GD ELECTRONIX (PVT) LTD
versus
REF HURT INVESTMENTS (PVT) LTD
and
THEMBINKOSI MAGWALIBA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 12 June 2014 and 20 August 2014

Opposed Application

S. Zvinavakobvu, for the applicant
H. Ranchod, for the defendant

MTSHIYA J: This is an opposed application wherein the applicant seeks the following relief:-

> "1. The Arbitration Award that was made by the Honourable Arbitrator, Thembinkosi Magwaliba on the 10th of September 2013 be and is hereby set aside and replaced with an order compelling 1st Respondent to compensate the Applicant in the sum of US$28 930.00.
>
> 2. There is no order as to costs."

On 10 September 2013, Advocate Magwaliba, sitting as an arbitrator granted the following award against the applicant:-

> "30.1 The claim is hereby dismissed.
>
> 30.2 The claimant shall pay the respondent's costs of suit including the costs of the tribunal."

The facts leading to the above arbitral award is that on 12 March 2012 the applicant and the respondent entered into a lease agreement (the lease) in respect of the respondent's property namely shop A21 at Stand 1442 Salisbury Township. The effective date of the lease was 1 April 2012 and as at the time of the filing of this application the lease was still in force,

with the applicant still in occupation. In terms of the lease, the applicant, in addition to paying rent, was also paying operating costs directly to the respondent. The operating costs which covered security were paid together with the rental. Clause 4.4 of the lease provides as follows:-

> "The Lessee shall pay monthly and simultaneously with the monthly rental any contribution to the Lessor's operating costs for the premises, the building and the property in general, as determined in accordance with this clause."

Clause 10 on security also provides as follows:-

> "In the event that the leased premises make up a portion of the entire premises then the Lessee shall be responsible for the same proportion of the security charges raised in respect of the entire premises as the floor/ground area of the leased premises bears to the floor/ground area of the entire premise. A certificate from the lessor's agent together with copies of invoices/receipts shall be sufficient proof for all purposes of the security charges for which the lessee is responsible."

The applicant's business in the leased premises is the selling of "various and diverse electronic goods, products accessories and related merchandise."

During the night on 3 April 2013 a break in took place at the leased premises resulting in the theft of the applicant's goods valued at US$28 930-00. The applicant, who was religiously paying his part of the security costs, attributed liability to the respondent. The applicant argued that the break in and theft were due to failure by the respondent "to provide the required necessary security services or due to the applicant's provision of insufficient, incompetent and/or negligent security personnel."

The respondent denied liability arguing that in terms of the lease the applicant was required to insure its assets against risk. The respondent also denied the allegation of negligence on its part or its agents. The dispute was then referred to arbitration in terms of Clause 29 of the lease.

The arbitrator singled out the following issues as requiring determination:-

> "2.3 Whether the security services in relation to the premises in issue had been contracted out by the Respondent to an independent contractor?
>
> 2.4 What form and nature did the alleged breach of contract take?
>
> 2.5 What is the effect of the insurance clause with the contract of lease?

2.6 What it is the effect of the exclusionary clause in the contract?"

Furthermore in paras 14. – 14.4 the arbitrator redefined the issues as follows:-

"14. It is upon these facts and submissions that I am required to determine the issues before me. I have formulated the issues in dispute as the following:-

14.1 Did the contract of lease oblige the Respondent to provide adequate and sufficient security to the Claimant?

14.2 Did the Respondent breach the contract if it was obliged to provide such security?

14.3 Was the Respondent's liability excluded in the contract?

14.4 Has the Claimant established the quantum of damages that it claims?"

Upon determining the above issues, the arbitrator granted the award quoted at p 1 of this judgment. It is that award that the applicant seeks to have set aside on the ground that the award is, in terms of article 34 of the first schedule to the Arbitration Act [*Cap 7:15*] (the Act), contrary to public policy, in the sense that it "completely absolves the respondent from liability."

The applicant maintains that upon receipt of payment for security services, the respondent was obliged to provide the requisite security. Absolving the respondent from liability, it was contended, would amount to unjust enrichment (i.e having received money for security services that were not rendered).

Indeed in paras 23 – 29 of the founding affidavit the applicant states:-

"23. The Application is premised on the fact that the Arbitration Award that was made by the Arbitrator, Honourable T. Magwaliba, is contrary to public policy.

24. As aforesaid, the Arbitration Award completely absolved the Respondent from liability. I need to pinpoint the fact that right from the inception of the lease agreement, Respondent has been receiving security charges and it is clear that it had a corresponding duty to provide security.

25. After having received payment, it is natural that they ought to make good any losses that might have arisen out of their failure to perform in terms of the contract.

26. It is crystal clear that Respondent was liable for the loss that befell the Applicant to the extent the loss had arisen due to the negligence of the agents of the Respondent, for which it is fully responsible in terms of the law.

27. What then comes out clear is that the finding absolving Respondent is bad at law as it clearly constitutes an act of unjust enrichment.

28. The public policy of Zimbabwe does not condone unjust enrichment. Actions anchored on the concept of unjust enrichment are perfectly allowed in our law. The law does not accept that a person benefits from his own wrongdoing.

29. In the present case, it is clear that respondent, through the confirmation in the Arbitration Award, has been allowed to make a profit at the expense of the Applicant. It has been allowed to keep the profits directly arising directly from its wrongdoing. This clearly constitutes a proper ground for the setting aside of the Arbitration Award as **Article 34(2)(b)(ii)** of the **Uncitral Model Law** states that:

> "(2) An Arbitral Award may be set aside by the high court only if:
> ……
>
> (b) The High Court finds that ……..
>
> (ii) The Award is in conflict with the public policy of Zimbabwe."

I want to believe that, in error, the applicant, in its heads of argument, cited Article 36 of the Act which in fact deals with "grounds for refusing recognition or enforcement" of an award. Article 34 referred to in the founding affidavit is the one that deals with grounds of setting aside an award by this court. This application is premised on that article.

In its opposing papers the first respondent argued, as a preliminary issue, that Article 34 of the Act does not grant this court the power to substitute its own decision as indicated in the relief sought. That submission is correct because the Article only empowers this court to set aside an award on the grounds stipulated therein. I note, however, that in argument, the applicant did not persist with that relief. I shall therefore not dwell on it.

In the main the first respondent argued that it never contracted to hire security services on behalf of the applicant. It submitted that it was a mere conduit for passing on the

security costs to an independent contractor i.e. the security company not mentioned in the papers.

I believe that, notwithstanding a number of the numerous arguments made *in casu*, a determination of the correct meaning of clauses 4 and 10 of the lease agreement will dispose of this matter. The said relevant parts of the said clauses provide as follows:-

> "4 OPERATING COSTS
>
> 4.1 For the purposes hereof;
>
> Shall mean those costs that are incurred by the Lessor in respect of maintaining the building and/or the property for which the Lessee is also liable in terms of this Lease, including (but not limited to): cleaning expenses to common areas; electrical expenses including electrical lighting installations to common areas; security expenses; the cost of water, electricity, gas, coal, coke or any other fuel used in the building for any purposes except that used in the various lettable premises in the building; building amenity costs, including towel and other toilet services, and the costs of maintaining outdoor gardens and plants; costs of repairs and general maintenance, painting, salaries and wages of all employees engaged in the operation and maintenance of the building and the property; air conditioning maintenance; sewerage and refuse removal costs, running costs in respect of the common areas; pest control; insurance premiums, rent collecting expenses and fees; accounting , audit and secretarial fees; levies or charges payable to the local authority or any other responsible authority.
>
> 4.2 The Lessee shall be liable for its pro rata contribution, towards the property operating costs determined on the ratio the gross lettable area occupied by the Lessee bears to the total gross lettable area of the premises herein referred to as the 'operating cost attributable share.'
>
> 4.3 Where any dispute arises between the parties in regard to the operating costs, any dispute as to any amount payable by the Lessee in respect of operating costs or the reasonableness of the expenditure, such dispute shall be referred to an independent person who has at least ten (10) years experience in the management, maintenance and upkeep of premises, buildings and properties similar to those forming the subject matter of this lease. Such independent person shall be agreed upon by both parties, and failing agreements within seven (7) days after the date of a written declaration of such dispute as notified by

either party to the other, shall be nominated by the President of the Royal Institution of Chartered Surveyors (Zimbabwe Group) or the President of the Real Estate Institute of Zimbabwe whichever is chosen first. Such independent person shall, in making his decision act as an expert not as an arbitrator, and shall have due regard to generally accepted standards and practices in the property industry. The expert's determination shall be binding on both parties. The expert shall determine which party shall bear the costs of such determination, having regard to which party's submissions were substantially upheld in the determination of the dispute.

4.4 The Lessee shall pay monthly and simultaneously with the monthly rental any contribution to the Lessor's operating costs for the premises, the building and the property in general, as determined in accordance with this clause.

10. SECURITY

In the event that the leased premise make up a portion of the entire premises then the Lessee shall be responsible for the same proportion of the security charges raised in respect of the entire premises as the floor/ground area of the leased premises bears to the floor/ground area of the entire premises. A certificate from the Lessor's agent together with copies of invoices/receipts shall be sufficient proof for all purposes of the security charges for which the Lessee is responsible."(my own underlining)

Furthermore, the arbitrator found out that one of the issues for determination was: "whether the security services in relation to the premises in issue had been contracted out by the respondent to an independent contractor?" The arbitrator did not stop there. He went on to pronounce that one of the issues to be determined was:

> "Did the contractor of lease oblige the respondent to provide adequate and sufficient security to the claimant?"

Indeed the key question is: Was the respondent, in terms of the contract obliged to provide security services for the applicant?"

It is true that the applicant was obliged to insure his goods in terms of clause 12 of the lease agreement. Clause 12 provides as follows:-

> "12.1 The Lessor shall be responsible for the insurance of the building in which the leased premises are situated against risk of destruction, damage, or loss by fire but the Lessee shall not do or cause or permit to

be done any act whereby the insurance premium in respect of such policy may be increased or the rights of the Lessor in terms of such policy may be prejudiced in any way. The Lessor shall be reimbursed of the insurance premiums from the Lessee in terms of clause 4.2.

12.2 Should any insurance held by the Lessor be invalidated by reason of any act or omission on the part of the Lessee or its employees or agents, the Lessee shall be liable to the Lessor for any expense, loss or damage incurred or sustained by the Lessor thereby, including consequential loss.

12.3 Should any additional premium become payable by the Lessor as a result of any act or omission on the part of the Lessee, the Lessee shall be liable for and shall pay to the Lessor forthwith on demand the amount of such increase.

12.4 The Lessee shall be responsible for the insurance of his own property within the leased premises."

However, notwithstanding the above need for additional security, the respondent does not deny that the applicant religiously paid for security-costs in terms of the lease agreement. The respondent does not also deny that the lease agreement was not explicit on who would be responsible for security-services. It is from that lacuna in the agreement that the applicant comes up with the reasoning that payment of security-costs directly to the respondent implied that the respondent would be responsible for the security-services as long as it paid for the security costs.

Given the definition of 'operating costs' in clause 4 of the lease agreement, I am in agreement with the applicant's position on the respondent's implied obligation. Security costs are included in the definition of operating costs. I am unable to distinguish security costs from those costs relating to electricity, water, gas, coal e.t.c. These costs were billed directly to the respondent who in turn recovered the costs from the tenants. The tenants had no direct or separate contracts with service providers for operating cost. That is the arrangement that the respondent opted for and should live with.

In para 17 of the award the arbitrator states:-

"17. In the end, the term of the contract in terms of which security-services were provided to the whole of the premises <u>can only be implied</u>. No specific term of the contract of lease places that duty on the respondent." (My own underlining)

My finding is that the only reasonable implication under the circumstances was that the respondent would provide security when the applicant paid for it in relation to its own proportion. The applicant paid religiously.

However, the arbitrator then goes on to dismiss the implied term of the contract on the ground that the applicant did not plead it in its statement of claim. This is where I believe the learned arbitrator went into error. He correctly read the implication from the contract and from the conduct of the parties but then went on to depart from his correct finding. The arbitrator ought to have realised that security-costs for the entire premises were an issue between the respondent and the service provider. The respondent's only role was to pay the declared portion of its own security-costs as part of the operating costs. The security arrangements were between the respondent and the so called "independent contractor".

There is nothing in the contract or conduct of the parties that suggests the applicant knew how the security-services were procured. The applicant was certainly not privy to those arrangements and hence it could only look to the entity that arranged and received costs for security. That entity was the respondent.

Payment of its portion of security costs meant that the applicant indeed required security and therefore reasonably expected the respondent to provide same. I do not see how the applicant would have proceeded against "an unnamed independent contractor" with whom it had no contractual relationship whatsoever.

Accordingly, my finding is that the correct interpretation of clauses 4 and 10 of the lease agreement was that the respondent was obliged to provide security-services to the applicant upon being paid the relevant costs to cover the applicant's portion of the operating costs. A contrary finding would, in my view, be a departure from the need to uphold the sanctity of contracts. Such a finding would, indeed, offend public policy.

Given the fact that the law allows this court to set aside an award on the basis that it is against 'public policy' it therefore, becomes necessary to explain what public policy is.

In *Delta Operations (Private) Limited* v *Origen Corporation (Private) Limited* SANDURA JA had this to say:

> "The test to be applied in determining whether an award is in conflict with the public policy of Zimbabwe was set out by this Court in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S). At 466 E-G GUBBAY CJ, with whom EBRAHIM JA and I concurred, said:

> "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. 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 wold 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."

In the same judgment wherein the relief sought was based on the fact that public policy had been infringed, SANDURA JA said:

> "the arbitrator's reasoning or conclusion in making the award went:
>
> > "…..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……"
>
> It would, therefore, be contrary to public policy to uphold the award."

Indeed, *in casu*, the applicant has argued that the arbitrator's failure to find that upon being paid the costs for security, the first respondent was obliged to provide the service, clearly constituted "a palpable inequity." That submission is in line with the law as indicated in the above cited case.

In view of the interpretation I have given to clauses 4 and 10 of the lease agreement, I am in agreement with the position taken by the applicant. Absolving the respondent from liability would injure public policy. There is, therefore, merit in the application to have the arbitral award set aside.

I, therefore, order as follows:-

1. The arbitral award granted by Arbitrator Thembinkosi Magwaliba on 10 September 2013 be and is hereby set aside, and
2. There is no order as to costs.

Messrs Mutamangira & Associates, applicant's legal practitioners
Messrs Hussein Ranchod & Co, first respondent's legal practitioners