TRIBACK (PRIVATE) LIMITED
versus
STEPHEN ARCHIEFORD TARUONA
and
SHARON TARUONA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 17 March 2021 and 18 February 2022

Opposed Application – Registration of Arbitral Award

D. Ochieng, for the applicant
N. Mukure, for the 1st and 2nd respondents

MUSITHU J:

INTRODUCTION

The applicant seeks the registration of an arbitral award rendered on 18 February 2019, by arbitrator Mativenga Lloyd Mhishi. The relief sought is set out in the fairly detailed draft order, and reads as follows:

"IT IS ORDERED THAT:-

1. The Arbitral Award made in favour of the Applicant by the Honourable Arbitrator Mr. Mativenga Lloyd Mhishi on 18 February 2019 is registered as an order of the Court.
2. The Respondents shall take all the necessary steps required for obtaining a Capital Gains Tax Clearance Certificate including attending any necessary interviews and paying any assessed tax on this transaction within 7 days of this award.
3. The Respondents shall forthwith take all necessary steps required for the registration of the transfer of the property to the Applicant in accordance with the agreement of sale between them and the Applicant and signed by them on 11 March 2017.
4. In the event that the Respondents refuse or fail to comply with (2) and (3) above, the Sheriff is authorised to sign any documentation necessary for the transfer to the Applicant to be effected.
5. The Applicant shall pay the Respondents the remainder of the $18 000.00 after settlement of the Respondent's financial obligations related to the transfer of the property.
6. The Respondents, jointly and severally (the one paying the other to be absolved), shall pay the Applicant's costs of the arbitral proceedings on the scale of legal practitioners' fees published by the Law Society of Zimbabwe.
7. The Respondents, jointly and severally (the one paying the other to be absolved), shall pay the fees and expenses of the Arbitrator.
8. In the event that this application is opposed the Respondents shall pay Applicant's costs on the higher scale…."

The award rendered by the learned arbitrator in a property wrangle involving the applicant and the respondents, read as follows:

> "Accordingly, my award is as follows:
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> 1. The Claimant's claim is granted in terms hereof.
> 2. The Respondents shall take all the necessary steps required for obtaining a Capital Gains Tax Clearance Certificate including attending any necessary interviews and paying any assessed tax on this transaction within 7 days of this award.
> 3. The Respondents shall forthwith take all necessary steps required for the registration of transfer of the property to the Claimant in accordance with the agreement of sale between them and the Claimant and signed by them on 11 March 2017.
> 4. In the event that the Respondents refuse or fail to comply with (1) and (2) above, the Sheriff is authorised to sign any documentation necessary for the transfer to the Claimant to be effected.
> 5. The Claimant shall pay the 1st Respondent the remainder on the US$18 000 after settlement of the Respondents' financial obligations related to the transfer of the property.
> 6. The Respondents, jointly and severally (the one paying the other to be absolved), shall pay the Claimant's costs of these proceedings on the scale of legal practitioners' fees published by the Law Society of Zimbabwe.
> 7. The Respondents, jointly and severally (the one paying the other to be absolved), shall pay the fees and expenses of the Arbitrator."

The application was opposed.

FACTUAL BACKGROUND

The dispute revolves around an agreement of sale of an immovable property which was signed by the parties sometime in 2017. First respondent is a former employee of the applicant. Second respondent is the wife of the first respondent. First respondent was retrenched around 2017. Prior to the retrenchment, the applicant had advanced a loan to the first respondent. At the time of his retrenchment, the first respondent owed the applicant about US$492,000.00. The respondents signed an agreement for the sale of their property to the applicant in satisfaction of the outstanding loan amount. The parties also signed a loan agreement. In terms of the agreement of sale, the respondents sold their property to the applicant for US$365,000.00. That amount was however to be deducted from the outstanding loan obligation to the applicant. The loan agreement dealt with the purchase of the property, the withholding of US$18,000.00 due to the first respondent to cover rates, levies, electricity and any taxes due. Any balance that remained outstanding was to be paid to the first respondent.

Clause 6.3 of the agreement of sale required the first respondent as the seller, to attend an interview at the Zimbabwe Revenue Authority (ZIMRA), within five days of being called upon to do so, as well as do all such things necessary to facilitate the transfer of the property to the purchaser (the applicant herein). The respondents did not attend the ZIMRA interviews

when they were called upon to do so. According to the arbitral award, the first respondent was paid most of his retrenchment package, save for the US$18,000.00, which was held by the conveyancers for purposes of meeting the Capital Gains Tax obligations. The applicant sought the following relief before the learned arbitrator: an order compelling the respondents to do all things necessary to facilitate the transfer of the property to the applicant; costs of suit on the higher scale of attorney and client, as well as the costs of the arbitration. The respondents opposed the claim on the basis that the agreement was signed under duress and was therefore invalid. The respondents also counterclaimed for payment of the US$18,000.00, being the outstanding retrenchment package. As already established, the arbitrator found in favour of the applicant.

The Applicant's Case

According to the applicant, following the handing down of the award, the respondents approached this court for an order to set aside the award on 30 April 2019, under HC3559/19. The applicant opposed the application. The application was withdrawn on 11 December 2019. The conveyancer invited the respondents to attend to the ZIMRA interviews for Capital Gains tax assessment. The respondents replied through their legal practitioners asserting that their willingness to attend the ZIMRA interviews, but insisted on being paid the outstanding amount of US$18,000.00 in United States dollars, and not in local currency. Further engagements between the parties respective counsel ensued, with the respondents' counsel insisting on payment in the United States dollars notwithstanding the new currency regime wrought by changes in the law. The applicant's counsel insisted on a discharge of the remaining amount in local currency.

The Respondent's Case

The first respondent deposed to the main affidavit. He raised the following points in *limine* at the very outset: that the deponent to the applicant's founding affidavit lacked the requisite *locus standi* to institute the proceedings in the absence of a board resolution confirming his authority to do so; that the application was improperly before the court as the original arbitration agreement or a certified copy had not been supplied; that the applicant had not demonstrated a cognisable cause of action for the granting of the relief sought.

On the merits, the respondents contended that part of the award was contrary to public policy and could thus not be registered in its current form. They also argued that there was the unresolved issue of the currency in which the outstanding sum of US$18,000.00 was to be paid.

The Applicant's Reply

In its answering affidavit, the applicant disputed the authenticity of the respondents' signatures appearing in the opposing affidavits as they differed substantially from those appearing in the agreement of sale and the founding affidavits under HC3559/19. Apart from that objection, the applicant persisted with its claim as set out in the founding affidavit.

THE ISSUES

At the commencement of the oral submissions, Mr *Mukure* for the respondents dropped the preliminary points on *locus standi* and the absence of a cognisable cause of action. He persisted with the one concerning the impropriety of the application as it failed to comply with Article 35(2) of the Model Law.[1] In reply, Mr *Ochieng* for the applicant drew the court's attention to a certified copy of the contract founding the arbitration agreement.[2] He submitted that the objection had no foundation.

I agree with the applicant's counsel in this regard. The applicant supplied certified copies of both the arbitration agreement and the award. The court finds that there was substantial compliance with Article 35(2) of the Model Law. The objection is without merit and it is accordingly dismissed.

The only issues that remain for determination are:

1) Whether the respondents' opposition is irregular on account of the alleged fake signatures, which the applicant contends did not belong to the respondents; and
2) Whether the insistence by the applicant that the outstanding sum of US$18,000.00 be paid in local currency as opposed to United States dollars would render the registration of the arbitral award contrary to public policy.

THE SUBMISSIONS

In his oral submissions, Mr *Ochieng* did not dwell much on the alleged fake signatures that the applicant claimed afflicted the respondents' opposing papers. In its heads of argument, the applicant averred that the conclusion that the respondents' affidavits were forged was irresistible.

On the merits, Mr *Ochieng* submitted that the applicant was holding an award which had not been complied with. All the applicant was seeking was to have it registered so that it could enforce compliance. He further submitted that while the respondent opposed the registration of the award on public policy grounds, it had not set out which parts of the award

[1] Arbitration Act [*Chapter 7:15*]
[2] Pages 8 and 35 of the record of proceedings

offended public policy. Further, the opposing papers only referred to outstanding issues between the parties that ought not to be tampered with, as that would render the registration of the award contrary to public policy. The existence of the alleged outstanding issues could not affect the validity of the award which remained extant.

The respondents had spurned the opportunity to challenge the award by withdrawing their application to have it set aside. They could not use their opposition to accomplish that which they sought to achieve through an application to set aside the award. A notice of opposition was a shield and not a means of attack. The respondents' complaints were on findings of credibility by the arbitrator. They could not attack such findings at this stage. Counsel referred to the case of *JG Construction (Private) Limited v Mujere*[3].

In its heads of argument, the applicant submitted that the arbitrator ordered the applicant to pay *"the remainder of the US$18,000.00 after settlement of the respondents' financial obligations related to the transfer of the property"*. That US$18,000.00 had since been revalued to Z$18,000.00 by operation of law. Counsel cited the case of *Zambezi Gas (Pvt) Ltd v N R Barber (Pvt) Ltd & Ano*[4] in support of this submission. That amount had been tendered, but it was rejected. During the oral submissions, I requested counsel to address me on the issue of whether at law the court can grant an order which had the effect of altering the award. This was with specific reference to the applicant's prayer to alter the sum of US$18,000.00 to ZW$18,000.00. Both counsel filed supplementary heads of argument to deal with this point.

The applicant persisted with its argument that the obligation created by the award was for the applicant to pay the first respondent the residue of the ZW$18,000.00 that it owed. The applicant further submitted that at any rate, the arbitrator had become *functus officio*, and had no power to enforce his own award. That was now the prerogative of this court. On the strength of *Matthews v Craster International (Pvt) Ltd*,[5] the applicant further submitted that the court could not give its "badge of authority" for the enforcement of an obligation that did not exist. The applicant was only obliged to account to the respondents for ZW$18,000.00. The court had no power to reverse the revaluation. The applicant further contended that the revaluation

[3] SC 37/15 where at paragraph 18 of the judgment the court said:
"[18] As I see it, two hurdles confront the appellant. The first is, that in the light of the clear and straightforward case presented by the respondent, the court *a quo* cannot be faulted for preferring the latter to that of the appellant which changed at its convenience. The second is the approach of this court, on appeal, to factual findings made by a lower court. It is, that an appellate court will not interfere with such findings unless they are irrational or clearly wrong or so outrageous in their defiance of logic that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion".
[4] SC 3/20
[5] HH 707/15

of obligations also affected court judgments and awards made by arbitral tribunals. The court could only enforce an obligation that existed.

In response Mr *Mukure* submitted that the allegation that the respondents' signatures were not authentic was baseless. In any case, the respondents had not dissociated themselves from their signatures. Counsel cited the case of *Hwara v Mudimu & Another*[6], in support of this submission.

It is perhaps critical that I dispose of the issue of the signatures at the outset. In my view, the onus rests on the applicant to prove that the respondents' signatures were forged. This is critically so if one considers that ordinarily it is the party whose signature was forged that should be challenging the authenticity of their own signature. It is the respondents who should be disowning their own signatures on the basis that they were forged. In the absence of corroborative evidence from a handwriting expert, this court would be persuaded by Mr *Mukure's* submission that the argument is baseless. The objection is devoid of merit and it is accordingly dismissed.

As regards the merits of the application, *Mukure* submitted that the respondents' gripe with the application was the variation of the denomination of the currency from the United States dollar to the local currency. He further submitted that the respondents were owed US$18,000.00 less certain financial obligations. In their heads of argument, the respondents argued that in rendering the award, the arbitrator effectively made a contract on behalf of the parties, and they must live with it.

The respondents further contended that it would constitute a palpable inequity for the award to be registered in the form proposed by the applicant. The registration of the award would be against the public policy principle of sanctity of contracts. In their heads of argument, the respondents somewhat bizarrely alleged that *"…the award purports to enforce an agreement that Respondents did not voluntarily subscribe to. In the underlying circumstances the Applicant took advantage of Respondent's economic necessity or distress"*. The respondents further submitted that their contract with the applicant ought not to have survived

[6] [2015] ZWBHC 3. The court said:

> "There is no law which stipulates that a person's signature must be consistent or be the same on each and every document that he/she appends a signature to. Prior to raising this point first respondent had never seen applicant sign on any document. No expert evidence by a questioned document examiner was furnished to buttress the contention that the signature is not that of applicant. The allegation is just first respondent's *ipsissima verba*. The affidavit was deposed to before a legal practitioner who is a commissioner of oaths. The claim therefore is without merit and is hereby dismissed as mere attempt at sophistry."

but the learned arbitrator somehow upheld it. In doing so, he effectively re-wrote the contract for the parties. The respondents further alluded to outstanding issues, such as the payment of the US$18,000.00 which amount if tempered with, would render the registration of the award contrary to public policy.

THE ANALYSIS

The outstanding issue for determination is whether the insistence by the applicant that the outstanding sum of US$18,000.00 be paid in local currency as opposed to United States dollars would render the registration of the arbitral award contrary to public policy. Before I deal with that issue, it is important that the court disposes of a related matter which I asked counsel to address in their supplementary heads of argument. It relates to whether this court can alter the currency in which the remainder of the US$18,000.00 is to be paid to the respondents after the settlement of the first respondent's remaining financial obligations. The applicant's counsel submitted that by operation of law, all United States dollar obligations were now dischargeable in local currency. For the respondents, it was argued that this court could not alter the arbitrator's award, by varying the currency in which the outstanding amount was to be paid. In *Ndlovu* v *Higher Learning Centre*[7], MATHONSI J (as he then was) explained the role of the court in applications of this nature as follows:

> "Respondent cannot seek to challenge an arbitral award in opposing papers filed in an application for registration. In an application of this nature this court does not inquire into the merits or otherwise of an arbitral award. That is the province of the Labour Court upon an application or appeal being made to that court.
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> Registration of an arbitral award is only done for purposes of enforcement because the labour structures have no enforcement mechanism. Upon registration the award has the effect of a civil judgment of the appropriate Court. …….. As long as the award stands unchallenged the appropriate court has no mandate to inquire into the propriety or otherwise of that award and is obliged to register it." (Underlining for emphasis)

The *Ndlovu* v *Higher Learning Centre* case was cited with approval by MAFUSIRE J in *Nyaguse & Others v ZIMRA*[8], where an attempt had been made to discredit the propriety of an arbitral award. The court concluded that at this stage, it could not be petitioned to enquire into the correctness of an award.

It is common cause that on 22 February 2019, the Government of Zimbabwe introduced a new currency called the Real Time Gross Settlement Electronic dollar (RTGS), through the Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act

[7] HB 86/10 at page 2 of the judgment.
[8] HH 453/15. See page 10 of the judgment.

and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)) Regulations, 2019, (hereinafter referred to as "S.I. 33/19" or the instrument). The instrument was gazetted on 22 February 2019. That date became the first effective date as defined in the Finance Act (No.2) Act, No.7 of 2019 (the Finance Act). The new currency ran parallel with other currencies that were accepted as legal tender, under what was known then as the multi-currency basket.

On 24 June 2019, the Minister of Finance and Economic Development caused to be gazetted Statutory Instrument 142 of 2019 (Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019) (SI 142/2019). The 24th June 2019 became the second effective date as defined in the Finance Act. This instrument abolished the multi currencies and declared the ZWL to be the sole legal tender in Zimbabwe. The two instruments were later incorporated into the Finance Act. The Finance Act was gazetted on 21 August 2019. The law regarding the treatment of debts or financial obligations that arose before the first effective date as defined in the Finance Act has been settled by the Superior Court[9]. The award was rendered on 18 February 2019, a few days before the first effective date as defined in the Finance Act.

Paragraph 5 of the award obliged the applicant to *"pay the 1st Respondent the remainder on the US$18 000 after settlement of the Respondents' financial obligations related to the transfer of the property."* The applicant tendered payment in local currency, but it was rejected by the respondents. In its submissions, the applicant insisted that the tender of payment in local currency accorded with the position of the law, and this court was required to register an award that obliged it to make payment in local currency.

This court is being asked to endorse a payment in local currency. In essence, the court is being asked to substitute the United States dollar payment as ordered by the arbitrator with a payment in local currency. Were this court to do that, it would in essence be varying the arbitral award. But then this court is not exercising its review or appellate powers at this stage. This court cannot therefore substitute a foreign currency obligation with a local obligation at this stage. The court cannot arrogate to itself, powers that it does not have at this stage of the proceedings. The court's view is that the parties ought to have submitted themselves before the honourable arbitrator in terms of Article 33 of the Model Law for an appropriate relief. After all, it was the arbitrator's award. Instead, the parties continued to haggle between themselves on the issue of the currency in which the outstanding balance was to be settled as attested by

[9] *Zambezi Gas Zimbabwe (Private) Limited v N. R. Barber (Private) Limited* SC 3/20 and *Breastplate Service (Pvt) Ltd vs Cambria* SC-66/20

the communication between their respective counsels. The application for the registration of the award was only made on 29 June 2020, long after the currency regime had changed.

The next issue is whether the respondents have set out valid grounds for the refusal of the registration of the award on public policy grounds. The public policy concept was dealt with by GUBBAY CJ in *ZESA v Maposa*[10] as follows:

> "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. 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"

The issues that the respondents raised in opposition are matters that ought to have been presented at the arbitration stage or in their own application to have the award set aside. They cannot seek to reopen the arbitration proceedings at this stage. The respondents have failed to demonstrate that the reasoning or conclusions in the award went beyond mere faultiness thus constituting a palpable inequity that is outrageous in its defiance of logic. In short, they have failed to demonstrate that the registration of the award in its current form would offend public policy. The court finds no basis upon which the registration of the award in the form in which it was rendered by the honourable arbitrator should be declined.

COSTS

The applicant sought an order of costs on the higher scale in the event that the application was opposed. From a reading of the papers, the only significant issue that stood in the way of a resolution of the dispute between the parties was the currency in which the remainder of the US$18,000.00 was to be paid after the settlement of the respondents financial obligations related to the transfer of the property. The court has already determined that it will not vary the arbitral award. It will proceed to register it as it stands. Both parties are equally at fault to the extent that they failed to resolve the dispute concerning the currency in which the outstanding balance was to be paid, within the parameters set by the law. I consider this to be a fitting case where each party should be made to bear its own costs of suit.

[10] 1999 (2) ZLR 452 (S) at page 466

DISPOSITION

Accordingly, it is ordered that;

1. The arbitral award made in favour of the applicant by the Honourable Arbitrator Mr. Mativenga Lloyd Mhishi on 18 February 2019 is registered as an order of the Court.
2. The respondents shall take all the necessary steps required for obtaining a Capital Gains Tax Clearance Certificate including attending any necessary interviews and paying any assessed tax on this transaction within 7 days of this order.
3. The respondents shall forthwith take all necessary steps required for the registration of the transfer of the property to the applicant in accordance with the agreement of sale between them and the applicant and signed by them on 11 March 2017.
4. In the event that the respondents refuse or fail to comply with paragraphs (2) and (3) above, the Sheriff is authorised to sign any documentation necessary for the transfer to the applicant to be effected.
5. The applicant shall pay the respondents the remainder of the US$18 000.00 after settlement of the respondents financial obligations related to the transfer of the property.
6. The respondents, jointly and severally (the one paying the other to be absolved), shall pay the applicant's costs of the arbitral proceedings on the scale of legal practitioners' fees published by the Law Society of Zimbabwe.
7. The respondents, jointly and severally (the one paying the other to be absolved), shall pay the fees and expenses of the arbitrator.
8. There be no order as to costs.

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Machiridza Commercial Law Chambers, legal practitioners for 1st and 2nd respondents