PORTNET HOLDINGS (PVT) LTD

versus

MUCHANETA MALISENI

HIGH COURT OF ZIMBABWE

MUTEMA J

HARARE, 3 September, 2012

**Opposed Application**

*S. Kachere*, for the applicant

*T. Marume*, for the respondent

 MUTEMA J: The respondent was an employee of the applicant. On 30 January, 2009 the parties concluded a mutual agreement to terminate the respondent’s contract of employment. The agreement was reduced to writing and the respondent was awarded the following as terminal benefits:

* A Dell Latitude laptop
* A Mitsubishi Lancer motor vehicle
* US$16 000-00.

Thereafter the respondent was paid US$6 600-00 in two batches leaving a

balance of US$9 400-00. When the applicant dragged feet in liquidating the balance owed, the respondent caused the dispute to be referred for conciliation on 28 February, 2011. Following a stalemate, the dispute was referred to compulsory arbitration. On 25 August, 2011 the arbitrator gave an award in the absence of the applicant ordering it to pay the respondent the US$9 400. The arbitrator found that the applicant was in default.

 On 6 September, 2011 the applicant filed this application to have the arbitral award set aside on two grounds, viz that the applicant was not given proper notice of either the appointment of the arbitrator or the arbitral proceedings and that the award is in conflict with the public policy of Zimbabwe. According to the court application, the relief sought is said to be in terms of Article 36(1)(a)(ii) and 36(1)(b)(ii) of the Arbitration Act, [*Cap 7:15*]. That Article deals with grounds for refusing recognition or enforcement of awards. Article 34 is the one that deals with application for setting aside arbitral awards. The correct citation therefore should have been Article 34(2)(a)(ii) and 34(2)(b)(ii) respectively of the Arbitration Act. This is so despite the fact that the grounds provided for in Article 36(1)(a)(ii) and 36(1)(b)(ii) are respectively the same as the proof provided for in Article 34(2)(a)(ii) and 34(2)(b)(ii). There is a distinction between the procedure of having an arbitral award set aside and grounds upon which a court can refuse to recognise or enforce an arbitral award.

 Be that, as it may, the gist of the application is that firstly, by not being given proper notice of the appointment of the arbitrator or the arbitral proceedings, the applicant was denied the right to be heard which constitutes a breach of natural justice; secondly the alleged agreement by the parties to have the respondent paid her terminal benefits in foreign currency at a time when that was illegal or unlawful in the country is contrary to the public policy of Zimbabwe and the *in pari delicto* rule should be invoked.

 The respondent raised two points *in limine*, viz:

1. That this application is not properly before the court in that the applicant should have applied for rescission of the default award before the arbitrator; and
2. That this court has no jurisdiction to entertain the matter. It being an employment/labour matter, this court’s jurisdiction is ousted by s 89(1) of the Labour Act, [*Cap 28:01*].

Both these points *in limine* are idle and should not detain me. I dismiss

them on the simple reason that the applicant’s contention is that because it was not given proper notice of either the appointment of the arbitrator or of the arbitral proceedings and that the award is contrary to the public policy of Zimbabwe, it is accordingly entitled to apply to this court for the setting aside of that award in terms of Article 34(2)(a)(ii) and (2)(b)(ii) respectively. That provision reads:-

“ ARTICLE 34

Application for setting aside as exclusive recourse against arbitral award

1. ……
2. An arbitral award may be set aside by the High Court only if –
3. the party making the application furnishes proof that –
4. ……..
5. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
6. ……
7. ……

or

1. the High Court finds, that –
2. ……
3. the award is in conflict with the public policy of Zimbabwe”.

In view of the foregoing provision, it goes without saying that neither of

the points raised *in limine* by the respondent is imbued with any semblance of merit.

 I will proceed to deal with the two grounds upon which the application for the setting aside of the arbitral award is premised.

THAT THE APPLICANT WAS NOT GIVEN PROPER NOTICE OF THE APPOINTMENT OF THE ARBITRATOR OR OF THE ARBITRAL PROCEEDINGS\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Article 3(1)(a) of the Arbitration Act provides that:-

 “(1) Unless otherwise agreed by the parties-

1. any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business……” .

Annexure “B” to the applicant’s founding affidavit gives the applicant’s

name and address as

 “The HR Manager,

 Portnet Holdings (Pvt) Ltd

 32 Shepperton Road

 Graniteside

 Harare”.

The same annexure has the arbitrator’s record of proceedings which

recorded that “Respondent was in default. Respondent was invited to take part in the arbitration proceedings but did not turn up” .

 While I remain alive to the fact that the most ideal mode of proving service of communication or a document is a return of service as is the case with court process, that stringent method of effecting service in respect of arbitral proceedings is not provided for anywhere in any of the relevant statutes. Article 3(1)(a) cited *supra* is the recognised mode of proving service of any written communication in respect of arbitral proceedings.

 On the strength of annexure “B” above, I have not been persuaded that the honourable arbitrator lied when he recorded that the respondent was invited to take part in the arbitration proceedings but did not turn up on 11 August, 2011.

 There is no evidence that the parties had agreed that the applicant would be notified of either the appointment of the arbitrator or of the arbitral proceedings via delivery of the notice upon its legal practitioners in order to buttress the applicant’s contention that no such proper notice was served upon its legal practitioners. The seeming misapprehension can be gleaned from the somewhat confusing para(s) 5 and 6 of the applicant’s founding affidavit which are worded thus:-

“5. At all material times and during the conciliatory proceedings, the applicant was legally represented and had chosen its present Legal Practitioners’ principal place of business as its address for service.

6. However, notwithstanding the above and upon the appointment of Mr T Vareta as an Arbitrator, no proper notice was served upon the applicant’s erstwhile legal practitioners’ offices, the applicant’s chosen address for service”.

The confusion is engendered by the use of the word “erstwhile” in para 6

above. That word denotes “former”. If the applicant had chosen its present legal practitioners’ principal place of business as its address for service, why then would it desire that the notice be served upon its former legal practitioners’ offices as its chosen address for service.

 Putting aside the confusion alluded to *supra* what the applicant is insinuating in the contention is that while it is not disputing that service was effected at its place of business that service should have been effected at its legal practitioners’ principal place of business. Apart from the absence of proof of its choice of its address for service as alleged the fact that notice was delivered at the applicant’s place of business deems the communication to have been received pursuant to Article 3(1)(a) of the Arbitration Act.

 The question that begs the answer is was there knowledge by the applicant of the arbitral proceedings? The answer must certainly be in the affirmative for the applicant cannot be heard to say it had no knowledge of the arbitral proceedings because the notice ought to have been served not on its HR Manager at its place of business but upon its legal practitioners’ principal place of business.

 It is telling to note that annexure ‘A’ to the applicant’s founding affidavit is a company resolution dated 21 June, 2011 authorising the HR Manager, who is the deponent to the founding affidavit, to attend to all court processes for and on behalf of the company. This resolution was made more than a month prior to the arbitral hearing. In the founding affidavit, he does not specifically deny ever receiving the notification of the arbitral hearing.

 In terms of Article 34(5)(b) a breach of the rules of natural justice in connection with the making of the award makes such award to be in conflict with the public policy of Zimbabwe. In *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (SC) it was held that the approach to be adopted is to construe the public policy defence restrictively in order to preserve and recognise the basic objective of finality in all arbitrations and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated.

 *In casu*, over and above the need to employ the restrictive approach in construing the public policy defence connected to the *audi alteram partem* rule, I have not been able to find that the applicant was not given proper notice of either the appointment of the arbitrator or of the arbitration proceedings. That ground of complaint accordingly falls away.

THAT THE AGREEMENT BY THE PARTIES TO PAY RESPONDENT TERMINAL BENEFITS IN FOREIGN CURRENCY WHEN SUCH WAS ILLEGAL FOR WANT OF EXCHANGE CONTROL AUTHORITY IS CONTARY TO THE PUBLIC POLICY OF ZIMBABWE AND THE *IN* *PARI DELICTO* RULE SHOULD APPLY\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 The contention here is that since Zimbabwe only adopted the multicurrency regime in February, 2009, any transactions prior to that date that were concluded without exchange control authority are illegal for breaching s 4(1)(a)(ii) of the Exchange Control Regulations S.I. 109 of 1996 which provides that:-

“Subject to subs (3) unless permitted to do so by an exchange Control Authority –

1. no person shall, in Zimbabwe –
2. ………
3. borrow any foreign currency from, lend any foreign currency to or exchange any foreign currency with any person other than an authorised dealer”.

The applicant also placed reliance on the *Maposa* case *supra*, *Delta Operations*

(*Pvt*) *Ltd* v *Origen Corp* (*Pvt*) *Ltd* 2007 (2) ZLR 81 (S) and *City of Harare* v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H).

It is now settled law that in seeking to set aside an arbitral award on the grounds that it is contrary to public policy, it is for the applicant to show that some fundamental principle of the law or morality or justice was violated. In the instant case, over and above the common cause facts stated in the opening paragraphs of this judgment, the following are also common cause: the applicant was in the business of trading in computers. It was trading in foreign currency. It was remunerating its employees – the respondent included – in foreign currency. All these transactions by the applicant were in contravention of s 4 (1)(a)(ii) of the Exchange Control Regulations SI 109/96 quoted *supra*. The applicant was therefore trading and paying salaries illegally. It now wishes to resile from an illegal agreement in which it has discharged the bulk of its obligations on grounds of public policy.

What no one can deny is that whatever the case, the respondent is still entitled to be paid her terminal benefits. Can the balance of those benefits to be paid today in Zimbabwe dollars? I think not. That currency has for now been rendered moribund and cannot transact.

In the *Zesa* v *Maposa* case *supra* at 466 E-G GUBBAY CJ (as he then was) said:

“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.”

These are salutary guiding *dicta*. However, conversely where, such as in *casu*, to allow an applicant to benefit from such illegality by way of unjust enrichment would constitute 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 Zimbabwean would be intolerably hurt by the setting aside of the award, then it would surely be contrary to public policy to set it aside. The concept of public policy is not immutable. It must conform to changing times and suit existing circumstances.

Even if the *in pari delicto potior est conditio possidentis* rule applied, given the applicant’s conduct in *casu*, the case calls for the relaxation of the rule on grounds of justice and equity. The *locus classicus* on the relaxation of the rule is the South African case of *Jajbhay* v *Cassim* 1939 AD 537 at pp 544 – 545 where STRATFORD CJ said:

“… Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitudes in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it on the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy as not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment.”

In *casu* both parties were deliquent but I am constrained, on the facts, to find that the applicant was the more deliquent. There is need to prevent unjust enrichment of the applicant to the detriment of the respondent.

In the result, the application cannot succeed and is accordingly dismissed with costs.

*Musarira Law Chambers*, applicant’s legal practitioners

*Matsikidze & Mucheche*, respondent’s legal practitioners