1. LOLA VERLAQUE
   and
   EDWARD VERLAQUE
   versus
   CHESTER MHENDE
   and
   MARY ANNE MHENDE
   and
   MOSES HUNGWE CHINHENGO N.O

2. CHESTER MHENDE
   and
   MARY ANNE MHENDE
   versus
   LOLA VERLAQUE
   and
   EDWARD VERLAQUE

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE; 25 June 2024 & 15 January 2025

Applications for (1) setting aside of; and (2) Registration of arbitral award

T Magwaliba, for the applicants in HC 1129/23 and the respondents in HC 7965/22
D Ochieng, for the 1st and 2nd respondents in HC 1129/23 and the applicants in HC 7965/22
No appearance for the 3rd respondent in HC 1129/23

CHIKOWERO J:

1. This judgment disposes of two applications. Case number HC 1129/23 is an application for the setting aside of an arbitral award handed down by the arbitrator on 18 November 2022 while HC 7965/22 is an application for the registration of the same award.
2. On 5 January 2023 this court, per CHINAMORA J, consolidated the two applications and ordered that they be set down for hearing before the same judge and on the same date.

3. Both applications are opposed. At the hearing, and with the consent of both counsel, I heard submissions on the application for the setting aside of the arbitral award with the understanding that the outcome of that application will determine the fate of the application for registration of the arbitral award.
4. In terms of the award, the applicants were evicted from Kwayedza Farm in Norton and the cancellation of the joint venture agreement between them and the first and the second respondents was confirmed. They were also ordered to pay contractual damages to the first and second respondents in the sum of US$440 732 plus interest as well as holding over damages in the sum of US$716 per day from 1 November 2021 to the date of vacation of Kwayedza Farm, plus interest. The applicants were ordered to pay the costs.
5. The applicants are South African nationals. They are, respectively, daughter and father. The first and second respondents are Zimbabwean nationals. They are spouses. The third respondent, who has not participated in these proceedings, is the arbitrator.
6. The first and second respondents were offered rights and interest in a certain piece of land called Kwayedza Farm under the Government of Zimbabwe's Land Reform and Ressettlment Programme. They accepted the offer. The farm, which is situate in Norton, is one hundred and nineteen hectares in extent.
7. On 25 April 2019 the applicants entered into a Joint Venture Agreement and a Joint Venture Supplementary Agreement with the first and second respondents. In terms thereof, the parties agreed to associate together in a joint venture with the aim of conducting farming business on Kwayedza Farm. They constituted themselves as a Joint Venture.
8. The main farming business of the joint venture was to be crop farming. For this purpose the parties undertook to make certain capital contributions required by the joint venture. The first and second respondents' contribution was availing the use of land on the farm, workshops, sheds, exclusive rights to irrigation infrastructure, the right to use existing staff accommodation and to build more accommodation for staff, the right to use other fixed structures that the joint venture might find useful, water rights to enable the joint venture to produce irrigated crops, permission to cut down trees to create more arable land and to

use the wood as fuel for curing tobacco. For their part, the applicants were to manage the farming operations as well as funding the same.

9. Clause 3 of the joint venture agreement reads:-

> "FARMING OPERATIONS
> The JV [abbreviation for joint venture] shall, on or before the 1st of September each year, discuss the intended cropping program for the next 12 months."

10. Clause 4 reads:

> "MANAGEMENT
> The JV will aim to operate in the spirit of co-operation and understanding. Whilst the investor is the technical partner in the JV, both parties agreed that the JV will employ managers to oversee the management of farming operations. The Landholder shall not unduly compete at the expense of the JV's operations and will do what it can to create production oriented work environment. The JV will aim to operate under a spirit of good will."

By "investor" was meant the applicants while "Landholder" referred to the first and second respondents.

11. Because of its significance, I reproduce clause 1(b) of the joint venture agreement. It reads:

> "1. JOINT VENTURE CONTRIBUTIONS
> (a) …
> (b) The Landholder's contribution to the JV shall be the use of the Farm and its land for the purposes of farming (Annexure A map of the area that is available). The workshops and SHED structures on the farm may be utilized by the JV. The Landholder agrees NOT to enter into a JV of any of this portion of land with any party for the duration of this Agreement. It is recorded that the area of land to be utilized by the JV for purposes of this JV is demarcated on the map attached as Annexure A. The Landholder has the right to farm as area on his own account, in the area between the barns, main road and entrance to the barns.
> (c_-m) …"

12. The joint venture agreement was for an initial period of ten years commencing on 1 April 2019 and ending **on 20 March 2029**. It was renewable on terms to be agreed after the expiry of the initial ten year period.

13. As it turned out, disputes arose before two years were up from the date of signing of the joint venture agreement and the joint venture supplementary agreement. The parties dragged each other before the magistrates court, this court and, finally the arbitrator. Their efforts yielded the arbitral award the subject of this judgment.

14. The dispute arose from clause 7 of the joint venture agreement and certain clauses of the joint venture supplementary agreement. Clause 7 reads:

> "Sharing of income.
> 100% of Gross revenue from cropping, animal husbandry ad livestock production (revenue) will be the landholder's share of income. A monthly contribution of US$1788 (payable in the equivalent Zimbabwe Dollars at interbank rate ruling on the date of payment) shall be paid each month to the landholder. This will be reconciled and deducted from the 10% percent (sic) of gross income at the completion of annual sales."

15. The pertinent clauses of the joint venture supplementary agreement read:

> "Over and above the said agreement given to the Minister of Lands, we both parties agree on the following:
> 1. There shall be 12 months rent free occupation on the farm from 1st April 2019 to 30 March 2020.
> 2. R25 000 (equivalent of US$1788) per month after the one year rent free period with escalation of 6% per annum shall be paid by the Partner to the Landholder.
> 3. An inventory list of all equipment to be handed over by the Landlord to the Partner will be drawn and signed by the Parties upon the Partner taking occupation before end of May 2019."

16. At pp 12 -13 of the arbitral award the arbitrator said:

> "Claim for confirmation of cancellation of JVA." Did the JV take off the ground?
> 47 The foundation of the claimants' case against the respondents is that although the parties signed a JVA in April 2019, its terms were generally observed in the breach. The parties did not discuss and agree on a cropping programme as envisaged in the JVA. Farming activities were conducted by the respondents without consultations with the claimants such that the claimants remained in the dark as to what was happening. The respondents paid part of the monthly contributions but never produced the annual production and sales figures to enable the parties to come up with the annual revenue and calculate the 10% share thereof payable to the claimants. That share could have been less than the amount of monthly advance payments under the JVA or more than them, in which case the claimants would have been entitled to more than they had been paid in terms of the JVA. I agree with the analysis of claimants' counsel on whether the joint venture was ever consummated. He submitted it never was:
>
> '22. The starting point in regard to the merits of the main claim is to affirm its true character. Since the respondents acted unilaterally in their use of the property availed by the claimants and failed to agree a programme of operation, there is no joint venture to dissolve. By failing to cooperate with the claimants to establish a joint venture, the respondents committed a breach which entitles the claimants to damages representing that which would have accrued to the claimants if the joint venture had been formed …
>
> 23. The uncontroverted evidence amply confirms the respondent's failure to form the joint venture. As Bamford (op.cit) records at p11, this is 'an enterprise jointly embarked upon with the object of making a profit.' The respondent's persistent rebuff of the claimants' approaches to agree an operational scheme was thus even more than a breach of an express and material term of the contract. It undermined the fundamental character and

purpose of the whole transaction. Analysed carefully, the contract between the parties (although styled a 'joint venture agreement') was really an agreement to form a joint venture, because no joint endeavour could truly be pursued in the absence of the all important production plan that the respondent obstructed.

24. The totality of the evidence [particularly such features as the ill defined role of Atwell and the conscious omission to notify -let alone include-the claimants in respect of what were clearly major decisions] is strongly suggestive of the respondents having used the agreement to form a joint venture as a Trojan horse by which they surreptitiously gained the use of the farm for their personal venture. The respondents may have (perhaps unwittingly) confirmed such motives in their belated proposal that they pay the accrued arrears and thereafter be allowed to use the farm as they wish…The particulars of the venture that the respondents in fact established are thus their own concern. The issue in these proceedings concerns the notional performance of the venture that never came to be because of the respondents' breach.'

48. The picture that emerges from the interaction of the parties is clear. The respondents were in fundamental breach of the signed JVA. The (sic) neglected or failed, in their capacity as the technical partner, to produce not only a cropping programme but also an action plan to breathe life into the joint venture. As now understood by the claimants, they took control of the farming activities and produced farm outputs through their agents without venture partners. Thus, it is reasonable to conclude that they conducted operations at Kwayedza Farm without transparency and to their own account and benefit. In the circumstances, I am satisfied that the claimants were, accordingly, entitled to cancel the JVA, and claim damages as may be warranted or appropriate. The claimants sought an order that the respondents should be ordered to vacate the Farm immediately upon the making of the award in their favour. I propose to give a longer period within which to move off the Farm and further that the parties may agree on any period in that regard, as they see fit."

(all underlining my own.)

17. As for quantification of the damages, the arbitrator said at pp 14 – 15 of the arbitral award:

"52. The claimants base their claim for damages on the historical performance of the Farm in the period before the respondents come onto the scene.

53. The claimants took occupation of the Farm in 2001. At that stage tobacco was grown on 40 hectares. Same hectarage was used for growing winter wheat. The farm was producing 110 000 chickens per placing. The claimants continued this magnitude of production of the Farm. They brought thereon 40 herd of cattle and 16 sheep. Mr B Nomatoma, a farmer at Parklands Farm in the same district, and former Agricultural Extension Officer of the area for 5 years until end of 2007, deposed to an affidavit in support of the levels of production at the Farm:

'I know Mr Chester Mhende of Kwayedza Farm since 2003. I was his extension Officer. The farm is well known for 10 x 5000 chickens operation in the main section and 4 x 15000 Chickens in the top section, tobacco and winter wheat.'

54. Another local cereal farmer, Mr Herbert Ushewokunze VI, earlier mentioned, also deposed to an affidavit: 'I know Kwayedza Farm (which is located 8 kilometres up from my farm, also on Porta Road) because I leased the farm for three years until 2014 when I grew 60 hectares of soya beans, 20 hectares of maize and 60 hectares barley crop in winter.

> The farm also had 10 chicken houses on the main section with a holding capacity of 50 000 per placement while the top section had 4 chicken houses with a holding capacity of 60 000 per placing, plus tobacco curing facilities for 40 hectares of irrigated and dry land tobacco."
> 55. I have already set out above the provisions of the JVA. In terms thereof, the parties were to agree, in September of each year, on the cropping program for the next twelve months. That did not take place. A moratorium on payment of monthly contributions to the claimants was agreed upon thereby freeing the respondents to set themselves up on the Farm. The moratorium meant that the respondents were not required to pay as income for the claimants the 10% of gross revenue for the first year of operation – 1 April 2019 to 30 March 2020. Thus, the claimants do not claim anything in relation to the moratorium period.
> 56. The claim for damages starts with the second year of operations. Basing the quantum of damages on the historical production figures as well as on the operations by the respondent at the farm as they understood them, the claimants demand payment of US$127 142 for the period 1 April 2020 to 30 March 2021, being their share of the gross revenue at 10%. The schedules in the claimants' written statement of evidence as expounded upon by first claimant's oral evidence provide details of the calculations. The items of production relied upon are notional sales figures for chickens at point of lay, cattle, sheep, tobacco and wheat, giving a total of US$1614 750, 10% of which is US$161 475.00. From this figure the claimants deducted the total amount of monthly contributions paid by the respondents in the sum of US$34 333.00. Thus, the amount to be paid by the respondents for the second year is US$127 142.00.
> 57. The same method of calculation is used for the third year of operations -April 2020 to October 2021 when the termination period of notice expired. The total claimed for this period is US$241 906.00. This brings the total amount of damages claimed for the two periods to US$369 048."

18. The arbitrator also had regard to the same schedule wherein damages were claimed in the sums of US$1025 and US$1150 for a lost alternator and chain respectively as well as US$975, US$20 000, US$36 050, US$9000 and US$5000 in regards to (presumably) the replacement cost of a lost cable and the cost of renovating five chicken houses, 7 boreholes, re-thatching the main housing compound and renovating a collapsed gazebo respectively. The schedule also reflected US$1466 as damages in respect of a washing machine (presumably as the replacement cost of a missing or damaged washing machine).
19. All in all, the first and second respondents' claim as reflected in the schedule was awarded as prayed for. The damages totalled US$440 732. In addition, holding over damages of US$716 per day, based on 10% of the notional sales figures for chickens, cattle, sheep and wheat between April and October 2021 were awarded.

20. The applicants' erstwhile legal practitioner attended the arbitral hearing on a watching brief. This was so because the applicants had not complied with various requirements leading up to that hearing. The applicants did not therefore participate at the arbitral hearing. But they had already made the point, in papers responding to the claim for damages, that the first and second respondents should prove the amount of damages claimed by them. I pause to observe that even if the applicants had not filed anything in response to the statement of claim the first and second respondents were still required, at law, to prove the damages.

21. Before me, Mr Magwaliba made the primary submission that I should set aside the arbitral award because the damages were awarded without evidence. In other words, that the award of damages violated a fundamental principle of law that before any damages are awarded he who claims such should prove the same. Further, that justice would turn on its head if I were not to set aside the arbitral award seeing as no evidence of mitigation of damages was placed before the arbitrator and, in awarding damages to the first and second respondents, the arbitrator did not himself call for evidence touching on mitigation of damages.

22. With these submissions I totally agree.

23. Nothing turns on the fact that ultimately, the applicants did not participate at the hearing before the arbitrator. The arbitral award is in violation of the public policy of Zimbabwe.

24. Article 34(2) of the Arbitration Act [*Chapter 7:15*] reads:

> "(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."

25. In *Zimbabwe Electricity Supply Authority* v *Maposa* 1999(2) 452(S) the court said at 466E-F:

> "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 recognize 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."

See also *Alliance Insurance* v *Imperial Plastics (Private) Limited and Anor* S 30/17; *OK Zimbabwe Limited* v *Ardmbare Properties (Private) Limited and Anor* SC 55/2017; *Willoughbys Investments (Pvt) Ltd* v *Peruke Investments (Pvt) Ltd and Anor* 2014(1) *ZLR S01(H) and Pamire and Ors* v *Dumbutshena NO and Anor* 2001(1) ZLR 123(H).

26. I consider that fundamental principles of law or justice are violated by the award.

27. Damages for breach of contract are intended to place the innocent party in the position he would have occupied had the contract been performed to the extent that can be done by the payment of money, but without undue hardship to the defaulting party. See R H Christie Business Law in Zimbabwe 1998 at p 124. In explaining this principle, the court in *Rowland Electro Engineering (Pvt) Ltd* v *Zimbank* 2007(1) ZLR 1(H) said at 13F-G:

> "A comparison is made between the patrimonial position that the plaintiff would have occupied had the breach not occurred and the position that exists as a result of the breach. The plaintiff would therefore be entitled to the difference where the former exceeds the latter."

28. What the parties agreed to by way of sharing of income was that the first and second respondents would be entitled to 10% of the gross annual revenue from the sales of the cropping, animal husbandry and livestock produce as reconciled with the monthly advance payments made to the respondents.

29. The agreement was not that the applicants would make use of the whole farm. So, the notional figures of sales based on the historical production of the farm (used by the arbitrator to quantify the damages) constituted "no evidence" for purposes of calculation of damages. This on its own means that the damages were awarded without evidence. Now, it is a fundamental principle of law and justice in this jurisdiction that an award of damages can only be made on evidence. See *Triangle Limited* v *Phiri* SC 107/04. Justice would turn on its head if this court were not to set aside the arbitral award even after

finding that, effectively, the award of damages was made without evidence. The reasoning by the arbitrator and the conclusion made by him to award what he perceived to be 10% of the gross annual revenue for the two years 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 if it were not set aside. The award strikes at the very root of the fundamental principles of the law of damages.

30. The rationale behind the provision requiring the parties to discuss the intended cropping programme for the next twelve months on or before the first of September each year was meant to shed light on the size of the intended farming programme for each year. Among other things, this would be informed by the funding capacity of the applicants in each of the envisaged ten years. This would in turn have a bearing on the income to be paid to the first and second respondents from year to year, in the event that farming operations actually took place resulting in the sale of agricultural produce.

31. The arbitrator, correctly, found that the first and second respondents "remained in the dark" as regards the farming operations that were conducted on the farm by the applicants at the material time. Now, justice would turn on its head if this court does not set aside an arbitral award made in favour of parties, as regards payment of damages, who brought nothing before the arbitrator.

32. In fact, in their statement of evidence filed with the arbitrator on 2 September 2022 (record p 392) the first and second respondents say of the applicants:

> "They remain in occupation as of today's date without any production, three years later have not paid monthly contributions nor the share of income. Claimant is not aware of any farming activities respondents are doing on the farm as they have closed all communications and prefers it through their legal practitioners. Instead of production respondents engaged in endless litigation that sought to chase away claimants off the farm."

34. In the same statement, the first and second respondents also say (record p 389):

> "As a result of non compliance with clause 3 regarding farming operations claimants are entitled to damages for loss of income over the period of 3 years so far being the period that the respondents have held the farm idle." (underlining is mine).

35. Indeed, it was common cause that the applicants never embarked upon any crop farming on the land in question at all material times. All they had was a herd of cattle and some sheep. The first and second respondents did not place any evidence before the arbitrator that the applicants sold any of those animals, and if so, what the gross earnings were. In all these circumstances any fair minded and sensible person would consider that the conception of justice in Zimbabwe would be intolerably hurt if the arbitral award were allowed to stand. It, in the first place, did not have the proverbial leg to stand on. In awarding damages to the first and second respondents the arbitral award goes beyond mere faultiness and incorrectness.

36. The arbitrator found that the first and second respondents did not produce the applicants' books of accounts. Indeed, not even the applicants' bank statements were placed before him. All this means, as correctly submitted by Mr Magwaliba, that no evidence of the applicants' gross earnings was before the arbitrator. Consequently, it was not possible to even begin to calculate the difference between what the first and second respondents should have received by way of their 10% of gross annual income over the two year period and the advance payments made to them. See *Rowland Electro Engineering (Pvt) Ltd* v *Zimbank* (supra).

37. This I also mention. It was only after this court issued a spoliation order by consent and another consent order for contempt of the former court order that the first and second respondents allowed the applicants to resume occupation of the farm in question. Those orders, and the applications leading to the orders being granted, were before the arbitrator. Despite this, the first and second respondents did not adduce evidence that they mitigated damages. Nor did the arbitrator call for evidence of mitigation of damages. This on its own would have sufficed to set aside the arbitral award: *Clan Transport Company (Private) Limited v Clan Transport Workers Committee SC 1/02 and Triangle Limited* v *Phiri* SC 107/04.

38. In light of all the foregoing, the need to discuss the setting aside of the arbitral award vis-a-vis holding over damages and damages for the lost and or damaged property falls away.

It also is unnecessary that I discuss the other grounds relied upon for seeking the setting aside of the arbitral award.

39. In the result, IT IS ORDERED THAT:

1. The application for the setting aside of the arbitral award of Moses Hungwe Chinhengo handed down on 18 November 2022 which is case number HC 1129/23 is granted.

2. The arbitral award handed down on 18 November 2022 is set aside in terms of Article 34(2)(b)(ii) of the Arbitration Act [*Chapter 7:15*].

3. The first and second respondents shall pay the applicants' costs of suit jointly and severally the one paying the other to be absolved.

4. The application for the registration of the arbitral award of Moses Hungwe Chinhengo handed down on 18 November 2022 which is case number HC 7965/22 be and is dismissed.

5. The applicants shall pay the respondents' costs of suit jointly and severally the one paying the other to be absolved.

CHIKOWERO J:……

Dube, Manikai and Hwacha, applicants' legal practitioners in case number HC 1129/23 and first and second respondents' legal practitioners in case number HC 7965/22.

Rubaya-Chinuwo Law Chambers, first and second respondents' legal practitioners in case number HC 1129/23 applicants' legal practitioners in case number HC 7965/22.