ISRAEL JACKSON CHIRANGWANDA
versus
ZIMBABWE LEAF TOBACCO
and
ADVOCATE DAVID OCHIENG

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE,8 November 2013 and 4 February 2015

Opposed Application

T Magwaliba, for the applicant
T Mpofu, for the respondent

MAKONI J: On 21 June 2012 the respondent (as applicant), in Case No 5936/11, instituted proceedings in terms of Article 35 of the Arbitration Act for the registration of an arbitral award. It was opposed by the applicant (as respondent). On 5 March 2013 and by consent of the parties, and in terms of a court order, the two matters were consolidated. On the day of the hearing and with the consent of the parties I heard arguments in respect of HC 6361/11 first. The understanding was that if the matter succeeds then case number HC 5737/11 will be dismissed. If it fails then the order sought in HC 5731/11 will be granted.

The brief background to the matter is that in September 2009 the applicant entered into a contract with the first respondent to finance his tobacco crop for 2009-2010 tobacco growing season. In terms of the contract the applicant was required to grow a certain hectrage of tobacco and to market the produce exclusively through the 1st Respondent. It is common cause that the applicant cultivated the required hectare and marketed tobacco worth USD 10890,29 through the first respondent. The first respondent then demanded the sum of USD 51687,56 which it alleged was the outstanding Grower Debt. The applicant disputed liability to pay the sum alleged or at all. As a result, the

dispute was referred for arbitration. The second respondent was appointed the arbitrator. He made an award in favor of the first respondent.

The applicant seeks the setting aside of the award on the following grounds as averred in the founding affidavit:

A. The arbitrator's conclusion in holding that the supply of sub-standard coal did not constitute a breach of the agreement is grossly irrational and, in the circumstances of the case, it resulted in a failure of justice.

B. The arbitrator's finding that the 1st respondent, who had reached the agreement by supplying sub-standard coal, should be paid the whole Grower Debt, is against public policy.

C. The decision by the arbitrator to award the 1st respondent the full value of the coal which:

i. By the 1st respondent's own admission, had been reduced owing to the poor quality of the coal

ii. Had caused him massive losses at the curing stage of the tobacco, was not only grossly irrational but also is repugnant to the basic notions of justice.

D. In any event, the arbitrator erred in a material, obvious and gross manner in creating an issue between the parties which did not arise from their submissions.

E. The arbitrator misconstrued the facts or dismally failed to apply his mind to the question regarding the Annual Production Schedule or he totally misunderstood the issue pertaining thereto and made a grossly irrational conclusion so much that the resultant injustice intolerably hurt the conception of justice in Zimbabwe and resulted in a failure of justice.

F. The Arbitrator's reasoning or conclusion in respect of the issue of Annexure E goes beyond mere faultiness or incorrectness and constitutes a palpable inequity and is outrageous in its defiance of logic or accepted moral standards. Further, acceptance by the arbitrator of Annexure E at face value was considering the circumstances of the case, contrary to public policy.

G. The finding that a contract farmer, who has performed all his obligations in terms of the contract of this nature, is obliged to pay the Grower Debt, from other sources of income in case of poor harvest, is contrary to public policy.

The first respondent opposes the application on the basis that none of the grounds relied upon by the applicant for the setting aside of the award fall within the ambit of the limited grounds for setting aside an award. It further avers that the applicant failed to appreciate the proper meaning of what constitutes an award that is contrary to public policy. The arbitrator's award in this matter is in no way contrary to public policy.

1. Article 34(2) of *The Model Law*, in its relevant portions, provides as follows:

" An arbitral award may be set aside by the High Court only if -
(a) the party making the application furnishes proof that-
(i) .....; or

(ii) .....; or

(iii) **the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration,** provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(iv) .....; or

(b) the High Court finds that-

(i) .....; or

(ii) the award is in conflict with the public policy of Zimbabwe."

Public policy has been defined in a number of cases in our jurisdiction. The fact that an award could be wrong, by which is meant it is at variance with the law, does not make it contrary to public policy. See *Catering Employers Association of Zimbabwe* v *Deputy*

Chairman Labour Relations Tribunal & Another HH 206-00 where it was stated:

> "Even when The Arbitrator made a finding that was erroneous or unreasonable the court should not interfere but it could only interfere if the decision was attended by a gross irregularity or it resulted in a failure of justice."

See also *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) at 466E-G where Gubbay CJ stated:

> "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."

In exercising its powers in terms of Article 34, the court must be cognisant of the need to preserve and recognize the basic objective of finality in the arbitration process. See *ZESA Supra* at 465 D-F. See also *Muchaka* v *Zhanje* 2009 (2) ZLR 9H.

I agree with the approach adopted by Mr *Mpofu* to identify the issues placed before the arbitrator, what he dealt with and how he dealt with it. After this exercise the court can then be able to determine whether a breach of public policy occurred.

Mr *Magwaliba* at the hearing, in my view, totally departed from the heads of argument filed by the applicant. He contended that there are three main public considerations in this matter *viz*:

1. Gross errors in the arbitrators finding on both substantive and procedural issues. Under this head, he submitted that the understanding by the Arbitrator of the contract between the parties was not correct. What was agreed on by the parties to be recoverable is the value of the crop inputs and financial assistance to be agreed on by the parties. There is nowhere in the contract where reference is made to the

sum of money advanced to the applicant. Nowhere in the draw down document, Annexure C is an amount mentioned. The assistance to the applicant was in kind and not financial. The understanding by the arbitrator of the contract therefore materially clouded the manner in which he subsequently dealt with rest of the issues.

2. The contract that the first respondent sought to enforce was contrary to the specific provisions of the law. Under this head, Mr *Magwaliba*, contended that on p107, paragraph one in the second line, the Arbitrator stated that the annual production schedule (APS), attached as Annexure C to the contract, indicates that the estimated cost of the crop finance as at that date USD 32313,18. The Arbitrator relied on a wrong document. As the APS only sets out the materials required to cultivate the hectrage and the quantities thereof. That error created a fundamental difficulty. The Arbitrator had to define what type of contract the parties entered into. It could have been one of two: i.e. an agreement of sale or a loan agreement. He contended that the arbitrator shied away from making that determination on that point but that there was a debtor and creditor relationship between the parties. At the same time the arbitrator contradicts himself when he makes a finding that there was an agreement of sale. According to the applicants papers the deliveries were done when there was no agreement in place. The absence of a price is critical. An agreement of sale would require a definite and certain price. From the facts it could not be a loan. Therefore the arbitrator made an award for a sum of money when there was no agreement respect of that in the contract.
3. Mr *Magwaliba* further submitted on p 111 the last paragraph, the Arbitrator made a finding in favor of the respondent in respect of an issue which had not been answered by the applicant. The arbitrator grossly erred. What was not denied by first respondent is taken to be admitted i.e that the first respondent induced the applicant to sign the invoice on p 34.

On p 112 the Arbitrator made a finding that it was not necessary to sign the APS. This permeates from the mistake that he used the wrong Annexure C. On p 113 in the last paragraph the arbitrator found gross anomalies regarding the dates of the invoice. The

invoice refers to a schedule which the arbitrator did not see. Patently the invoice was incomplete. The person who signed on behalf of the applicant is not identified. The arbitrator makes a finding binding the applicant with those factual findings. There was no basis for the arbitrator to make the finding that he did.

On p 114 the arbitrator concedes that the issue of the non-variation clause had not been argued before him but he proceeded to make a finding based on that clause.

On p 116 in the last paragraph the arbitrator made a finding that the first respondent admits to not having supplied coal of the required quality but he did not make a finding that was a breach of the contract by the first respondent.

The arbitrator failed to make a finding that the respondent failed to uphold the principles that underlie the contract it entered into i.e the contract was entered in furtherance of a Government Program to empower A1 and A2 farmers. The contract was entered into in terms of SI 61/04. The respondent was supposed to source off-shore funding and supply products at cost to the grower". The first respondent admits that the pricing model that it adopted is less than clear see p 77 paragraph 16 (2). The principles underlying the government enacting that particular SI was to allow first respondent to finance for growers and not to ensure that the respondent who made unmitigated profits at the expense of the grower. The fairness of the contract has to be measured against the expectation of the government. It is patently unfair for a financier to trap the grower into a debt. If the applicant had known the purchase price in 2008 he would have elected whether to enter into the contract of not. Public policy in Zimbabwe would not allow international capital to take advantage of the new breed of farmers in that fashion.

The first respondent admits to providing sub-standard coal. It gives a discount but at the same time insists that it wants all its money. Its unconscionable and against good morals. The situation that the applicant finds himself in is due to sub-standard coal. The arbitrator did not invite parties to make submission on the applicants counter claim.

Mr *Mpofu* in his opening submissions remarked that he had listened to appeal submissions which the court cannot relate to in such an application. There is no relationship between the founding affidavit and the submissions made on behalf of the applicant. Mr *Magwaliba* took very fresh issues some of which should have been dealt

with in the founding affidavit e.g the issue of illegality.

Mr *Mpofu* contended that the issue of illegality was not raised before the Arbitrator see the Agreed Statement of Facts. It was also not raised in the founding papers. It is an issue founded on facts. The applicant must establish how much was expended in bringing these inputs and that what was being charged is above what was being claimed. On the issue of the supply of the substandard coal Mr *Mpofu* submitted that the applicant must show that the type of coal made him lose so much and that the claim by the first respondent is so much and that there must therefore be a set off. This is not what the applicant did before the Arbitrator. It did not make such a claim before the Arbitrator. It is not the duty of the Arbitrator to relate to a claim that has not been made.

Regarding the issue of breach of the contract Mr *Mpofu* submitted that at p 130 para 7.2 the applicant admits that it was not peremptory for the first respondent to supply coal. The Arbitrator made his finding based on the clause that the first respondent "will buy and secure partial grower requirements of coal" contained in the APS. The Arbitrator was therefore correct in making a finding that there was no breach of contract.

He further submitted that the contract between the parties was a debtor creditor contract i.e a *mutuum*: a loan for consumption. The issue of the type of contract was not an issue before the Arbitrator. It was not suggested before the arbitrator that there was no cause of action.

I extensively recorded the submissions by Mr *Magwaliba* because they were a total departure from the Heads if Argument filed of record. I agree with Mr *Mpofu* that the submissions by Mr *Magwaliba* were mostly appeal submissions which this court cannot relate to in an application filed in terms of Article 34. I also agree that most of the issues that he raised were fresh matters which were not alluded to in the founding affidavit and which were not before the arbitrator.

The first point raised by Mr *Magwaliba* is that there were gross errors in the Arbitrator's findings on both substantive and procedural issues.

He also submitted that the Arbitrator grossly erred when he made a finding in favour of the first respondent on an issue which the first respondent had not contested.

The case authorities are very clear that under Article 34 or 36, the court does not

exercise appeal powers. An award cannot be set aside because the reasoning or conclusion of the arbitrator was wrong in fact and in law. The Arbitrator's decision, even if erroneous as contended by Mr *Magwaliba,* cannot be set aside unless the reasoning or conclusions were so flawed as to violate some fundamental principle of law or morality of justice.

All the other issues raised in the applicant's submissions such as the illegality of the contract, the nature of the contract between the parties that the Arbitrator used a wrong Annex C, supplying coal of a substandard coal, the applicant, attacked the findings made by the Arbitrator. He did not go further to establish that the reasoning in the 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 not consider that the conception of justice in Zimbabwe would be intolerably hurt by the award.

On the issue of sub-standard coal Mr *Magwaliba* submitted that it was unconscionable and against good morals that the first respondent would insist on getting the full amount for the coal despite its admission that it provided substandard coal. He further submitted that the Arbitrator did not invite the applicant to make submissions on the counter-claims. What is unconscionable is the conduct of the first respondent not the award by the arbitrator. Failure to invite submissions does not warrant the award to be set aside. In any event it was up to the applicant to make out his case before the arbitrator.

From the above its clear that the applicant has not made out a case to have the award set aside.

In view of that I will dismiss the application to set aside the award and grant the application to register the award.

As a result I will make the following order:

1. The arbitration granted by the Arbitrator Advocate David Ochieng dated 5 April 2011 be and is here by registered as an order of the High Court.
2. The applicant shall pay the cost of suit.

Gill, Godlonton & Gerrans, applicants' legal practitioners
Muzondo & Chinhema, Respondent's legal practitioners