DISTRIBUTABLE (47)

1) A. ADAM AND COMPANY (PRIVATE) LIMITED 2) SGI PROPERTIES (PRIVATE) LIMITED 3) HONOURABLE RETIRED JUSTICE SMITH
v
GOOD LIVING REAL ESTATE (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA & MAKONI JA
HARARE: 16 MARCH 2021 & 14 MAY 2021

F. Mahere, for the appellant
S. Hashiti, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court setting aside an arbitral award granted in favour of the appellants, on the basis that it was contrary to public policy as it was made in defiance of an extant court order.

THE BACKGROUND

On 10 January 2010, the first appellant entered into a partnership agreement with the respondent for purposes of developing its immovable property, Stand No 1514 of 151 Mbuya Nehanda Street. Subsequently, the parties concluded a lease agreement in terms of which the appellant leased the property to the respondent on 26 August 2010. A dispute between the parties ensued regarding the interpretation of the terms of the two agreements and the parties' rights and obligations flowing therefrom.

The parties failed to resolve the dispute amicably and ended up before the High Court. On 10 September 2013, by the parties' consent, the court ordered the parties' dispute to be referred to arbitration for resolution. The third appellant (arbitrator) was engaged by the parties to deal with the matter.

Proceeding in terms of Article 13(2) as read with Article 12(2) of the UNCITRAL Model Law, the respondent sought, before the arbitrator, his recusal from dealing with the matter. It alleged that the personal relationship between the arbitrator and the directors of the first appellant influenced his impartiality. Further, that the arbitrator's handling of interlocutory applications evinced bias.

At the arbitrator's proposal, the parties appointed an independent two men tribunal, to determine the application for the arbitrator's recusal from determining the matter. On 13 May 2016, the tribunal dismissed the application for recusal on the basis that the facts alleged lacked substance as to be frivolous, thus the respondents were not *bona fide* in making the application.

On 11 October 2016, the arbitrator issued a preliminary award associating himself with the tribunal's finding that there was no valid basis for his recusal. However, there is on record a preliminary award dated 20 April 2015, indicating that the arbitrator had already made a ruling and dismissed the application for his recusal before referring the matter to the two men tribunal. It appears it was not handed down.

On 23 November 2016, the respondent approached the High Court and in the appellants' default, obtained the following order per CHIGUMBA J:

"1. It is hereby declared that the 3rd respondent abdicated his duties by directing that a panel of independent arbitrators must hear the application for his recusal.
2. The order or directive given by the 3rd respondent, that applicant and 1st respondent should appoint an independent tribunal of two arbitrators to determine an application for his recusal filed on 20th March 2015, be and hereby declared contrary to public policy and is hereby set aside.
3. There shall be no order as to costs."

Notwithstanding this order, the arbitrator proceeded to issue the final arbitral award on 6 December 2016 in favour of the appellants. He reasoned that there was nothing in the order prohibiting him from determining the application for his recusal or continuing to handle the arbitration after deciding on his recusal. He stated that he considered the application for his recusal and dismissed it, thus he could properly continue with the arbitration.

On 8 February 2017, the appellants applied for the registration of the arbitral award in terms of articles 35 and 36 of the Arbitration Act [*Chapter 7:15*] for purposes of enforcement. The respondent opposed the application alleging impropriety in the way the application for recusal was dealt with by the arbitrator. The respondent also alerted the court to its application under HC 1347/17 for the arbitral award to be set aside in terms of Article 34(2) of the Act on the basis that it was contrary to public policy.

In its application to have the award set aside, the respondent argued that the arbitral award was contrary to public policy in that it was made in violation of CHIGUMBA J's order which the arbitrator was aware of as it was served on him on 3 May 2016. It was further submitted that the arbitrator breached the principles of natural justice by failing to allow the parties to make representations on the application for recusal before rendering his final award and on the merits of the arbitration itself.

In its opposing papers, the appellants averred that it was the parties who appointed the two men tribunal, thus the application was founded on a falsehood that the arbitrator set up the tribunal to which he then referred the application for his recusal. It insisted that the arbitrator exercised his duties and functions professionally and consistently in accordance with the law. His findings and determination were faultless in fact and law. It was further stated that the default order by CHIGUMBA J was clandestinely obtained and an application to have it rescinded was pending.

In response, the respondent averred that the arbitrator's referral of the application for recusal to the two men tribunal was unlawful and unprocedural as he ought to have asked the parties to file their submissions and argue the matter before him. The respondent denied giving any instructions to the arbitrator or agreeing to the appointment of the tribunal. It further contended that it was irregular for the arbitrator to make an award without first making a ruling on the application for his recusal. The arbitrator was also said to have failed to exercise his duties in that when he rendered the final award, he agreed with the findings of the tribunal yet the extant court order by CHIGUMBA J set aside the appointment of the tribunal. The respondent further alluded that the arbitrator failed to disclose the existence of the preliminary award in which he decided on his recusal in 2015 only to reveal it in 2016.

By way of a letter dated 16 February 2018, the appellants sought a simultaneous hearing of the two applications. The court *a quo* granted the request.

DETERMINATION OF THE COURT *A QUO*

The court dismissed the appellants' application for registration of the arbitral award and granted the application for the setting aside of the arbitral award. The court held that the award was made in violation of the rules of natural justice and also in defiance of logic. It

reasoned that there was a discrepancy as to whether or not the application for recusal was dealt with by the two men tribunal on 13 May 2016 or by the arbitrator as far back as 20 April 2015.

The court also found that the third appellant ignored and disregarded the order made by CHIGUMBA J and such violation of an order of the court was contrary to public policy and Article 24(2)(c)(ii) of the schedule to the Arbitration Act. It is on that basis that the court dismissed the appellants' application for the registration of the arbitral award. The court also highlighted that, in light of the findings it made, an order for costs on a legal practitioner and client scale was appropriate in the circumstances.

Aggrieved by this ruling, the appellants noted an appeal on the following grounds:

"1. The court *a quo* grossly misdirected itself in finding that Hon Arbitrator Retired Justice Smith violated the order of Justice Chigumba dated 23 November 2016 under Case November 201 6 **No. HC 444/16** in circumstances where this order was rescinded by Justice Munangati–Manongwa on the 23rd of October 2017.

2. Based on the gross misdirection on the facts set out in ground 1, the court *a quo* erred in finding that there was any violation by the third appellant that was contrary to public policy.

3. The court *a quo* erred in finding that there was a violation of an order of court and accordingly public policy in terms of a non-existent clause of the Model Law, namely "Article 24(2)(c)(ii) of the Schedule to the Arbitration Act."

4. The court *a quo* erred in finding that the final award was made in violation of the rules of natural justice when in fact all parties had been accorded an adequate opportunity to be heard and impartially so.

5. The court *a quo* erred in dismissing the application for the registration of the arbitral award in case no HC 1054/17 without affording the Appellants (or any other party) an opportunity to be heard.

6. The court *a quo* erred in handing down a judgement that purports to be a composite judgment (absent an order consolidating the two matters) but in respect of which there is only one order.

7. The court *a quo* erred in ordering that costs on a legal practitioner and client scale be paid by the Respondent, including the Appellants, when there was no justification for the penalty and no reasons given for the order against the Appellants."

SUBMISSIONS IN THIS COURT

At the commencement of the appeal hearing, Mr *Hashiti*, for the respondents, indicated that he was abandoning the preliminary objections raised in the respondent's heads of argument which attacked the validity of the appeal. He indicated that he would advance argument on the merits of the case as motivated in the respondent's heads of argument. Thus, the parties' argument was restricted to the merits of the matter.

Ms *Mahere*, for the appellants, relying on the case of *Zesa* v *Maposa* 1999 (2) ZLR 452 (S) at 466E, submitted that there are very limited grounds upon which a court can refuse to give effect to an arbitral award. She averred that an arbitral award will not be contrary to public policy simply because the reasoning or conclusions of the arbitrator are wrong in fact or law.

Ms *Mahere* argued that the court *a quo* erred in holding that the award was made in violation of the extant order of CHIGUMBA J yet that order did not prohibit the arbitrator from dealing with the question of his recusal from the proceedings. Upon being asked by the court, counsel failed to explain why the arbitrator referred the application for his recusal to the two men tribunal when he had already made a ruling on it in 2015. However, she stated that the arbitrator's preliminary award, handed down before CHIGUMBA J's order was the arbitrator's determination on his recusal and that, that award had not been set aside. Whilst accepting that the arbitrator was aware of CHIGUMBA J's order when he made the final award, Ms *Mahere* submitted that he had already decided on and dismissed the application for his recusal.

In response, Mr *Hashiti* submitted that the fact that the arbitrator determined the application for his recusal before CHIGUMBA J's order was inconsequential. He argued that

the arbitrator ought to have reconsidered the question of recusal in his final award since, at that time, CHIGUMBA J's order was extant. He also submitted that the court *a quo* correctly found that the arbitrator's award was made in violation of the rules of natural justice because after CHIGUMBA J's order was issued, the arbitrator handed down his award without hearing the parties on the issue of recusal and on the merits.

Counsel further submitted that the appellants' application for registration of the award was considered simultaneously with the respondent's application to set aside the award as per the parties' request. This, he stated, was evident from the orders granted by the court *a quo*. Whilst accepting that the court *a quo* did not give reasons for the punitive order of costs Mr *Hashiti* submitted that the order was justified in view of the appellants' conduct of insisting on registering an award irregularly made.

In rebuttal, Ms *Mahere* insisted that the court *a quo* did not consider its application for registration as it did not hear arguments or give reasons for its dismissal. She submitted that an order setting aside the order of the court *a quo* and remitting the application for the registration of the award would be most appropriate. Ms *Mahere* also submitted that the court *a quo* erred in awarding costs on a higher scale without justification.

ISSUES FOR DETERMINATION

The appellant's grounds of appeal and the parties' submissions raise the following issues:

1. Whether or not the court *a quo* erred in holding that the arbitral award was contrary to public policy having been made in defiance of an extant order of the court.
2. Whether or not the order of costs made by the court *a quo* is valid.

I proceed to determine each issue in turn.

1. Whether or not the court a quo erred in holding that the arbitral award was contrary to public policy having been made in defiance of an extant order of the court

The grounds for interference with an arbitral award for being contrary to public policy are provided for in Article 34(2) of UNCITRAL Model Law as set out in the schedule to the Arbitration Act [*Chapter 7:15*] as follows:

> "(2) An arbitral award may be set aside by the *High Court* only if —
> (*b*) the *High Court* finds that —
> (i) …
> (ii) the award is in conflict with the public policy of Zimbabwe."

Subsection 5 also provides that:

> "(*5*) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—
> (a) the making of the award was induced or effected by fraud or corruption; or
> (b) a breach of the rules of natural justice occurred in connection with the making of the award."

What constitutes a violation of public policy was considered in *Zesa* v *Mapo*sa, *supra*, where this Court remarked:

> "An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside. Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision."

The court further stated, at p 466F–G that:

> "Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes a palpable inequity that is so far-reaching and outrageous in its defiance of logic or acceptable 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 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." (Emphasis added)

These remarks were considered by this Court in *Alliance Insurance v Imperial Plastics (Private) Limited & Anor* SC 30/17 at p 10, where it held that:

> "The question that should be in the mind of a Judge who is faced with this ground for setting aside an arbitral award is that, in light of all the submissions and evidence adduced before the arbitrator, is it fathomable that he would have come up with such a conclusion. If the answer is in the affirmative, there is no basis upon which to set aside the award. The appellant's submissions should be considered in the light of these remarks." (Emphasis added)

This reasoning ought to be weighed against the court *a quo*'s finding that it was contrary to public policy for the arbitrator to render his ruling in defiance of a binding court order. CHIGUMBA J's order had the effect of nullifying the two men tribunal's decision on the arbitrator's recusal from the proceedings. The order also rendered the application for recusal unresolved. That application had to be determined by the arbitrator as it called on him to disqualify himself from involvement in the case on the ground that he was biased.

While the appellants argue that the arbitrator decided on the application for recusal on 11 October 2016 when he rendered the final award, that award made after CHIGUMBA J's order does not re-examine the application for recusal. Instead, in the final award, the arbitrator insisted that CHIGUMBA J's order did not prohibit him from determining the application for his recusal or continuing to handle the arbitration after deciding on his recusal which, according to him, he had already done.

Considering that CHIGUMBA J's order came after the determination of the recusal, the arbitrator could not ignore or overlook a valid court order. He ought to have considered the application for recusal afresh and determined it, before proceeding to issue the final award, as he was seized with that application. That a court order must be strictly complied with and remains valid until set aside by a competent court of law is trite. This was stated in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 569, where the court held:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham L.C., said in Chuck v Gremer (1) (Coop. temp. (1 Cott. 342)"

The same position was reiterated by the court in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E), as follows:

> "A court order stands and must be strictly obeyed until set aside by a higher court, and the same court which granted the original order does not have the right to nullify its effect or interfere with that order except in very limited circumstances in the context of variation…"

Therefore, the arbitrator could not competently hand down the final award which did not make a determination on the application for his recusal where the import of CHIGUMBA J's order was that the arbitrator had to determine the issue. The fact that CHIGUMBA J's order was later rescinded is insignificant as the fact of the matter is that as at the time the final award was made the arbitrator was in defiance of an extant and binding order of the court. It cannot be overemphasised that defiance of a binding court order is contrary to public policy.

In any event, it was irregular for the arbitrator who claimed to be personally involved in the matter to continue adjudication and render a final award pronouncing the parties' rights. In his preliminary award, the arbitrator states:

> "When I received an application to recuse myself I called for a meeting with the parties. I told them I was prepared to hear submissions and make a decision. However, as I was personally involved, if I refused the Application I might well be accused of bias. The parties agreed with my submissions and agreed that the matter should be referred to an independent party. They selected retired Judge Moses Chinhengo. Subsequently, Prof. Lovemore Madhuku was included as part of the tribunal. The tribunal heard the submissions and ruled that the Application for Recusal should be dismissed.
>
> I agree with their findings. I consider there is no valid basis for me to recuse myself. I accordingly declare that I will not recuse myself." (Emphasis added)

From the arbitrator's remarks, a likelihood of bias cannot be ruled out. I find that any reasonable person faced with the preliminary award would suspect that the arbitrator was impartial. One need not prove actual bias but its likelihood. See *Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity & Ors* SC 111/04. More so, by appealing the court *a quo*'s judgment, the arbitrator appears to have pitched his tent together with the appellants thereby confirming his alleged impartiality.

2. Whether or not the order of costs made by the court a quo is valid.

The appellants criticise the court *a quo*'s order of costs on the basis that it did not justify that order. I find merit in this submission. Whilst costs are entirely within the discretion of the court, an order for costs must be substantiated by reasons. In *Mahembe v Matambo* 2003(1) ZLR 148 (H) at 150 C-D, the court laid out the circumstances which justify the granting of an award of costs on an attorney and client scale in the following words:

> "… the courts only award such costs in situations where it is clear that the losing litigant was not genuine in the pursuance of a stand in the litigation process. Rubin L Law of Costs in South Africa Juta & Co (1949) 190, classified the grounds upon which would the court be justified in awarding the costs as between attorney and client:
> 1. Dishonest conduct either in the transaction giving rise to the proceedings or in the proceedings.

2. Malicious conduct
3. Vexatious proceedings
4. Reckless proceedings
5. Frivolous proceedings."

Therefore, an award of punitive costs is granted in exceptional circumstances against a party whose conduct is not *bona fide* and warrants censure.

The order made by the court *a quo* must have been substantiated by the appellant's conduct which warranted the award of punitive costs. The court did not make such findings. As such, it is difficult for this Court to ascertain the correctness of the court *a quo*'s decision on costs as its reasons remain locked in the mind of the judicial officer. See *S v Makawa* 1991(1) ZLR 142(S), at 146D-E. The award of costs on a punitive scale against the appellant is improper and may be interfered with.

It is accordingly ordered as follows:

1. The appeal is allowed in part in respect of the order as it relates to costs on a legal practitioner client scale.
2. Paragraph 2 of the order of the court *a quo* under HC 1054/17 is amended by the deletion of the words "on a legal practitioner client scale' such that it reads as follows:
3. "The 1st and 2nd respondents jointly and severally, the one paying the other to be absolved, pay costs of this application."

4. The rest of the appeal be and is hereby dismissed.
5. The appellant to pay the respondent's costs of the appeal.

GWAUNZA DCJ: I agree

BHUNU JA: I agree

Garabga, Ncube & Partners, appellant's legal practitioners

Zinyengere & Rupapa, respondent's legal practitioners