HC 1229/22

HARRISON HOLDINGS (PVT) LTD

Versus

MUNAKIRI LEAF TOBACCO (PVT) LTD

And

SIMBARASHE MUNAKIRI

HC 1566/22

MUNAKIRI LEAF TOBACCO (PVT) LTD

And

SIMBARASHE MUNAKIRI

Versus

HARRISON HOLDINGS (PVT) LTD

HC 2995/22

HARRISON HOLDINGS (PVT) LTD

Versus

MUNAKIRI LEAF TOBACCO (PVT) LTD

and

SIMBARASHE MUNAKIRI

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 11 October 2022

CONSOLIDATED OPPOSED APPLICATIONS

R. Mabwe, for the applicant

J. Mapuranga, for the respondents

CHIRAWU-MUGOMBA J

1. The three above cited matters were consolidated for purposes of hearing through HC 3382/22 on the 15th of June 2022.

2. HC 1229/22 is an opposed application for the registration of an arbitral award issued by Susan Muchaneta Mutangadura dated the 5th of October 2021.

3. HC 1566/22 is an opposed application for the setting aside of the same award.

4. HC 2995/22 is an opposed application for dismissal of HC 1566/22 for want of prosecution.

5. HC 2995/22 was abandoned by consent.

6. At the end of the hearing on the 11th of October 2022, I gave the following order *ex tempore*

a. That Case number HC 2995/22 being a chamber application for dismissal for want of prosecution be and is hereby abandoned by consent.

b. **HC 1229/22:** The application to register the arbitral award be and is hereby dismissed with costs.

c. **HC 1566/22:** - The application to set aside the arbitral award be and is hereby granted with costs.

7. I have been requested for reasons for the judgment. These are they.

8. For purposes of the hearing, I started with HC 1229/22 being the application for registration since the outcome would affect the application for setting aside of the award. I will also refer to the parties as cited in HC 1229/22.

9. The application for registration was made in terms of Article 35 of the Arbitration Act [*Chapter 7:15*]. The following award was made in favour of the applicant:

a. First and second respondents shall pay to the claimant the amount of US$109 434 being arrear rentals in respect of first respondent's occupation of 35 Simon Mazorodze Road, Ardbennie, Harare, jointly and severally, one paying the other to be absolved.

b. First and second respondents shall pay to the claimant, holding over damages at the rate of US$200.00 per day for the period 1 May 2021 to date of vacation or eviction from 35 Simon Mazorodze Road, Ardbennie, Harare, jointly and severally, the one paying the other being absolved.

c. First respondent and all those claiming occupation through the first respondent be and are hereby evicted from 35 Simon Mazorodze Road, Ardbennie, Harare.

d. First and second respondents shall pay to the claimant interest at the rate of 15% per annum from the date of each amount, jointly and severally, the one paying the other to be absolved.

e. First and second respondents shall pay claimants costs of the arbitration proceedings as stipulated by law.

10. The dispute between the parties emanates from a lease agreement over the above-mentioned premises. The 2nd respondent bound himself as surety and co-principal debtor. The applicant contended that the respondents had breached the lease agreement and claimed payment of arrear rentals, interests, eviction, holding over damages and costs of suit. The respondents denied being in breach of the lease agreement. The applicant sought the registration of the award as an order of the High Court.

11. The premise of the respondents' argument was that the United States dollar ceased to be legal tender in Zimbabwe on the 24th of June 2019. The law was changed in March 2020 through S.I 85/2020. Therefore, rentals due and payable between the period 24 June 2019 can only be paid in Zimbabwe currency. They denied subletting the premises and also that a payment of ZWL$3,000 was on the 31st of March 2021.

12. The arbitrator made the following findings in support of the award. Apart from questioning the legality of claiming rentals pegged in United States dollars for the period 24 June to March 2020, the respondents did not deny that they had failed to make rentals payments for the premises as provided in the lease agreement. They did not also deny subletting the premises and that the lease had also expired. No proof of the ZWL$3,000 payment was submitted. The arbitrator took note of the fact that the applicant argued that the provisions of SI 212/19 do not have retrospective effect. They cannot affect a lease agreement entered into. Further that s6 of the Exchange Control (Exclusive use of Zimbabwe dollar for domestic transactions (amendment) Regulations, 2020 provided for

parties with free funds to settle obligations in United States Dollars. Further still that SI85 of 2020 provided for payment of goods and services in United States dollars or the local currency at the ruling rate of the day. Claimants claims payment of rentals in local currency equivalent at the ruling rate of the day.

13. The respondents strenuously opposed the application as being in conflict with the public policy of Zimbabwe for one or more of the following reasons: -

a. It disregarded the positive law applicable in Zimbabwe at the material time that outlawed the use of the United States dollars as legal tender for all local transactions. The lease agreement was a local transaction.

b. The lease agreement in so far as it stipulates that the Zimbabwe dollar is the base for currency, offends against the legislative and currency position.

c. The award disregards a payment of ZWL$3,000 that was made which at the time it was made was equivalent to US$ 36 000.

14. It is pertinent to note that the respondents in HC 1566/22 raised the same public policy argument in challenging the award. In addition, they raised the same issue of a payment that had not been taken into account. They therefore prayed for the setting aside of the award on the basis that it contravened public policy.

15. In opposing HC 1566/22, the applicants denied that the award was contrary to public policy. They contended that the although the lease agreement is a domestic transaction, it was concluded before the amendment of s23 of the Finance Act.

16. The issue of the ZWL$3047 payment need not detain the court. There was no proof of its payment as noted by the arbitrator. The issue of arrear rentals and holding over damages and ancillary relief also need not detain the court. The amounts as awarded by the arbitrator barring the currency are correct. Mr. *Mapuranga's* submission that the amount is being contested adds no value to the case.

17. The only issue that will resolve both HC 1229/22 and HC 1566/22 is whether or not the award is contrary to public policy? Can an arbitrator in the circumstances of this case make an award in United States dollars? The issue submitted by Mrs Mabwe about the expiration of the lease, in my view is irrelevant as it was never contested.

18. Guided by Article 33 of the act, I encouraged the parties to find each other given the fact that in my view as expressed above, the matter hinged on the issue of the currency. In particular 33(1)(b)

ARTICLE 33

Correction and interpretation of award; additional award

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties—

(*a*) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(*b*) if so, agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the Interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

The parties were however unable to agree on the matter.

19. Registration of an arbitral award is provided for in Article 35 as follows: -

RECOGNITION AND ENFORCEMENT OF AWARDS

ARTICLE 35

Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in *the English language*, the party shall supply a duly certified translation into *the English language*.

The applicant duly complied with these requirements. See *Gwanda Rural District Council vs Botha,* SC -174-20.

20. Article 34 (2)(b)(ii) of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, which is set out, with modifications, in the First Schedule to the Arbitration Act [*Chapter 7:15*] (the *Model Law*), which provides that;

"(2) An arbitral award may be set aside by the High Court only if—

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

21. Article 34 (2) (b) (ii) finds resonance in Article 36 (1)(b) (2) on refusal of registering an award on the ground that it is contrary to public policy.

In our jurisdiction there is a plethora of cases on the meaning of public policy. In *ZESA v Maphosa 1999 (2) ZLR 452 at p 466 where at 466 E-G GUBBAY CJ* said:

> "*Under articles 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*".

22. In *Breastplate Service (pvt) Ltd vs Cambria Africa PLC,* SC 66/2020, the Supreme Court had occasion to comment on the implications of S1 33/99 and SI 142/19 as follows:

> Present Status of S.I. 33 of 2019 and S.I. 142 of 2019
>
> For the sake of completeness, it is necessary to address and clarify the present status of the two statutory instruments under scrutiny *in casu*. S.I. 33 of 2019 was enacted in terms of s 2 of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20]*. In terms of s 6(1) of that Act, S.I. 33 of 2019 lapsed after the expiry of a period of 180 days. However, its provisions have been re-enacted, with some crucial modifications, through s 22 of the Finance (No. 2) Act 2019 (Act No. 7 of 2019). As for S.I. 142 of 2019, its provisions have also been substantially reproduced, in virtually identical terms, in s 23 of Act No. 7 of 2019. This Act was promulgated on 21 August 2019 and came into operation and effect on the same date. Section 21 of the 2019 Act inserts and re-enacts, with effect from the "first effective date", *i.e.* 22 February 2019, the entirety of s 44C of the Reserve Bank Act as was contained in s 3 of S.I. 33 of 2019. Section 44C (2) preserves the position of funds held in foreign currency designated accounts as well as the continued acquittal of foreign loans and foreign obligations denominated in any foreign currency in such foreign currency. As regards the issuance and legal tender of RTGS dollars, s 22 of the 2019 Act re-enacts the provisions of S.I. 33 of 2019, but with certain critical changes which are not relevant for present purposes, with retrospective effect from the first effective date, *i.e.* 22 February 2019. *Section 23* of the 2019 Act reproduces and re-enacts the provisions of S.I. 142 of 2019, to declare in essence that any foreign currency

whatsoever is no longer legal tender in any local transactions and that the Zimbabwe dollar shall, with effect from the "second effective date", *i.e.* 24 June 2019, be the sole legal tender in all such transactions, subject to the original savings in respect of the opening and operation of foreign currency designated accounts, the payment of customs duties and import or value added tax and payments for international airline services.

23. With reference to SI 212/19, the Supreme Court stated as follows: -

"*I have earlier alluded to the wide impact of S.I. 212 of 2019, to wit, the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations 2019, promulgated on 27 September 2019. The term "domestic transaction" is very broadly defined in s 2(1) of the Regulations, subject to s 4, to encompass virtually every conceivable commercial transaction within Zimbabwe. Section 3(1), which is also subject to s 4, expressly prohibits the payment or receipt of any currency other than the Zimbabwe dollar, as the price or consideration payable or receivable in respect of any domestic transaction. Section 4 enumerates those transactions which are excluded from the scope of the definition of "domestic transaction". Of particular relevance for present purposes is s 4(e), which excludes "transactions in respect of which any other law expressly mandates or allows for payment to be made in any or a specific foreign currency".*

24. In my view, the lease went through three specific currency changes from the 1st of April 2019. SI142/19 in section 2 made the Zimbabwe dollar the sole legal tender with effect from the 24th of June 2019. The lease agreement had already been entered into. S.I 212/19 in section 3 making the Zimbabwe dollar the exclusive currency for use in domestic transaction. This was with effect from the 27th of September 2019. The lease agreement had already been entered into. SI 85/2020 allowed the payment of goods in foreign currency using free funds with effect from the 29th of March 2020. This was during the subsistence of the lease agreement. SI 185/2020 (Exchange Control) exclusive use of Zimbabwe dollars for domestic transactions) (Amendment) Regulations, 2020 (no.3) provides for dual pricing and quotations and offering of prices for goods and services. There are also civil penalties for the contravening s7(1) of the SI.

25. In paragraph 44 of her analysis, the arbitrator states very clearly that the applicant is seeking US$109 434 **payable at the prevailing auction rate on the date of payment.** In my view, there was nothing wrong in the applicant seeking payment in United States dollars at the prevailing rate given the analysis of the legal position above. The same

view relates also to the holding over damages. The arbitrator however, inexplicably made an award solely in United States Dollars. That means, the applicant could insist on payment in United States dollars contrary to the ***ratio*** in the *Breastplate* case. That constitutes a palpable inequity as contemplated in the *ZESA* matter (supra). As rightly submitted by Mr *Mapuranga,* the rentals could not accrue in United States dollars. While the figure could be expressed in that currency, the arbitrator ought to have made it clear that this was at the prevailing rate as at the date of payment. Mrs *Mabwe* referred the court to the judgment in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe (Pvt) Ltd*, 1988 (2) ZLR 482 (SC) wherein it was held that: -

"*Our courts are at liberty to give judgments in foreign currency. This follows the radical approach adopted in England by the House of Lords in 1975. As was observed by GUBBAY CJ (as he then was), at 488 A-B.*"

26. However, while I am bound by that decision, I take cognisance of the fact that the law relating to use of currency was affected radically as discussed *infra.* The award was clearly wrong in so far as it made an award solely in United States dollars.

27. As I have alluded to already, the arguments in HC 1229/22 and HC 1566/22 are similar. Article 36 (1) (b) (ii) category allows a court to refuse to register an award for being contrary to public policy. Article 34 (1) (b) (ii) allows a court to set aside an award on the ground that it is contrary to public policy. My findings on public policy in HC 1229/22 apply with equal force to HC 1566/22.

28. Costs are always at the discretion of the court. In *casu,* the applicant insisted on registering the award despite it clearly being contrary to public policy. Applicant should therefore pay the costs.

Matsika Legal Practitioners, Applicant's Legal Practitioners

Kadzere, Hungwe and Mandevere, Respondents' Legal Practitioners.