HARARE SPORTS CLUB
versus
ZIMBABWE CRICKET
and
COMMERCIAL ARBITRATION CENTRE

HIGH COURT ZIMBABWE
MANGOTA J
HARARE, 1 June and 21 July, 2017

Opposed Matter

Mr N Mugandiwa, for the applicant
Mr B Diza, for the 1st and 2nd respondents

MANGOTA J: The applicant and the first respondent entered into a lessor-lessee relationship respectively. They, on 16 July 1999, signed a notarial agreement of lease ["the lease"]

The applicant let, and the first respondent hired, a certain portion of the property known as Harare Sport Club ["the property"]. This is situated in the District of Harare formerly Salisbury.

The agreed monthly rent for the property was Z$40 000. This was changed to US$170 per month at the introduction of the multiple currency. The lessee, it was agreed, would pay a pro-rata share of electricity and / or water charges it would have used. The monthly rentals, it was further agreed, would be escalated annually at the parties' mutually agreed rate.

The applicant and the first respondent ["the parties"] maintained their lessor-lessee relationship cordially for ten (10) years running. Each, it is assumed, made every effort to remain within the four corners of the lease.

The introduction of the multiple currency saw the two of them drifting apart. At the centre of their disagreement was the *quantum* of rentals which the first respondent was to pay on a month-by-month basis for its lease of the applicant's property.

The applicant's position was that the sum of USD170 was a token monthly rental. It stated that the parties agreed upon that figure whilst discussions for rent which was to be paid for the property remained in progress. It said the understanding was that the negotiations would enable the parties to strike a balance between them and agree upon a monthly rental which was commensurate with the value of the property. It submitted that, in April 2015, rent for the property was increased from USD170 to USD3000 per month. It averred that the stated figure of $3000 per month remained way below its expectations of what it considered to be a realistic monthly rental for the property.

The first respondent denied that rent for the property was increased from USD170 to USD3000 per month. It acknowledged the agreed monthly sum of USD170 and not more than that. It stated that the two of them agreed, as parties, that it would continue to pay USD170 per month. It averred that the rent was deliberately low because the parties agreed between them that the first respondent would be responsible for making all the necessary improvements that would be required on the property from time to time. Such improvements, it said, would accede to the applicant subject to the latter compensating it for the same. It stated that compensation would be by way of set off against rentals in terms of clause 5 (c) of the lease.

The parties' disagreement on the issue of rent which the first respondent should pay and ancillary matters prompted the applicant to file the present application. It moved the court to authorise the second respondent to appoint an arbitrator to determine its disputes with the first respondent. it filed its application in terms of Article II of the Model Law Schedule (Section 2) of the Arbitration Act [*Chapter 7:15*] ("the Act").

The first respondent opposed the application. The second respondent who was cited for purposes of the applicant's intended order did not opposes the application.

The first respondent's two *in limine* matters were that:

(a) the court did not have the power to authorise the second respondent to appoint an arbitrator who would preside over the parties' contractual issues– and

(b) because the parties' dispute related to the appropriate rental for the property, the matter should have been referred to the Commercial Rent Board for determination.

It stated, on the merits, that no dispute(s) existed between the applicant and it. It submitted that the parties were still negotiating the issue of rent which it was to pay for the property. It said clause 5 (c) of the lease excused it from paying rent. The clause, it claimed, obliged the applicant to deduct its rentals from the value of the improvements which it made on the property. It indicated that it owed the applicant nothing. It stated that the necessary measures which Article 11 (4) of the Model Law envisaged related to the court appointing the arbitrator. The court, it submitted, could not assign that responsibility to the second respondent. It, therefore, moved the court to dismiss the application with costs.

The first respondent was not being candid when it stated that no dispute(s) existed between the applicant and it. The existence of the dispute(s) requires little, if any, debate. The correspondence which the parties exchanged between them in November 2014 constitutes ample evidence of the existence of the same. It was indeed in some of that correspondence that the first respondent declared the existence of a dispute or disputes between the applicant and it. It even threatened, from as far back as the mentioned period, to exercise its rights in terms of the lease and have the dispute(s) referred to arbitration.

In a letter, Annexure BC3, which it addressed to the applicant's erstwhile legal practitioners on 3 November 2014, the first respondent wrote, on a without prejudice basis, and stated, in part, as follows:

> "The dispute between Harare Sports Club (HSC) and Zimbabwe Cricket (ZC) has now degenerated to levels where we require independent intervention.
>
> In case you are not aware, let me advise you that this dispute has been going on for some time now." (emphasis added).

In its second letter, Annexure C 4, which its legal practitioners wrote to the applicant's legal practitioners on 24 November 2014, the first respondent stated, in part, as follows:

> "We have instructions to advise you that our client is not agreeable to the unilateral figure of
>
> $10 000 as the monthly rental for the cricket field. It is apparent that this figure was plucked out of thin air without any legal or practical basis. To that end, our client evokes clause 3 (c) of the

> lease agreement and exercises its rights to refer the matter to an independent arbitrator to make a determination……
> In addition to this, our client disputes yours' baseless allegation that it is unable to hold on to financially sustained or viable international or local cricket especially in light of the recent games against South Africa and Australia. Our client questions yours' interpretation of clause 21 (b) (iii) of the lease agreement and would like to subject your client's view of the breach of that clause to arbitration in terms of clause 20 (a) of the lease agreement.
> …….
> Furthermore, our client has also been paying Harare Sports Club water, rates and electricity bills out of charity but however in consideration of your client's present stance and the stand-off between the parties as well as clause 3 (b) of the lease agreement, our client will only pay its pro-rata share and shall calculate the amounts which were due to be paid by your client and will seek reimbursement of the same" [emphasis added]

The first respondent declared the existence of a dispute from as far back as November 2014. It was, therefore, naive for it to suggest, as it did, that there was no dispute when the applicant declared the same in the present application. Its assertion which was to the effort that there was no dispute because the parties were still negotiating the rent which it should pay for the property was as misplaced as it was too far fetched. Parties who, in ernest, commenced discussing the issue of what rent it should pay in 2009 cannot be heard to say that they are still discussing the same subject matter some six or so years later. It, however, did the honourable thing when it conceded during the hearing of this application, the existence of the dispute(s) between the applicant and it..

Clause 20 (a), and to some extent clause 3 (c), of the lease spelt out the manner in which disputes which arise between the parties would be resolved. Clause 3 (c) makes reference to the escalation of rentals. It reads, in part, as follows:

> "(c) the rentals …. shall be escalated on an annual basis with effect from the first anniversary of the effective date at a rate to be agreed between the parties, in default of which it shall be determined and set by an independent arbitrator appointed by mutual agreement between the parties, whose decision shall be final and binding as between them……[emphasis added]"

Clause 20 (a) of the lease is wider in scope and substance than clause 3 (c). It reads, in part, as follows:

> "20 (a) Save as is otherwise expressly provided in this agreement, should any dispute arise between any of the parties in regard to:

i. the interpretation of;
ii. the effect of;
iii. the parties respective rights or obligations under;

iv. breach of;
v. the termination of; or
vi) any matter arising out of the termination of this agreement;
that dispute shall be decided by arbitration in the manner set out hereunder:

(b) (i) ……
(ii)…….
(iii)……
(c) the arbitrator shall be selected by mutual agreement between the parties.
(d) ……
(e) the parties irrevocably agree that the decision made by the arbitrator shall be final and binding upon them and shall be carried into effect and can be made an order of court or (sic) competent jurisdiction. Such decision shall not be subject to review, appeal or re-hearing" [emphasis added].

The parties, it is evident, crafted for themselves a clearly defined manner of resolving their dispute(s). The understanding between them was, and is, that they would mutually agree to appoint an arbitrator who would determine their cause whenever such arose or arises. It was never their intention that when disputes arise, one of them would renege on the agreed position and suggest another way of resolving the same.

The lease which the parties signed is a contract. The parties' adherence to its terms and conditions cannot be understated. *A fortiori* when, as *in casu*, the lease is couched in clear and unambiguous terms.

The first respondent's suggestion which was to the effect that the applicant should have taken the dispute(s) between them to the Commercial Rent Board is, on the basis of the principle of sanctity of contract, misplaced. Sanctity of contract provides that, once a contract is entered into freely and voluntarily, it becomes sacrosanct and courts should enforce it. [See Innocent Maja: *The Law of Contract in Zimbabwe* page 24]. Our legal system pays great respect to the principle of sanctity of contract. The courts would rather uphold than reject contracts [see *Mudoo (Pvt) Ltd* v *Wallace*, 1979 (2) SA 957]. The doctrine of sanctity of contract holds in Zimbabwe [see *Old Mutual Shared Services (Pvt) Ltd* v *Shadaya*, HH 15/13].

The principle of sanctity of contract was not the only reason which made the Commercial Rent Board route impossible for the parties to pursue. The suggested route could not hold for other reasons. Chief amongst those reasons were the assertions of the first respondent. The

matters which it raised in its affidavit fell outside the mandate of the Commercial Rent Board. Amongst those matters were the following:

i. whether or not clause 5 (c) of the lease excused the first respondent from paying rent for its use of the applicant's property;
ii. whether or not the Commercial Rent Board could determine matters which pertained to the first respondent's payment of electricity and /or water it used, or uses, for its operations at the property;
iii. whether or not rent increased from $170 to $3 000 in April, 2015 – and
iv. whether or not the first respondent owes the applicant $64 119.85 for rentals, electricity and water charges.

The above matters fall more into the realms of clause 20 (a) of the lease than they fall under the provisions of the Commercial Rent Board. They speak to the interpretation of the lease, breach or otherwise of the same as well as the parties rights and obligations under the lease.

The Commercial Rent Board does not, in my view, contain any provisions by means of which such matters can be resolved. It cannot, in short, competently deal with the observed matters. The Commercial Rent Board route which the first respondent was so pleased to persuade the court to follow is out of the question.

The lease was a well thought out document. It contained a mechanism for resolving disputes. Its shortcoming was that it failed to provide for all possible eventualities. It, for instance, remained silent on what would happen where parties failed to mutually agree on a way forward when a dispute such as the present one has arisen. It did not envisage a situation where the parties would fail to mutually agree on the appointment of an arbitrator to resolve their dispute or, as *in casu*, their disputes.

The observed shortcoming of the provisions of the lease prompted the applicant to apply as it did. It moved the court to authorise the second respondent to appoint an arbitrator who would determine the parties' disputes. It placed reliance on Article 11 (4) of the Arbitration Act [*Chapter 7:15*] ["the Act"] in the mentioned regard.

The first respondent's position was that the court did not have the power to authorize the second respondent to appoint an arbitrator. It stated that the court can appoint an arbitrator. The power of the court does not, according to it, extent beyond its ability to appoint an arbitrator.

The court established the existence of a dispute, or disputes, between the parties. It also ruled out the Commercial Rent Board route which the first respondent urged it to consider favourably. It remained alive to the fact that:

(a) the parties agreed on a procedure for appointing an arbitrator- and

(b) the procedure in question contained some shortcomings which the parties could not, on their own, cure except through such an application as the present one.

Whether or not the court has the power to authorise the second respondent to appoint an arbitrator for the parties' case does, in a large measure, depend on the interpretation which must be placed on the applicable law. Article 11 of the Act makes reference to the Appointment of Arbitrators. It read, in part, as follows:

"(1) ……

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement-
(a) in an arbitration with three arbitrators each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator …. or if two arbitrators fail to agree on the third arbitrator …. the appointment shall be made, upon request of a party, by the High Court;
(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the High Court. [emphasis added].

4. Where, under an appointment procedure agreed upon by the parties
(a) a party fails to act as required under such procedure; or
(b) …… or
(c) …..;
any party may request the High Court to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment. [emphasis added]

A reading of the above cited Article shows that the court can only properly act under section 3 (a) and (b) of the Act. It can do so at the request of the aggrieved party.

The parties' case falls under s 4 of Article 11 of the Model Law. They agreed on an appointment procedure. They incorporated their position in this regard in the lease. The first respondent failed to act under the procedure which the parties defined for themselves. The court cannot appoint an arbitrator for them. It, in any event, was not requested to do so.

What the applicant moved the court to do was to take the necessary measure. The court has the power to take that necessary measure. The relevant law, Article 11 (4) of the Model Law, confers that power upon it.

Given the fact that:

(a) the parties' disputes cannot remain unresolved for times immemorial;

(b) the first respondent failed to act as is required of it under the procedure which the partied defined for themselves- and

(c) the parties' agreement does not provide them with another way of securing the appointment of the arbitrator;

the necessary measure which the law allows the court to take is to authorise the second respondent to appoint the arbitrator who would deal with, and determine, the parties' dispute(s). That, in my view, is the correct interpretation which must be placed on the phrase "any party may request the High Court to take the necessary measure." Any interpretation which falls outside the stated one would produce an absurd result. The law is not crafted to produce absurd results.

The legislature, in its wisdom, could not insert into the Act a clause which served no purpose. It remained alive to the inherent jurisdiction of the court. It allowed the court a wide discretion to enable it to deal with such a matter as the present one. The court can, in the exercise of its inherent jurisdiction, authorise the second respondent to act in line with the applicant's prayer. The law allows it to act as such.

The court has considered all the circumstances of this case. It is satisfied that the applicant proved its case on a balance of probabilities. The application is, therefore, granted as prayed.

Kantor & Immerman, applicant's legal practitioners
Mhishi Nkomo Legal Practice, 1st & 2nd respondent's legal practitioners