THE TRUSTEES OF TATENDA SHENJERE MUTIZWA FAMILY TRUST
versus
INNOCENT MATANDE
and
AULINE MATANDE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 9 November 2016 and 15 March 2017

Registration of Arbitral Award

C. Mavhondo, for the applicant
T. Zhuwarara, for the respondent

CHITAKUNYE J. This is an application for the registration of an arbitral award obtained by the applicant against the respondents.

On 11 January 2013 the applicant entered into an agreement of sale with the respondents for the sale of Stand No. 325 Greystone Township 5 of Greystone A, situated in the district of Salisbury otherwise known as No. 31 Guys Cliff, Greystone Park, Harare (hereinafter referred to as the property). The terms of the agreement included, *inter alia*, that:

1. The purchase price for the property was US$ 230 000.00
2. A deposit of US$ 110 000.00, was to be paid within 3 days of signing of the agreement.
3. The balance of US$ 120 000.00 to be paid in two equal instalments of US$60 000.00 to be paid not later than 1 August 2013 and 1November 2013 respectively.
4. In the event of default by the purchaser, and failure to remedy the breach within 30 days, the sellers were entitled to retain all the payments made by the purchaser on account of the purchase price as *rouwkoop* (pre-estimated damages).
5. In the event of cancellation of the agreement any claim for damages would include, *inter alia*, wasted legal fees, agents' commission, fees and expenses and stated rates; taxes and costs.

6. Any dispute arising from the agreement directly or indirectly shall be dealt with through arbitration in terms of the Arbitration Act, [*Chapter 7:15*].

The applicant duly paid the deposit. On the first instalment, the applicant paid US$50 000.00 instead of the US$60 000.00. A balance of US$70 000.00 remained outstanding.

On 20 January 2014 the Respondents alleged that the applicant was in breach of the agreement and that in terms of Clause 9.1 of the Agreement of Sale they were entitled to cancel the agreement and to retain all amounts paid as *rouwkoop*. The respondents purported to cancel the agreement of sale.

The applicant disputed both the cancellation of the agreement and the retention of the US$160 000.00 as *rouwkoop*.

The applicant subsequently referred the dispute to arbitration in terms of Clause 17 of the agreement of sale.

Both parties presented written submissions before an arbitrator. In the submissions the applicant claimed a refund of US$135 000.00 among other things. The respondents on their part initially offered a refund of US$44 575.00 but later reduced the offer to US18 018.00.

After a full hearing of the dispute, on 3 May 2016, the arbitrator found in favour of the applicant. The respondents were ordered to:

a) Pay the applicant US$ 135 000.00 within 14 days of the award;
b) Pay the applicant interest on US$135 000.00 at the prescribed rate from 20 January 2014;
c) Pay the applicant's costs in that matter; and
d) Refund the applicant the arbitration costs in the sum of US$ 3 600.00.

Upon the respondents not complying with the award, the applicant sought the registration of the award in terms of Article 35 of the Arbitration Act [*Chapter 7:15*]

The respondents opposed the application. In their opposition the respondents contended that the award is contrary to the public policy of Zimbabwe and so it should not be registered. In this regard respondents relied on Article 36 (1) (b) of the Arbitration Act which states that court may decline the registration of an award if the award is contrary to the public policy of Zimbabwe.

The respondents' contention in this regard was premised on the *rouwkoop* clause which they contended entitled them to retain all the money that had been paid by the applicant at the time of cancellation of the agreement as a penalty (and not as damages per

se). Thus to order them to refund the applicant was contrary to the public policy of Zimbabwe.

The respondents also raised issue with the identity of the applicant contending that no allegation was made that the applicant is capable of suing or being sued in its own name.

From the founding affidavit and the opposing affidavit the issues for determination were as follows:

1. Whether or not the application is anomalous at law for want of particularity with regards the deponent's authority to represent the Applicant.
2. Whether or not the *rouwkoop* clause in this case is to be construed as pre-estimated damages or penalty.
3. Whether or not the arbitral award is contrary to public policy.

It is, however, pertinent to note that in his heads of arguments, counsel for the respondents made no submissions on the first two issues. These issues were apparently abandoned as even in his viva voce submissions, counsel did not address those issues. The abandonment of those aspects was proper as clearly there was no merit in the respondents' contentions that gave rise to those two issues.

The issue that remained for considerations and upon which counsel for both sides made serious submissions was whether or not the award was contrary to the public policy of Zimbabwe.

As already alluded to, the respondents' opposition was premised on Article 36 (1) (b) (ii) of the Arbitration Act which is to the effect that the registration of an Award will be refused where its recognition or enforcement would be contrary to the public policy of Zimbabwe.

The applicant on the other hand maintained that the Award is not contrary to the public policy of Zimbabwe at all and as such it should be registered.

The circumstances under which an award maybe deemed to be contrary to the public policy of Zimbabwe are limited. The general trend has been to construe the meaning of public policy restrictively so as not to defeat the objective of finality of arbitration.

Article 36 (3) of the Arbitration Act states that:

> "For the avoidance of doubt and without limiting the generality of paragraphs(1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to 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 respondents did not allege (a) or (b) above. They alleged that the award negates the principle of sanctity of contract; and that the award grants the applicant a relief that was never contemplated by the parties. These are aspects they contend have been adjudged to be at variance with the public policy of Zimbabwe.

In *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) at p 465 D, GUBBAY CJ aptly opined that:

> "In my opinion 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."

At p 466 E-G the Honourable Chief Justice went on to state that:

> "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……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 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 *Husaihwevhu & Others* v *UZ-USF Collaborative Research Programme* 2010 (2) ZLR 448 (H) at 455 H-456B GOWORA J (as she then was) reiterated the need for a restrictive construction when she said that:

> "The courts in this country have construed the defence of public policy very restrictively so that the objective of finality to arbitration is achieved. It follows, therefore, that the grounds upon which an award may be set aside or those on which a court may refuse to register the award are very narrow. Whether or not the arbitrator erred is not an issue that should concern this court in deciding whether or not the award should be registered in terms of the statutory provisions providing for registration. The issue to be decided is whether or not the respondent has shown that its registration would be contrary to the public policy of Zimbabwe and, in my view, the respondent , apart from a mere bald statement, has not shown that it would be."

In *Delta Operations (Pvt) Ltd* v *Origen Corp. (Pvt) Ltd* 2007(2) ZLR 81(S) the court upheld a High Court decision to set aside an Award made in favour of the appellant after finding that the award was contrary to public policy on four reasons. The reasons were outlined as follows: i) the arbitrator granted remedies which were not available to the appellant in terms of the contract; ii) by granting the alternative relief the arbitrator deliberately ignored or disregarded s 4 (1) of the Contractual Penalties Act, chapter 8:04; iii) the arbitrator created an issue between the parties which did not arise from their submissions and awarded a measure of damages which went so far outside the contract as to create a new contract for the parties; iv) the arbitrator did not give reasons for granting the alternative

relief, which failure is contrary to article 31(2) of the Model Law. This is in conflict with the public policy in Zimbabwe and invalidated the alternative relief.

As a consequence of the above anomalies court held that the award was contrary to the public policy of Zimbabwe and so could not be registered.

In *casu*, the parties in their wisdom decided to have Clause 9.1 in their agreement of sale and also agreed that disputes between them be referred for arbitration. If therefore what came out of the arbitration should not be registered the onus is on the respondents to show that the award is contrary to the public policy of Zimbabwe.

The respondents contended that the effect of Clause 9.1 of the agreement was that once the applicant breached the payment clause, the respondents were empowered to activate the *rouwkoop* clause and forfeit whichever money had been paid as penalty (and not as damages *per se*). It is in that light that counsel for the respondents argued that the award was contrary to public policy on the basis of sanctity of contract. As far as respondents were concerned, the clause in question was a penalty clause and did not permit any refund to the applicant. Thus irrespective of how much would have been paid by the time of breach, or prejudice suffered, the applicants were not entitled to any refund.

The applicant on the other hand argued that the parties agreed that the *rouwkoop* clause would act as pre-estimated damages. This is evident from the clause itself as it states, *inter alia*, that:-

> " .. the seller shall be entitled, without prejudice to any other claim the seller may have against the Purchaser to cancel and determine this agreement without further notice, and to retain all payments made by the Purchaser on account of the purchase price as *rouwkoop*(pre-estimated damages) or …"

It is clear that in their wisdom by *rouwkoop* they meant pre-estimated damages. It may also be noted that irrespective of which term was used, in their submissions to the arbitrator the parties showed that they were of the view that the respondents should prove damages or prejudice suffered as a result of the breach and the applicant will be refunded the balance. In this regard both parties accepted that the Contractual Penalties Act was applicable as this was an instalment sale of land. Their dispute before the arbitrator was not whether any sum should be refunded or not but on the quantum of the refund.

In their submissions to the arbitrator the respondents indicated that in terms of the Contractual Penalties Act a court is entitled to order a creditor to refund a debtor the whole or any part of any instalment deposit or other moneys the debtor has paid.

Having accepted the application of the Contractual Penalties Act one is left wondering as to what has changed for the respondents to now contend otherwise.

Section 4 of the Contractual Penalties Act states that:

> "(1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.
> (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may-
> (a) reduce the penalty to such extent as the court considers equitable under the circumstances and;
> (b) grant such other relief as the court considers will be fair and just to the parties.
> (3) Without derogation from its powers in terms of subsection(2), a court may—
> (a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or
> (b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.
> (4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question."

In consonant with the above provisions when the parties appeared before the arbitrator they were clear on the need for the respondents to show the extent of the damages/prejudice suffered hence, in their submissions, the respondents outlined the various sums they claimed to have been prejudiced totaling US$115 725.00 and offered a refund of UD$ 44 575.00. Upon revisiting the prejudice suffered they amended their offer of refund to US$ 18 018.00 the respondents were clearly trying to prove the extent of prejudice suffered so that the arbitrator can arrive at an appropriate sum for refund.

I allude to this to show that as the parties approached the arbitrator they contemplated an award in the form of a refund to the applicant. This is the award the arbitrator granted. The only difference being the quantum of the award. The determination of the quantum was for the arbitrator after considering the evidence placed before him. It is thus incorrect to say that in their agreement the parties did not contemplate the nature of the relief granted to the applicants.

Respondents' counsel argued that in line with the Delta case (*supra*) this Award should not be registered as it is contrary to the penalty stipulation the parties agreed to. Unfortunately, that may not be so. In the Delta case, at 87B-C SANDURA JA aptly stated that:

> "In terms of s 4(1) of the Act, [Contractual Penalties Act], such a stipulation is enforceable in any competent court, unless the court finds, in terms of s 4(2) of the Act, a basis for declining to enforce the penalty stipulation or for reducing it. No such basis exists in the present case, and none was found by the arbitrator."

In *casu*, the arbitrator found a basis for not enforcing the penalty stipulation and articulated it well. In fact the respondents by their own offers of refund appeared to appreciate the need for a refund. It was just a question of the quantum to be refunded. The injustice of retaining the entire sum paid was obvious even to the respondents.

It may also be noted that in terms of s 4 (2) of the Contractual Penalties Act, court may not permit the enforcement of the penalty clause if it is out of proportion to the prejudice suffered by the creditor.

In *casu*, the applicants had paid about 70% of the purchase price and if the *rouwkoop* clause was to be enforced in the manner desired by the respondents it would result in the applicant losing the US$ 160 000.00 and also the property to the gain of the respondents. The respondents did not show that the entire US$ 160 000.00 was commensurate with the prejudice suffered.

In *UDC Ltd v Kenward Enterprises (Pvt) Ltd& Others* HH 139-01 GILLESPIE J opined that:

> "It maybe that the penalty is reasonably commensurate with the damages suffered. That however, is a factual inquiry. It is one involving an onus of proof that can only be discharged by the adduction of evidence. The proof of enforceability of the penalty, therefore, is proof of an illiquid claim. It should accordingly be pursued by a court application supported by a proper affidavit, or sets of affidavits, of evidence and quantum of loss."

See also *Zimbabwe Reinsurance Co. Ltd* v *Musarurwa* 2001 (2) ZLR 211 at 214G-215A.

Further, in *Nighert Savania & Another* v *Nathan Mnaba* HH 323/13 where an agreement of sale contained a similar clause entitling the seller to retain all payments paid as *rouwkoop*, at p 3 of the cyclostyled judgment, MANTHONSI J opined that:

> "While the agreement of the parties gives the first respondent an election, upon a failure by the respondent to make any payment before due date, to either enforce the agreement or cancel it and forfeit all sums paid towards the purchase price as *rouwkoop* in consideration of value of damages sustained, the court cannot blindly enforce such stipulation without regard to justice and fairness. Here we have a situation where the respondent paid the greater part of the purchase price leaving a smaller part. The first applicant claims the whole of it without even beginning to justify why he is entitled to it……."

The learned judge went on to hold that the penalty was out of proportion with the prejudice suffered by the respondent.

It is thus clear that if the respondents are to retain the whole amount they must show that the amount is not out of proportion to the prejudice suffered. In determining whether the

penalty is out of proportion regard may be had to the words of CANEY, A.J.P in *Western Credit Bank Ltd v Kajee* 1967(4) SA 38(N) at 391B-D wherein the learned judge stated that:

> "The words 'out of proportion' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the legislature would have said so. What is contemplated, it seems to me, is that the penalty is reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded."

In this matter the decision by the arbitrator showed that he found the penalty to be out of proportion with the prejudice. The respondents in their own submissions before the arbitrator had confirmed this by their offer of a refund.

The only issue which prompted the respondents to oppose this registration is the quantum of the award and not the nature of the award. In my view it cannot be said that a difference in the quantum of the award is against fundamental principles of law or that it makes the award contrary to public policy. The arbitrator gave full reasons for coming to the conclusion as he did. If there is any error in this, it cannot be said that his reasoning or conclusion 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 so as to make the award contrary to public policy of Zimbabwe.

I thus conclude that the respondents defence is untenable. The award will be registered.

The respondents will bear the cost of this application.

Accordingly it is hereby ordered that:

1. The Arbitral Award handed down by the Honourable Arbitrator C.H. Lucas on 3 May 2016, in the matter of *The Trustees of Tatenda Shenjere Mutizwa Family Trust* v *Innocent Matande and Auline Matande* is hereby registered for the purposes of enforcement, as an order of this court in terms of Article 35 of the Arbitration Act [*Chapter 7:15*].
2. The respondents shall jointly and severally, the one paying the other to be absolved, pay costs of this application.

Mhishi Legal Practice, applicant's legal practitioners
Kantor & Immerman, respondents' legal practitioners