

**LEGACY HOSPITALITY MANAGEMENT SERVICES LIMITED**

**v**

**(1) AFRICAN SUN LIMITED  
(2) HON. JUSTICE MTSHIYA (RTD) N. O.**

**SUPREME COURT OF ZIMBABWE,  
MAKONI JA, MATHONSI JA, MWAYERA JA,  
HARARE, 9 SEPTEMBER 2021 & 29 MARCH 2022**

*T Mafukidze*, for the appellant

*E T Matinenga*, for the 1<sup>st</sup> respondent

*No appearance*, for the 2<sup>nd</sup> respondent

**MWAYERA JA:** This is an appeal against the entire judgment of the  
Judgment No. SC 43/22  
Civil Appeal No. SC 53/20

High Court dismissing an application to set aside an arbitral award in terms of Article 34 of the Arbitration Act [*Chapter 7:15*] and registering the award instead.

**FACTUAL BACKGROUND**

The appellant is a non-resident company in the business of hospitality management providing hotel management services. The first respondent is a resident Zimbabwean company that leases hotels and lodges in Zimbabwe and is listed on the Zimbabwe Stock Exchange.

Sometime in 2015, the first respondent decided to outsource the management of some of its premium hotels and selected the appellant to manage its hotels. On or about 18 September 2015, the parties entered into a management agreement (“the agreement”) to

regulate their business relationship in terms of which appellant was to render management services to the first respondent's hotels. The agreement was amended and re-signed on 10 October 2015. Thereafter the agreed services were delivered by the appellant.

Subsequently, about three years later, on or about 13 September 2018, the first respondent purported to terminate the agreement between the parties on the basis that the Reserve Bank of Zimbabwe (RBZ), as the Exchange Control Authority, had refused to accommodate the first respondent's continued position of incurring the obligation to pay fees in foreign currency to the appellant in terms of the agreement. In addition to the RBZ's refusal to countenance the obligation for payment of fees by the first respondent. The first respondent also sought to terminate the agreement on the basis that the appellant had refused to renegotiate the terms and rates of payment in order to bring the parties agreement in conformity with the RBZ's Exchange Control Regulations.

Judgment No. SC 43/22  
Civil Appeal No. SC 53/20

2

The first respondent indicated that it was unable to pay outside the RBZ's directives, as it deemed that this would be illegal. Further, the first respondent averred that the fact that the RBZ refused to countenance the continued accrual of the foreign currency obligation, made the fulfilment of its contractual obligation permanently impossible to perform. The respondent averred that the impossibility to perform was through no fault of either party, but that a supervening impossibility barred the parties from performing the terms of the agreement.

The appellant was not amenable to the termination of the agreement and disputed the lawfulness of the termination by the respondent. Dissatisfied with the purported

termination by the first respondent, a dispute arose and the parties referred the dispute to the second respondent for arbitration.

### **PROCEEDINGS BEFORE THE ARBITRATOR**

In its claim before the second respondent, (the arbitrator) the appellant contended that the first respondent had unlawfully terminated the agreement as it should have given the appellant notice of the *force majeure* in terms of clause 25.12.3 of the agreement. It averred that after being given notice of termination, only the appellant was entitled to terminate the agreement and not the first respondent, since it was the one alleging failure to perform due to the RBZ directives. The appellant claimed, before the arbitrator, that the termination was unlawful and invalid. The appellant further claimed that there was no supervening impossibility warranting the purported termination of the agreement. The appellant in summary sought an order in the following terms;

Judgment No. SC 43/22  
Civil Appeal No. SC 53/20

3

1. The purported termination was invalid and improper and should be set aside for noncompliance with the parties' agreement.
2. There was no supervening impossibility as refusal of authority to pay by RBZ only amounted to delay in payment, which did not excuse non-performance.

The second respondent found in favour of the first respondent. His finding was based on the fact that the lack of approval of the agreement from the RBZ signified the existence of *force majeure*. He stated that it was unlawful for two parties to enter into an agreement without the authority of the RBZ in terms of the Exchange Control Act [*Chapter 22:05*]. The resultant *force majeure* was detrimental to both parties and as such the first

respondent was equally entitled to withdraw from the agreement by operation of the law. He issued an award in favour of the first respondent effectively dismissing the appellant's claim.

### **PROCEEDINGS IN THE COURT A QUO**

The appellant, dissatisfied with the arbitral award, approached the High Court in terms of Article 34 (2) (b) (ii) of the Arbitration Act seeking to have it set aside. The appellant averred that the award issued by the second respondent was contrary to public policy. It was illogical as it was in conflict with substantive contract law and it abrogated the tenets of the *pacta sunt servanda* principle, which recognises the sanctity of contract and provides that once a contract is entered into freely and voluntarily it becomes sacrosanct and the courts should enforce it. The appellant insisted that the agreement was lawful and therefore the purported termination by the first respondent was invalid.

The first respondent, in turn, opposed the application and also made a counter application for the registration of the award.

The court *a quo* found that the award was not so illogical as to offend public policy, as the parties had not obtained the authority of the RBZ, a prerequisite in terms of the Exchange Control Act. The court *a quo* reasoned that the award could not be said to be contrary to public policy as there was indeed a supervening impossibility since the agreement could not be implemented without the exchange control approval. It then dismissed the application for the setting aside of the award and registered it instead.

Aggrieved by the finding of the court *a quo*, the appellant lodged the present appeal on five grounds of appeal.

## GROUNDS OF APPEAL

1. The court *a quo* erred in failing to determine that the 2<sup>nd</sup> respondent's arbitral award abrogated the *pacta sunt servanda* principle. The 2<sup>nd</sup> respondent's award is inimical to public policy in that it irregularly excuses the 1<sup>st</sup> respondent from complying with express provisions of the contract relating to *force majeure*.
2. The court *a quo* erred in failing to hold that the 2<sup>nd</sup> respondent's arbitral award went far beyond mere faultiness or incorrectness. The Reserve Bank of Zimbabwe had no ability to cause nor call for cancellation of the contract *inter partes*. Consequently, the court *a quo* ought to have found offence in the 2<sup>nd</sup> respondent concluding that the Reserve Bank's suggestion that parties renegotiate their contract actuated *force majeure*.
3. The court *a quo* grossly misdirected itself in failing to find that the 2<sup>nd</sup> respondent's adjudication was palpably anomalous in that it was predicated on non-existent datum such as the finding that the appellant had refused to negotiate with the 1<sup>st</sup> respondent. Any decision born of non-existent facts is inimical to logic and thereby impairs the conception of justice.
4. The court *a quo* also erred in failing to hold that the arbitral award offended acceptable moral standards and what fair minded persons would consider just. In conflating the Exchange Control approval of the agreement by the Reserve Bank and the approval of payment the court *a quo* erred in law and rewrote the contract between parties.
5. The court *a quo* also ignores that in the circumstances, the 2<sup>nd</sup> respondent's arbitral award is not only anomalous at law but goes on to actuate a sense of shock for a

society in the midst of trying to court foreign investment in the ilk of the appellant. The registration of an award that negates what the parties agree in a contract eviscerates current law on exchange control, and occasion disinvestment in the country is contrary to public policy and must be set aside.

### **ISSUES FOR DETERMINATION**

Although there are five grounds of appeal, there are only two issues for determination, namely;

1. Whether the court *a quo* erred in not setting aside the award, and
2. Whether or not the court *a quo* erred in registering the award

### **SUBMISSIONS ON APPEAL**

Mr *Mafukidze*, for the appellant submitted that the court *a quo* erred in registering the arbitral award which was not only illogical but contrary to public policy. He argued that the termination of the agreement by the first respondent was unlawful and invalid. He further asserted that even if it was to be assumed that the first respondent was entitled to terminate the agreement, the termination was unlawful for want of giving notice.

He contended that in terms of clause 25.12.3 of the agreement, the respondent ought to have first given the appellant notice of the *force majeure* before terminating. After such notice it was the appellant who was entitled to terminate the agreement, and not the first respondent as it was the one alleging failure to perform due to the RBZ's directive. He further submitted that there was no *force majeure*, contending that the termination was unlawful and as such the arbitral award ought to be vacated.

*Per contra*, Mr *Matinenga*, for the first respondent, submitted that the termination of the agreement was above board and was lawfully done. He submitted that the agreement was registered with the RBZ for one year from 8 January 2016 to 7 January 2017. The yearly contract was not thereafter extended as the RBZ stated that the management fees had to be reviewed before the agreement could be renewed. He contended that the fact that the RBZ did not grant the relevant authority amounted to a supervening impossibility which had the effect of terminating the agreement.

It was further submitted that the respondent could not incur obligations to make a payment outside Zimbabwe without the RBZ's authority in terms of clause 11 (1) (b) of the Exchange Control Regulations and that without authority from the RBZ, the contract became not only unenforceable, but illegal. He submitted that the respondent conducted itself in accordance with the suspensive condition clause and the *force majeure* clause. Judgment No. SC 43/22 Appeal No. 9058/20 He argued that the court *a quo* properly registered the arbitral award which was not contrary to public policy. He urged the court to dismiss the appeal with costs.

## **THE 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 by the High Court. In terms of Article 34(2)(b),

“An arbitral award may be set aside by the High Court only if it finds that the subject matter or dispute is not capable of settlement by arbitration under the law of this country or the award is in conflict with public policy of Zimbabwe.”

Article 34(5) goes further to set out what would ordinarily be regarded as being contrary to public policy. It states,

“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 public policy of Zimbabwe if:

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.”

These provisions were considered in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) where the Court set out the approach to be adopted when considering whether an award is contrary to public policy. GUBBAY CJ, at 465D made the following remarks:

“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.”

He further stated 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 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 consists of 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.”

*Force majeure* which is also known as *vis major* in contract means that a superior force has occurred, disabling a party from performing contractual obligations due to a circumstance(s) beyond their control. A *force majeure* clause in a contract excuses a party from performing some or all of its obligations.

The case of *Standard Chartered Bank Zimbabwe Limited v China Shougang International* 2013 (2) ZLR 385(S) is apposite in illustrating what constitutes *force majeure*.



The Court made reference to the case of *Peter Flamman and Company v Kokstad Municipality* 1919 A D 427, in which SOLOMON ACJ, said;

“Nor is it necessary to consider generally what are the circumstances in which it can be said a contract has become impossible of performance. The authorities are clear that if a person is prevented from performing his contract by *vis major* or *casus fortuitus* under which would be included such Act of State as we are concerned with in this appeal he is discharged from liability”

See also the case of *Firstel Cellular (Pvt) Ltd v NetOne Cellular* 2015 (1) ZLR 94 (S) in which the Court when dealing with suspension of contractual obligations on the basis of a *vis major* or *causa fortuitus* held that, at page 10:

“It is trite that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arm’s length. Thus, the suspension of a contractual obligation by dint of *vis major* or *casus fortuitus* can only be allowed in very compelling circumstances. The courts are enjoined to consider the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the alleged impossibility.

See also *Watergate (Pvt) Ltd v Commercial Bank of Zimbabwe* 2006 (1) ZLR 65 (S) at 14 B-F (underlining my emphasis)

Judgment No. SC 43/22

2016 (1) ZLR 9 (S) at 20

Civil Appeal No. 65/20

The Latin maxim *pacta sunt servanda* aptly refers to the sanctity of a contract to the effect that a contract freely and voluntarily entered into is sacrosanct and should be given effect by the courts.

In *Barkhuizen v Napier* 2007 (5) SA 323(CC) the maxim *pacta sunt servanda* was succinctly defined as meaning that parties to a contract have freedom to contract and assent to whichever terms they wish to and the court should only intervene and oversee when such contract contravenes another set of legal rights.

In *Makani and Ors v Arundel School and Ors* CCZ 7/16 the Constitutional Court fluidly and in clear terms visited the import of the doctrine of sanctity of contract. It stated the following at p 24-25 of the judgement:

“It is trite that a contract concluded in contravention of the written or unwritten law, or one that is contrary to public policy, is susceptible to being struck down and rendered of no force or effect. The doctrine of sanctity of contracts is obviously subject to constitutional limits. As was observed in *Bredenkamp and Ors v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para 39, every contract or institutional rule must pass Constitutional muster.” Again, in *Barkhuizen v Napier* 2007(5) SA 323(CC) at para, 15, it was emphasised that:

“All law including common law of contract, is now subject to Constitutional control. The validity of all laws depends on their consistency with provisions of the constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control”

## **APPLICATION OF THE LAW TO THE FACTS**

The appellant’s main contention is that the arbitral award ought not to have been registered as it was illogical and offends the public policy of Zimbabwe. Judgment No. SC 43/22  
Civil Appeal No. SC 53/20  
10  
to buttress this contention, the appellant relied heavily on the contention that the award goes against the *pacta sunt servanda* principle which is at the heart of contractual agreements.

In order to determine whether the arbitral award offends public policy as contended by the appellant and vehemently disputed by the first respondent, due consideration to the agreement entered by the parties ought to be made. A close look at the contract reveals that the parties entered into a management agreement which needed exchange control approval as Legacy is a foreign company. The parties in due recognition of this legal position included a suspensive condition in their contract, in clause 5, which provides,

“5.3 This agreement is subject to the following suspensive conditions

‘5.31.....

5.32.....

5.33 that both parties receive all statutory and regulatory approvals necessary for the legal fulfilment of all requirements attendant to this management agreement.”

The exchange control approval relates to approval to enter into a liability to pay a foreign company which has to be paid in foreign currency. When the RBZ declined to authorize the agreement in terms of the Exchange Control Regulations, this constituted a supervening impossibility to the performance of the contractual obligations as it would have been unlawful to proceed without the authority of the regulatory board. It is apparent from the record that the parties received a year’s approval from RBZ. After the lapse of one year, the Reserve Bank of Zimbabwe refused to authorise the agreement and advised the parties to renegotiate. The renegotiation did not work out. The court *a quo*’s finding was that when the parties entered into the contract, they subjected themselves to fulfilment of statutory and regulatory requirements.

Judgment No. SC 43/22  
Civil Appeal No. SC 53/20

11

In this case there was no regulatory authority approval thus termination of the contract was inevitable. The *force majeure* affected both parties such that termination at the instance of either of the parties without giving notice was appropriate. The court *a quo*, having made a finding that the refusal of the Exchange Control authority to register the agreement fell squarely within a *force majeure* event as defined in clause 25.12.1 of the agreement, found no fault in the arbitral award setting aside the contract. The court *a quo*’s findings in that regard cannot be faulted.

In compliance with guidelines outlined in Article 34 (2) (ii) on what constitutes an award that conflicts with public policy, the courts have been scrupulous to interpret that provision narrowly. In doing so, the courts have been cognisant of the need to

protect the principle of sanctity of contract. The sentiments of MATHONSI J (as he then was) in *Harare Sports Club v Zimbabwe Cricket* HH398/19 at p 8 on the need to adopt a narrow interpretation as to what constitutes conflict with public policy, are apposite. He stated:

“..... After all, it is the parties who voluntarily submit to arbitration as an instrument for speedy and cost-effective means of resolving their disputes. 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.”

See also *Zimbabwe Cricket v Harare Sports Club & Anor* SC 27/22.

It is trite that parties to a contract are bound by the terms of the contract. If parties contractually agree to arbitration as a means of dispute resolution, then the court should be loath to interfere with decisions made by arbitrators. Intervention is only resorted to if the decision reached is in contravention of the Arbitration Act [*Chapter 7:15*] and/or is so irregular and illogical to amount to moral turpitude on the part of the arbitrator. This principle was emphatically enunciated by MALABA DCJ (as he then was) in *Alliance Insurance v Imperial Plastics (Pvt) Limited & Anor* SC 30/17 wherein he stated, at p 5 of the judgement:

“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). An application brought before the court under this provision is in essence a restricted appeal and the applicant should prove the grounds set out in order to succeed in its application.”

The cautionary approach was lucidly enunciated in *Peruke Investments (PVT) Ltd v Willoughby Investments (PVT) Ltd & Anor* 2015 (1) ZLR 491 (S) and also *Zimbabwe Electricity Supply Authority supra*.

See also *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77 and *Tel Cordia Technologies INC v Telkom SA Ltd* 2007 (3) SA 266 at 302 D-E, where Harms JA stated as follows:

“Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of limits of his power. The power given to the arbitrator was to interpret the agreement rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.... To illustrate, an arbitrator in a ‘normal’ local arbitration has to apply South African law but if he errs, in his understanding or application of the local law the parties have to live with it.”

Judgment No. SC 43/22

Civil Appeal No. SC 53/20

13

From the cases cited above, it appears settled that an arbitral award will not be lightly set aside on the basis that a party considers that the decision of the arbitrator is wrong. The court will not interfere with an award unless the reasoning of the arbitrator constitutes a palpable inequity so outrageous and far reaching in its defiance of logic or acceptable moral standards as to cause a fair-minded person to regard it as hurting all sense of justice and fairness. Article 34 is certainly not intended for the court to reassess a dispute on the basis that the appellant views the arbitrator’s decision as wrong.

The court *a quo*’s conclusion that the arbitrator’s finding that the parties subjected themselves to a suspensive condition in conformity with the exchange control regulations cannot be faulted. The continuity of the management agreement was centred on Reserve Bank of Zimbabwe approval.

When the RBZ declined to authorise the obligation to incur a foreign liability, the contract was rendered illegal and incapable of performance, regard being had to the fact that the appellant is a foreign entity. This constituted a *vis major*. It is apparent that the suspensive condition could not be fulfilled and this rendered continuity of the agreement unlawful and impossible. The sanctity of contract was not in any manner interfered with by the registration of the award by the court *a quo*.

The fact that the contract was impossible of performance meant that either of the parties was entitled to terminate it on that basis. The arbitral award registered by the court *a quo* did not amount to creation of a new contract for the parties neither did it interfere with freedom and sanctity of contract. Registration of the award actually gave effect to the contract made and entered into by the parties, contrary to the appellant's contention that termination of the agreement fell foul of the maxim, *pacta sunt servanda*, which recognises the sanctity of contract.

The agreement itself was self-regulating as it contained a suspensive condition. Once the authority to register the agreement was not given and/or renewed, the agreement was brought to its knees.

## **DISPOSITION**

Considering the circumstance of this matter and the nature of the agreement between the parties, the second respondent's finding that there was a supervening impossibility and that termination was inevitable cannot be said to be illogical and outrageous. The arbitral award was not so iniquitous as to violate principles of justice and

fairness. It does not at all conflict with public policy and as such was properly registered. The management agreement was terminated for impossibility to perform. The judgment of the court *a quo* cannot be faulted in that regard.

The appeal is without merit and stands to be dismissed. Regarding the issue of costs, there is no reason why the costs should not follow the result.

In the result, it be and is hereby ordered as follows:

The appeal be and is hereby dismissed with costs.

**MAKONI JA** : I agree

Judgment No. SC 43/22  
Civil Appeal No. SC 53/20

15

**MATHONSI JA** : I agree

*Mawere Sibanda*, appellant's legal practitioners

*Gill, Goldonton & Gerrans*, 1<sup>st</sup> respondent's legal practitioners