiving the award, even though the first respondent had been advised three weeks earlier that the award was ready for collection.

On the merits, the court found that both stands and the building thereon were leased out as a single unit. There was no evidence that 70 per cent of the usable rentable area of the building was on the stand belonging to the appellant and 30 per cent

on the first respondent's stand. The parties had contributed equal pieces of land to their partnership and it was immaterial that a larger portion of the building was located on the appellant's stand. The parties' contribution to the partnership was equal as both had contributed a stand and both paid for the expenses equally. The arbitrator's award of only 30 per cent of the net rental income to the first respondent was palpably inequitable and therefore contrary to public policy. In the result, the court held that the arbitrator had erred in rejecting the first respondent's claim and ordered that his award be set aside with costs to be borne by the appellant.

GROUND OF APPEAL

The procedural point raised in the grounds of appeal pertains to the period within which an arbitral award may be challenged. The appellant contends that the court *a quo* misdirected itself in holding that the stipulated period of three months commenced when the first respondent took receipt of the arbitral award as opposed to the day after it was advised that the award was available.

As for the merits, the appellant's position is that the court *a quo* misdirected itself in making the following findings:

- that it was common cause that the outgoings/expenses on the leased premises were shared equally between the parties;
- that the building was indivisible and that each party's share of the rentals therefrom should not be based on the usable area on their respective stands;

- that the payment of 70 per cent of the joint purchase price by one party and the payment of 30 per cent of that price by the other party was not based upon the rentable value of the improvements upon their respective stands;
- that it was immaterial that the larger portion of the building was located on the appellant's stand, even though that was the only reasonable explanation for the disparity in purchase prices paid by the parties;
- that the arbitrator's ruling should be overturned without any finding that he had misconducted himself;
- that the arbitrator made a ruling that was in conflict with the public policy of Zimbabwe.

RELEVANT PROVISIONS OF THE MODEL LAW

Article 34 of the Model Law (Schedule to the Arbitration Act [*Chapter 7:15*]) prescribes the procedure for setting aside an arbitral award and the substantive grounds upon which it may be set aside. It provides, in its relevant portions, as follows:

- “(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; or
 - (b) the High Court finds that—
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; 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)
- (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.”

As appears from paragraph (3) of Article 34, an application to set aside an arbitral award must be made within three months from the date when the applicant has received the award. I am unable to find anything specific in the Model Law that elaborates the manner and circumstances in which the applicant is deemed to have received the award. The only other provisions that are relevant to this question are Articles 3 and 31.

Article 3, which deals with the receipt of written communications, provides as follows:

- “(1) Unless otherwise agreed by the parties—
 - (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last know place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
 - (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.”

Article 31 governs the form and contents of arbitral awards. Paragraph (4) of this article stipulates that:

“After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.”

PRESCRIPTION PERIOD FOR CHALLENGING ARBITRAL AWARDS

In the instant case, both parties were advised by the Harare Arbitration Centre on 25 February 2011 that the arbitrator’s award was ready for collection. The first respondent uplifted the award on 14 March 2011 and filed its application to the High Court challenging the award on 14 June 2011. On these facts, the court *a quo* held that the actual date of receipt was when the prescriptive period began to run and that, therefore, the first respondent had timeously filed its application.

Mr *Morris* for the appellant submits that the period for filing an application under Article 34 of the Model Law cannot be allowed to run in perpetuity. He further submits that the receipt of an award does not necessarily involve physical prehension but can be effected *traditio longa manu* (by long hand delivery). He relies for this proposition on the headnote to *Groenewald v Van der Merwe* 1917 AD 233 where the following passage appears:

“To constitute delivery physical prehension is not essential if the subject-matter is placed in the presence of the would-be possessor in such circumstances that he and he alone can deal with it at pleasure.”

Mr *Uriri* for the first respondent argues that Article 34(3) must be read in its literal and grammatical sense, *i.e.* the award in question must be delivered to the

parties in order to be received. He further argues that the first respondent's delay in uplifting the award, as is explained in its answering affidavit, was occasioned by the arbitrator's insistence on the payment of his fees before the award could be released and the subsequent confusion as to whether or not the first respondent's payment was duly reflected in the arbitrator's bank account.

I have no doubt that the purpose of arbitration proceedings is to enable the expeditious resolution of disputes. Moreover, there are two maxims of the law that are apposite to the circumstances of this matter, *viz. leges vigilantibus non dormientibus subveniunt* (laws serve the vigilant and not the sluggish) and *interest reipublicae ut sit finis litium* (there must be finality to litigation). However, in the absence of any absurdity and on the particular facts of this case, I am disinclined to depart from the literal and grammatical meaning of Article 34(3).

I take this view for two compelling reasons. Firstly, a literal reading of Article 34(3), as requiring actual as opposed to putative receipt of the arbitral award, is amply supported by Article 3(1) which enjoins physical delivery of written communications in arbitral proceedings, either in person to the intended recipient or to his place of business or habitual residence or by registered mail. This interpretation is further fortified by Article 31(4) which explicitly mandates the delivery of a signed copy of the award to each party. The burden to do so is implicitly placed on the arbitrator himself or on the administrator of the place of arbitration. There is no obligation imposed upon either party to take steps to actively obtain a copy of the award.

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 penalise 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.

APPORTIONMENT OF INCOME AND EXPENDITURE

The main thrust of the decision *a quo* is that the parties had contributed equal pieces of land in the form of their respective stands to their partnership and, therefore, it was immaterial that a larger portion of the building was located on the appellant's stand. The court also found that both had paid equally for the expenses incurred on the leased property. Consequently, the arbitrator's award, dismissing the first respondent's claim for an equal share of the rental income derived from the property, constituted a palpable inequity contrary to public policy.

The core element of the arbitrator's findings was that, although each stand purchased and contributed by the parties was equal in size, the appellant's stand

contained a greater proportion of the permanent structures and more of the usable floor space. This disparity in value accounted for the significant disparity in the parties' respective contributions to the purchase price of the property.

In making his award, the arbitrator relied on the principle enunciated by *Voet* (Book XIX - Title 2 - Section 21) to the effect that each co-lessor is entitled to found his claim in proportion to his share of the leased property:

“The action on letting is a personal *bona fidei* action. It is granted to a lessor, and also to a lessee who has in turn sublet to another the thing which he had hired. If a number of persons have let, it is granted to each in proportion to his share. It lies against a lessee and, if there are more than one, against each in proportion.”

(This passage is quoted with approval in *De Pass v Colonial Government & Others* 1886 (4) SC 383 at 391 and *Colonial Government v Wassermann* (1887) 5 SC 185 at 187, and applied in *Glenn v Bickel* 1928 TPD 186 at 191-192).

The arbitrator accordingly found that the relationship between the parties in acquiring the stands as a single entity was one of co-ownership in proportion to the purchase price that each had paid. Thus, in leasing the stands as a single unit, the parties became co-lessors with each party being due its *pro rata* share of the income derived from the payment of rentals. In the arbitrator's assessment, law and good reason dictated that the share of the income derived from the leasing of the stands as one indivisible unit should be in proportion to the specific contribution made by each party to the purchase price of the single entity.

In my view, the arbitrator was perfectly correct in ascribing legal significance to the fact that the appellant and the first respondent had respectively paid 70 per cent and 30 per cent of the purchase price for the property. The reason for this arrangement was quite obvious. The appellant's stand contained a greater proportion of the permanent structures than those on the first respondent's stand and was therefore considerably more valuable in terms of usable and rentable space. In these circumstances, I am unable to find anything iniquitous in the apportionment of rental income in the same proportion as the parties' respective contributions to the purchase price of the property. There can be nothing outrageous in a co-lessor who owns a larger portion of a building receiving a greater return on the rentals received from that building. On the contrary, an equal 50 per cent apportionment of income between the parties would itself render a palpable inequity by unjustly enriching one of the parties to the grave detriment of the other.

As for the sharing of expenses, the arbitrator correctly dealt with this aspect with the concurrence of counsel for both parties. He made the specific point that the remaining financial issues relating to the deductions made by the appellant and the rates of interest to be paid by it on any monies found to be owing to the first respondent were to be referred to a mutually acceptable firm of accountants to make the necessary calculations. Thereafter, any dispute that might arise as to what figures should be factored in for the calculation exercise should be remitted to the arbitrator for determination. This aspect of the arbitrator's award appears to have been totally disregarded by the judge *a quo*. He clearly misdirected himself in this respect.

WHETHER AWARD CONFLICTS WITH PUBLIC POLICY

In terms of Article 34(2)(b)(ii) of the Model Law, an arbitral award is challengeable and may be set aside on the ground that it is in conflict with the public policy of Zimbabwe. As a rule, the courts are generally loath to invoke this ground except in the most glaring instances of illogicality, injustice or moral turpitude. In the words of GUBBAY CJ (as he then was) in the *locus classicus* on the subject, *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S), at 465D-E:

“In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.”

This cautionary approach is further underscored by the learned Chief Justice in elucidating the proper test to be applied, at 466E-H:

“An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.

Under article 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.”

In the instant case, there is no suggestion that the arbitrator failed to understand or apply his mind to the question before him. Moreover, as already intimated above, I am unable to find anything outrageously illogical or immoral in his reasoning or conclusions, whether as regards the apportionment of rental income between the parties or in relation to the sharing of leasehold costs and expenses between them. Indeed, I do not even think that his decision can be said to be faulty or incorrect in any material respect so as to warrant a different conclusion. Consequently, I take the view that the learned judge *a quo* misdirected himself in holding that the impugned award constituted a palpable inequity contrary to the public policy of Zimbabwe.

In the result, the appeal must succeed on the substantive merits of the matter. It is accordingly ordered that:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* is set aside and substituted as follows:

“The application is dismissed with costs.”

GOWORA JA: I agree.

HLATSHWAYO JA: I agree.

Atherstone & Cook, appellant’s legal practitioners

Mutumbwa, Mugabe & Partners, respondent’s legal practitioners