OK ZIMBABWE LIMITED
versus
ADMBARE PROPERTIES (PVT) LIMITED
and
DANIEL TIVADAR N.O.

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 18 February 2016 and 6 April 2016

Opposed application

T Mpofu, for the applicant
T Magwaliba, for the 1st respondent

MTSHIYA J: On 2 March 2015, the second respondent granted the following arbitral award in favour of the first respondent:-

> "AWARD
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> 17. In the matter submitted to arbitration by the parties, for the reasons set out in this final award, the partial award rendered on liability dated 15th of December 2014 and for the reasons recorded in the minutes of hearing dated 11th of February 2015 I make the following award:
>
> 1. The respondent is liable to pay "turnover rent" on pies produced at the premises but sold at other branches of the respondent;
> 2. The respondent do pay the claimant US$76 481.00 within fourteen [14] days of this award.
> 3. Each party is to bear its own costs of the arbitration and the parties are to contribute to the arbitrator's fees equally."

On 31 March 2015, the applicant filed an application (HC 2939/15) seeking the setting aside of the above award. The relief sought read as follows:

> "1. The arbitral award rendered by second respondent in the matter between the parties on the 2nd of March 2015 be and is hereby set aside in its entirety on the basis that it was rendered contrary to the public policy of Zimbabwe.
>
> 2. Costs of this application shall be borne by the first respondent."

The application was opposed.

On 2 April 2015, the first respondent filed a chamber application (HC 3035/15) for the registration of the second respondent's award of 2 March 2015 as an order of this court. The draft order sought read as follows:-

"IT IS ORDERED THAT:

1. The Arbitral Award dated 2nd March 2015 by the arbitrator Mr D. Tivadar be and is hereby registered as an order of this Honourable Court.
2. The respondent be and is hereby ordered to pay to applicant:
   (a) Outstanding arrear rentals in the sum of US$76 481.00.
   (b) Costs of suit on a legal practitioner and client sale in respect of this application."

The chamber application was served on the applicant who opposed it.

Both matters HC 2939/15 and HC 3035/15 were allocated to me for determination. The parties then agreed that for the purposes of hearing and determination, the two applications, HC 2939/15 and HC 3035/15 be consolidated.

The applications were duly consolidated by consent, with the parties also agreeing that the registration of the award as applied for in HC 3035/15 would depend on whether or not the relief sought in HC 2939/15 was granted or not.

Accordingly on 18 February 2016, the parties proceeded to present arguments on HC 2939/15.

I shall now give a brief background to the award granted in favour of the first respondent by the second respondent on 2 March 2015.

In terms of a lease agreement dated 30 December 2013, the first respondent leased its commercial premises, namely stand 1561 of Ardbennie, Harare (the premises) to the applicant. The lease agreement had a commencement date of 1 November 2010.

The rental clause in the lease agreement provided as follows:

"3. RENTAL

3.1. The rental payable by the Lessee to the Lessor for the premises shall be the sum of US$2.000.00 (two thousand United States dollars) (hereafter referred to as "the base rent") per month or 1.5% (one coma five percentum) of turnover (hereinafter referred to as "turnover rent") (net sale after deduction of Value Added Tax) per month, which ever is greater.
3.2. The monthly rentals payable for the premises in terms hereof, shall be paid in advance on or before the seventh (7) day of each month, without any deduction or set off and free of exchange and bank charged, into the Lessor's agent bank account, that is, Vaincourt Real Estate Trust BanABC account 11779825602134 Graniteside Branch, Harare or at such other address in Harare as the Lessor may from time to time in writing require.
3.3. The base rent referred to in clause 3.1 above shall be reviewed every six (6) months and agreed upon by the Parties to this Agreement."

As regards the use of the premises by applicant, clause 7 of the agreement provided as follows:

"7. USE OF PREMISES

7.1. The Lessee shall be entitled to use the premises for purposes of conducting all or any retail business together with all business reasonable or necessarily incidental thereto and for no other purposes whatsoever save with the prior written consent of the Lessor, which consent shall not be unreasonably withheld.

7.2. The Lessee, its bona fide employees, agents and sub-tenants shall be entitled to use such areas on the property as will allow the Lessee, employees and agents reasonable access and egress to the premises.

7.3. The Lessee's rights of beneficial use and occupation of the premises shall not extend to a certain borehole situated on the portion of the property on which the premises are situated and all entitlements and obligations in respect of the said borehole and any water extraction there from shall vest in the Lessor, provided that the Lessor shall not utilise the same in a manner which is or may be prejudicial to the Lessee's rights in terms thereof."

In the course of its operations at the premises, the applicant, in addition to its retail business, started manufacturing pies in the premises for own sales and for distribution to its other branches. The manufacture of pies was not covered in the lease agreement.

A dispute then arose as to whether the proceeds from the pies distributed to the applicant's branches should be included in the calculation of the 'turn over rent' mentioned in clause 3 of the agreement. To that end, the applicant avers:-

"d. First respondent however, took the view that the turnover agreed on between the parties had to be computed even on the pies manufactured at the leased premises and distributed to other branches. It was accepted that those pies were not sold by applicant.

1.7. A dispute arose between the parties on the claim made by first respondent in that regard and it is this dispute that was referred to arbitration"

It is the dispute referred to above that resulted in the parties referring the matter to the second respondent (the arbitrator) for arbitration.

The record shows that the agreed issues for determination, as recorded by the arbitrator, were:

"8.1. jurisdiction, in particular whether I have jurisdiction to award damages to the claimant in relation to a period before the commencement of the most recent lease agreement;
8.2. prescription, in particular whether part of the claimant's claim for damages has prescribed;
8.3. construction of the lease agreement, in particular the proper interpretation of the reference to "turnover" and "net sales" in clause 3.1 of the lease agreement.
8.4. quantum of damages, if the claimant is successful in its claim; and
8.5. the issue of cost."

In casu the issues for determination are only those spelt out in 8.3, 8.4 and 8.5

In seeking to have the award set aside the applicant takes issue with the interpretation given to clause 3.1 of the lease agreement by the second respondent resulting in the amount declared payable to the first respondent i.e US$76 481.00, which amount the applicant disputed.

The applicant also alludes, with disapproval, to what it refers to as "the piece meal nature of the award" (ie award granted in two stages). The first stage dealt with liability, whilst the second stage dealt with the quantification of damages.

The applicant, in its submissions, took issue with the second respondent's opposing affidavit which was filed on 4 May, 2015. Apart from the fact that the second respondent admits that it was filed out of time, the first respondent does not in any way take advantage of that document. I shall therefore not cloud the issues for determination by dwelling on a document which, in any case, is clearly not properly before the court.

In its opposing affidavit, the first respondent also took issue with the deponent to the applicant's founding affidavit. It argued that the deponent had no personal knowledge of the issues in dispute. That was, however, not persued in submissions. I therefore regarded the issue as abandoned.

In determining this matter, I am guided by Article 34 of the Arbitration Act [*Chapter 7:15*] (the Act). That article sets out the grounds upon which an arbitral award can be set aside.

The Article provides as follows:-

"

ARTICLE 34

Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
(2) An arbitral award may be set aside by the High Court only if
    (a) the party making the application furnished proof that-
        (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not a valid under the law to which the parties have subjected it or, failing any agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or
        (ii) the party making the application was not given proper notice of appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
        (iii) the award deals with a dispute not contemplated by or not failing 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) The composition of the arbitral tribunal or the arbitral procedure was in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Model Law;

or

(b) the High Court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under law of Zimbabwe; or

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

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds of setting aside.

(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."

In casu, the applicant has relied on the issue of public policy. It has argued that the award offends public policy in that:

> "1.9 This award is palpably inquitious and is contrary to the public policy of this country and must be set aside. ……..
>
> 2.1. The award re-writes the contract between the parties in a manner which caused prejudice to applicant. The agreement makes it clear that turnover rent is payable on net sales made by applicant. Net sales are exactly that, net sales. The pies distributed to applicant's other branches are not sold to those branches. They are instead distributed for sale. The agreement between the parties clearly does not provide for rentals to be paid on distributed products.
>
> 2.2 It is clear that the pies are only sold at the premises at which they are distributed. Applicant's branches selling those pies pay turnover rentals in certain instances for them to applicant's respective landlords at those premises. The award results in a single pie being charged turnover rental two times over. It results in first respondent recovering rentals for premises that are not its own. This is contrary to all acceptable principled and intolerably hurts the conception of justice in the minds of all just men.
> 2.3 The award rendered by the arbitrator does not interpret contract. This is because the circumstance to which it pertains was not in existence when the parties contracted. The award instead re-writes a contract and makes provision for this development which arose well after the parties had concluded their contract."

The applicant does not stop there. He goes further to say:-

"2.8. I also comment on the piecemeal nature of the award. That piecemeal approach to arbitration has already been frowned upon by this court as being contrary to public policy. In the circumstances of this matter, there are further problems with that approach being,

a. That it was the arbitrator's sole invention, the parties had not desired that approach neither had they given their consent to it being pursued,
b. The directives issued after the award modify the hearing and constitute a fundamental departure from what the parties agreed to at the pre arbitration hearing. The directive for further discovery is particularly problematic and does not have a basis. It took applicant by surprise,
c. The approach was meant to and did benefit first respondent who had failed to prove its case. The approach was meant to make up for the deficiencies in the evidence led by first respondent under circumstances where the arbitrator simply ought to have entered the equivalent of absolution from the instance.

2.9 The co-operation given applicant after the rendering of the first award does not therefore count for anything. At that stage, a substantive finding had been made and applicant had been "directed" to take certain steps. Those steps were taken in obedience to the directive and should be understood in that context.

3.1 For all reasons, I submit with respect that the award is unlawful and must be set aside as it offends the public policy of the forum."

The Act makes no provision for a party to appeal against the decision of an arbitral award. However, as already indicated, under Article 34, the Act allows a dissatisfied party to apply to this court for the setting aside of an award on the basis of grounds set out in the said article.

The Act, as set in Article 34 quoted above, gives specific reasons for which an arbitral award can be set aside. It is therefore important for this court to be guided by those grounds or reasons. In general, reliance on such guidance will avoid the danger of turning an application sought under Article 34 of the Act into an appeal. This is important because in many cases parties present grounds of appeal other than those stipulated in Article 34.

I do believe that in setting out the limited reasons for which an award can be set aside, the legislature gives value and protection to the institution of arbitration and indeed the purpose of arbitration. That route of resolving disputes is obviously cheaper, faster and less cumbersome than the formal court system. It is therefore important to give it the necessary value and protection. No party would choose the arbitration route if arbitral awards/decisions were not important.

I further believe that, for final resolutions to be made in disputes, it is, crucial that when parties say: "the arbitrator's decision shall be final and binding", that statement should indeed carry that meaning. To that end, I hold the view that the limited grounds to be relied on under Article 34 are meant to emphasize the issue of finality in the resolution of disputes and hence the protection rendered to arbitral decisions. Accordingly in situations where, as *in casu*, it is alleged that public policy has been injured, the courts are, particularly in our jurisdiction, generally guided by the principles spelt out in *ZESA* v *Maphosa* 1999 (2) ZLR 452 (S) where it was said:-

> "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 palpabale inequity that is so far-reaching and outrageous in its defiance of logic or acceptable moral standard that a sensible and a fair minded 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 casu the applicant argues that the second respondent was wrong in that:

> " a. Applicant was liable to pay turnover rent on pies produced at the leased premises but sold at other branches of the applicant.
> b. As a result the arbitrator awarded that applicant was to pay USD$76 481.00 to first respondent.
> c. He did not find that the parties had agreed on this issue. He proceeded as an Amiable Compositeur, standing as a moral judge on what is good and or bad."

The applicant further disagrees with the second respondent's interpretation of clauses 3.1 and 7 in the lease agreement.

As indicated in his finding, the arbitrator took the view that in clause 7.1, the phrase "all business reasonable or necessarily incidental thereto" covered the manufacture of pies in the premises. Having made that finding, he also found that the pies, although distributed to the applicant's branches, were for sale for the benefit of the applicant and therefore the returns thereof formed part of the 'turnover' rent referred to in clause 3.1. I agree.

I struggle to find fault in the arbitrator's interpretation of the two relevant clauses. There is evidence of the value attached to the distributed pies. That is the value of the pies prior to leaving the leased premises. The pies were not given away. The manufacture of pies was, in my view, part of "all business reasonably or necessarily incidental thereto". Such business, in my view, did not require revisiting the lease agreement for review. All the applicant had to do was to be honest and include sales of pies executed through branches. The manufacture of pies was, as I have said, business and the premises were leased for business.

The rent payable was either "the fixed sum of $2 000.00 (the baserent) per month fixed or 1.5% of turnover (turnover rent)- (net sales after deduction of value added tax) per month, which ever is greater". I do not see how the arbitrator can be said to have created a new contract for the parties.

It is common cause that, for the duration of the lease, the applicant paid the turn over rent. It is also not denied that a value was indeed placed on the pies distributed to the branches for sale. The branches belonged to the applicant and the sales were for the benefit of the applicant. The quantities and values of the distributed pies were recorded. It is those values that confirmed 'sales' to the branches. It is also those values that were eventually needed to arrive at the quantum of damages

My view is that a different finding on the part of the arbitrator would have meant that the applicant was unlawfully subletting the premises to "the branches" for them to manufacture pies in premises leased to it. However, that was not the position. The applicant manufactured pies in the premises for sale from within and from without i.e. through its branches. Furthermore, the agreed basis of 'turnover rent' would fall away if the premises were to be used as "a warehouse" for the applicant's branches.

I also find it difficult to accept the argument that the arbitrator was wrong in holding two sessions of the arbitration exercise. The second hearing process was clearly necessitated by the need to assess the amount due to the first respondent. The parties mandated the arbitrator to establish same. That could not have been achieved without the production of further evidence from the applicant, and indeed, to its great credit, the applicant readily cooperated. That was so because both parties wanted to have the quantum of damages established. Given the fact that rent was based on turnover, it follows that the first respondent was always entitled to information relating to same.

In view of the foregoing, I find nothing in the findings of the arbitrator that offends public policy. There is no basis for setting aside the award. The arbitrator's decision does not, in my view, constitute "palpable inequity" as described in the *ZESA* case *supra*.

The above finding means that there is nothing militating against the registration of the award as applied for by the first respondent in HC 3035/15. The main reason for opposing registration was that an application to have the award set aside was pending. Furthermore, the patries agreed that registration would depend on my deision in HC 2939/15. I have, *in casu,* refused to set aside the award and therefore opened the way for is registration.

On costs, I take note of the consolidation of cases HC 2939/15 and HC 3035/15. However, I believe that it will be fair for the applicant to pay costs on both applications. I do not think there was ever any merit in seeking to set aside the award and also opposing its registration.

I therefore order as follows:

1. The application, HC 2939/15, to set aside the arbitral award granted in favour of the 1st respondent by the 2nd respondent on 2 March 2015, be and is hereby dismissed.
2. The application, HC 3035/15, by the 1st respondent, for the registration of the arbitral award granted by the 2nd respondent in its favour on 2 March 2015, be and is hereby granted and the award is accordingly registered as an order of this court; and
3. The applicant in HC 2939/15 shall pay costs in respect of the consolidated cases, namely HC 2939/15 and HC3035/15.

Wintertons, applicant's legal practitioners
IEG Musimbe & Partners, 1ts respondent's legal practitioners
Gill Godlonton & Gerrans, 2nd respondent's legal practitioners