HC 13/21

QUARRYING ENTERPRISES (PRIVATE) LIMITED
versus
STONEZIM (PRIVATE) LIMITED
and
ADDINGTON BEXLEY CHINAKE (N.O)

HC 3203/21

STONEZIM (PRIVATE) LIMITED
versus
QUARRYING ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 19 November and 20 January 2022

Opposed Matter

Advocate *T Zhuwarara,* for the applicant
Advocate *R Mabwe*, for first respondent

MUCHAWA J: This judgment is a consolidated one for the matters HC 13/21 and HC 3203/21 following consolidation of the two matters by consent of the parties. In this judgment, I refer to the parties as cited in case HC 13/21.

The brief background to this matter is that the applicant and the first respondent entered into a written tribute agreement (main agreement) on 27 April 2016. The applicant would mine and extract granite blocks from seven specified claims owned by the first respondent in Mtawatawa District collectively known as the Chidje Granite Claims. The agreed financial arrangements were that the applicant would pay the first respondent monthly royalties in certain specified United States Dollar amounts. In response to the unstable and complicated exchange rate and inflation levels, on 16 December 2019, the parties signed an addendum to the main agreement which altered clause 4 of the main agreement. This amendment related to the payment of royalties and built in

monthly reviews in order to maintain the economic value of the agreement having regard to the prevailing economic environment, specifically, inflation.

A dispute then arose between the parties concerning payment of royalties and was referred to arbitration before the second respondent who rendered an award in favor of the first respondent on 24 November 2020. The arbitrator subsequently corrected and clarified the November award with the consent of the parties and issued a corrected final arbitral award on 20 December 2020. The applicant filed case HC 13/21 on 4 January 2021, seeking the setting aside of the award of 24 November 2020. On 18 June 2021, the first respondent then filed case HC 3203/21 seeking the registration of the award of 20 December 2020.

At the hearing of the consolidated matters, I first heard the points in *limine r*aised before getting into the merits of the applications. I deal with the preliminary points first.

1. Whether the applicant's supplementary heads of argument should be admitted

On the 15th of November 2021, the applicant filed supplementary heads of argument in which it was indicated that at the hearing of the matter, leave of the court would be sought for the admission of the supplementary heads of argument as they raise legal issues which are critical to the resolution of the dispute.

In response, the first respondent also filed supplementary heads of argument on 17 November 2021 in which it was questioned whether the applicant can file heads which raise a point of law a day before hearing of the matter. It was argued that this was not procedural as r 59 of the High Court Rules, 2021 only provides for the filing of heads of argument before set down of a matter. It was prayed that the supplementary heads of argument be expunged from the record. However, the first respondent proceeded to respond to the merits of the supplementary heads of argument.

It is not surprising therefore that parties consented to the admission of both supplementary heads of argument. I proceeded to admit same as they were both important to the resolution of the matters before me, no prejudice would be suffered by either party and cognizant too of the fact that a point of law can be raised at any time.

2. Whether the applicant's accountant, Emily Makurumure has authority to act on its behalf

The first respondent raised the preliminary objection that applicant's accountant, Emily Makurumure had no authority to attest to the notice of opposition in case 3203/21 and that therefore

there was no notice of opposition. This point was not pursued at the oral hearing. This is understandable as case law has stated that it is not always necessary to attach a company resolution confirming authority to act on behalf of a company, particularly where it is clear that the deponent is indeed employed by the company in a capacity in which she can positively attest to the facts in issue and there have been previous dealings on the issue with that person. It appears to me that it was common cause that the applicant was the one litigating. I will not spend time on this issue therefore.

3. Whether the applicant in case HC 13/21 is challenging the wrong award

Ms *Mabwe* submitted that the relief sought by the applicant makes it clear in the draft order that it is sought to set aside the award of 24 November 2020. This is buttressed too in the founding affidavit in para 3 of the founding affidavit and in the heads of argument. She averred that this award was superseded by that of 20 December 2020 which was granted pursuant to consent by the parties to have the November award corrected. It was contended that this effectively means that the parties abandoned the November award on the understanding it was incorrect and not fully reflective of the decision reached and the binding award is the December one.

Furthermore, Ms *Mabwe* argued that the application is founded on a nullity and it cannot stand and is therefore incurably bad.

Mr *Zhuwarara* submitted that the court should just consider that the two matters are being heard together and that the argument used in seeking the setting aside of the November award is similar to that in opposition of the registration of the December award. It was also averred that regardless of how the draft order is stated, the court is still enjoined to hear the application. Additionally, Mr *Zhuwarara* submitted that the two awards have basically identical orders, and the arbitrator's reasoning is the same. The court was urged not to be unduly concerned with technicalities but doing justice between the parties. It was then submitted that the court can amend the draft order.

I upheld this preliminary point as the applicant provided a clearly vacated award whose vacation happened by consent of the parties leading to the final corrected December award. A setting aside of the November award would not achieve anything as the December award would remain extant. There is a marked difference in paragraph (g) of the two awards. The November award provides as follows;

> "It is hereby confirmed that the Tribute Agreement as read with Addendum 1, between the Claimant and the Respondent was lawfully and properly cancelled."

On the other hand the December award provides in paragraph (g) as follows;

> "It is hereby confirmed that the Tribute Agreement, as read with Addendum No.1, between the claimant and the respondent was lawfully cancelled and consequently an order for the ejectment of the respondent and all those claiming any right of occupation through it is hereby granted. The respondent shall give claimant vacant possession of the Chidje Granite Claims no later than 4pm on 26 January 2021, failing which the claimant may register this award with the High Court of Zimbabwe and seek enforcement thereof."

The court could not of its own accord amend the draft order as no application for condonation had been made. Most importantly however, the founding affidavit could not sustain an amended draft order and cannot itself be amended. In paragraph 3 of the applicant's founding affidavit it is stated,

> "The applicant brings this application pursuant to Article 34 of Schedule 1 of the Arbitration Act [*Chapter 7:15*] for the setting aside of the arbitral award rendered by the second respondent, on 24 November 2020 (the award), a copy of which I annex hereto marked as Annexure 1."

Consequently, I dismissed case HC 13/21 with costs.

The merits: Case HC 3203/21

The first respondent seeks to register the December award which was in its favor, as the claimant. In that award, the applicant herein was the respondent.

A bit more detail on the dispute is necessary. Upon signing of the tribute agreement, the applicant was to pay USD 15,000-00 per month in advance, on or before the first day of such month. Such payment applied for the extraction of a maximum of 300 m3 per month whilst an additional USD 50-00 per an extra m3 was payable. The extra production was to be reconciled every six months and payment would be within seven days after the six month period.

Subsequent to the agreement, inflation levels, exchange rate fluctuation and the conversion of the United States dollar to the Zimbabwean dollar at 1:1 through Statutory Instrument 33 of 2019 [President Powers Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars] Regulations, 2019 meant that the actual value of the royalty payment of USD 15-000, 00 at ZWL 15-000, 00 was diminished. The parties then entered into Addendum 1 on 16 December 2019 which revised the amount of royalty to be paid. The relevant amendments were as follows:

a. From 0-150 m3 for the period 1 October 2019 to 31 December 2019 shall be ZWL 120,750-00;
b. From 0-150 m3 for the period 1 January 2020 to 31 December 2020 shall be ZWL 161,000-00;
c. From 0-300 m3 for the period 1 January 2021 to 30 April 2021 shall be ZWL 241,500-00

Amounts were also agreed on what was payable for any production above the agreed volumes. These are however not relevant for this dispute. A relevant clause to this dispute is clause 4.1.8.1. It provided as follows;

> "The royalties payable in terms of this agreement for the period 1 December 2019 to 30 April 2021 shall be reviewed on a monthly basis in order to maintain the economic value of the agreement regard being had to the prevailing economic environment in the country, inflation specifically included."

The issues making up the dispute before the arbitrator were set out as follows:

i. Whether or not the respondent has paid to the claimant the base royalty payments that are due and payable in terms of the Tribute Agreement, as read with Addendum 1 to the claimant either at all or;
ii. Secondly whether any payments made, were paid in the correct adjusted amounts taking into account inflation, for example;
iii. And thirdly if, absent proper payments in the correct amounts, the claimant properly terminated the Tribute Agreement; and
iv. Fourthly, the consequences of such termination if found to be valid

The arbitrator made the following factual findings:

a. That the respondent failed to pay the base royalties timeously and in the correct amount and was therefore in breach of the agreement
b. That the breach was not purged or rectified and the respondent admitted to its failure to pay base royalties and therefore invited cancellation of the agreement
c. That proper notice of violation was given and proper cancellation followed after failure to purge the violation.

The operative part of the award has the following terms;

"IT IS ORDERED THAT:

a) It is hereby declared that the respondent materially breached the Tribute Agreement as read with Addendum 1, by failing to timeously pay the base royalty and/or subsequently pay the monthly adjusted monthly royalty on time;

b) The respondent is in default of payment and in arrears in the sum of ZWL 1,483,061-46 as at the 1st June 2020, calculated in accordance with Annexure 'A' to this Award.
c) The respondent is therefore ordered to pay the claimant the sum of ZWL 1,483,061-46 being the money due and payable by the respondent to the claimant in respect of adjusted monthly royalties for the period December 2019 to June 2020;
d) The respondent is ordered to pay interest on the sum of ZWL 1,483,061-46 at the prescribed rate of 5% (five percent) per annum calculated from the 23rd September 2020 to the date of final payment;
e) All payments made by the respondent to claimant between December 2019 and date of this award are to be deducted from the above sums;
f) The respondent shall, in addition to paying the amount stated in paragraphs (c) and (d) above as adjusted by the effect of paragraph (e), pay to the claimant, representing holding over damages for the period starting from July 2020 to the date upon which vacant possession of the mining claims, namely Chidje Granite Claims, 21919 BM; 23534 BM; 23174 BM; 23175 BM; 26606 BM; 26607 BM; and 26608 BM, which are in the district of Mtawatawa at the rate of ZWL 368,662-72 per month and thereafter, for each subsequent month , through the addition of the monthly inflation figure provided by the Central Statistics Office on the amount, together with interest at the prescribed rate of 5% (five percent) per annum calculated from the 1st (first) of each month to the date of payment for such period as the respondent may remain in occupation of the mining claims or any portion thereof;
g) It is hereby confirmed that the Tribute Agreement as read with Addendum No. 1 between the claimant and the respondent was lawfully and properly cancelled, and consequently an order for ejectment of the respondent and all those claiming any right of occupation through it is hereby granted. The respondent shall give claimant vacant possession of the Chidje Granite Claims by no later than 4pm on 26 January 2021, failing which the claimant may register this Award with the High Court of Zimbabwe and seek enforcement thereof;
h) The respondent shall pay the claimant's costs of arbitration, including any disbursements incurred by the claimant at the Law Society of Zimbabwe legal practitioner and client scale."

The first respondent moves for registration of the arbitral award of December 2020 in terms of Article 35 of the Schedule to the Arbitration Act. It is averred that according to that award, the 26th of January 2021 was the last day of applicant's occupation of the Chidje Granite claims but the applicant has continued in occupation despite knowledge of the award which was received on 20 December 2020.

In opposition to the registration of the award, the applicant avers that it accepted the arbitrator's finding in respect to the formula for calculating the inflation adjustments and has since complied with that part of the order by making payment. What is challenged is whether the first respondent validly cancelled the agreement. It is also submitted that the applicant exercised its option to renew the agreement by giving the requisite notice on 29 October 2020 within the prescribed period and is therefore entitled to remain in occupation. It is further averred that it was not for the first respondent to accept or reject the option to renew. It is essentially argued that since the award has been complied with, there is no basis for registration of the award.

Regarding the validity of the cancellation, it is the applicant's case that the cancellation of the agreement was defective as the breach complained of was cured within the notice period so there was no legal basis to cancel the agreement.

Ms *Mabwe* submitted that the right to object to registration of an award is strictly limited to the grounds set out in Article 36 but in this case the applicant is not raising any recognized ground for refusing the enforcement of the award. It was averred that the applicant is merely challenging the correctness of the arbitrator's finding. This was said to be particularly so as in respect to the following assertions;

- "The cancellation was defective as the breach complained of was cured within the notice period. There was therefore no legal basis to seek an order confirming an unlawful cancellation of the agreement."

- "The arbitrator erred in finding that the respondent ought to vacate from the mining claim in question based on an alleged breach of contract which was remedied by the respondent and in that regard there was no legal basis to cancel the agreement"

The Court was cautioned to remember that it is not sitting as an appellate or review court and further that in any event, the agreement was validly cancelled based on a breach which was not remedied.

Ms *Mabwe* further submitted that as the applicant acquiesced to the award in respect of the amounts owing by complying with findings of the arbitrator and effecting payment, there is no cause for challenging the registration of the award. She also stated that at any rate the agreement between the parties has lapsed so there is no basis to refuse registration. The case of *Hlatshwayo* v *Mare & Deas* 1912 AD 242 was referred to for the argument that a party against whom a judgment is given, who acquiesces to it loses the right to reopen the case.

Furthermore, it was averred that the contract has lapsed due to the operation of clause 2.2 which provided that the contract would lapse by the 30th of April 2021 and any renewal was to be on terms and conditions to be agreed by the parties and there has been no such agreement. It was contended that the order relating to the eviction is not challenged as being contrary to the public policy of Zimbabwe and the applicant is bound to obey the eviction order therefore. Ms *Mabwe* argued that if the court was to refuse registration of the award, it would in fact be redrafting the lapsed contract for the parties if it allowed an extension of same.

Ms *Mabwe* questioned the stance taken by the applicant and submitted that the applicant cannot successfully argue that there was no breach and the cancellation was improper in the face of accepting the breach and making payment in terms of the award.

Mr *Zhuwarara* submitted that it is a fundamental notion of law that where an arbitrator departs from the strict letter of the agreement, then public policy stands violated. It was argued that the arbitrator rewrote the contract for the parties in respect of two findings being that there was a breach and that the cancellation was contemplated by the agreement.

It was explained that the law does not allow a party to challenge parts of an award hence the opposition to registration though the applicant accepts the quantification and amounts owing. It was averred that no one month notice was given for cancellation but only three days. It was also argued that there was no basis to find that there had been a breach as there was need for mutual agreement on the inflation adjusted royalty payment. The parties are alleged not to have agreed on what was due and payable and such agreement only came after cancellation of the agreement.

Mr *Zhuwarara* argued that an enforcement of the award would be repugnant to the understanding of contract law as it departs from the terms of the very agreement concluded by the parties themselves and in essence is a rewriting of the contract between the parties and allows the first respondent to escape its obligations. In particular, it was submitted that the award inexplicably excused the first respondent from complying with clause 4.1.8.3 of the Addendum to the Tribute Agreement which did not allow the first respondent to unilaterally set the monthly royalties payable. It was contended that the parties failed to agree on the adjustments to the royalties payable and these were only ascertained in the November award and that therefore, there could not have been a breach before that. The case of *Magodora & Ors* v *Care International* 2014 (1) ZLR 397 (S) was referred it in support of the argument that it is not open for courts to rewrite a contract between parties or excuse any party from the consequences of the agreement freely and voluntarily entered into, even if such terms are shown to be onerous. This was said to be a matter of public policy. Furthermore, Mr *Zhuwarara* argued that the second respondent's complete negation of the processes outlined in the agreements violates the *pacta servanda* principle which dictates that contracts and obligations that stem from an agreement must be honored and is part of our law as set out in *CNV Electrical (Pvt) Ltd* v *Brewtech Eng (Pvt) Ltd* 2016 (1) ZLR 465 (H.)

BHUNU JA in *Gwanda Rural District Council* v *Lourens Marthinus Botha (snr*) SC 174/20 provides a seminal judgment on registration of arbitral awards. I can do no better than quote as follows:

> " Thus in terms of the applicable law an application for the registration of an arbitral award is granted upon its mere presentation, authentication and production of the original arbitration agreement subject to the provisions of article 36. The essential requirements to be met by the applicant may be summarised as follows:
>
> 1. Present to the High Court the original or a certified copy of the arbitral award.
> 2. Present to the High Court the original arbitration agreement referred to in Article 7.
> 3. If the award or arbitral agreement is in a language other than English the applicant must provide a duly certified translation into English.
>
> Once the 3 basic requirements are met the applicant is entitled on the face of it to register the arbitral award as of right. The right to register is however not cast in stone as it is subject to Article 36 which provides an exception to the general rule entitling the applicant to register the arbitral award upon fulfilment of the 3 basic requirements for registration."

It is evident that the applicant herein seeks to rely on Article 36, in particular that the award is contrary to public policy, to oppose its registration. The correct position in applying the law is set out in the case of *OK Zimbabwe Ltd* v *Admbare Properties Ltd & Anor* SC 55/17. PATEL JA, as he then was set out the following;

> "It is now axiomatic that the concept of public policy as well as what might be perceived as being in conflict with that policy, within the meaning of Articles 34 and 36, must be construed narrowly so as to attain the objective of finality in commercial arbitration as contemplated by the Model Law. The *locus classicus* on the subject is the decision of this Court in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S), *per* GUBBAY CJ, at 466E-G. As was emphasised in that case, an award is not contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. The reviewing court does not exercise an appeal power by having regard to what it considers should have been the correct decision. It will only intervene to set aside an award on the ground of public policy where the reasoning or conclusion 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 consider that the conception of justice in Zimbabwe would be intolerably hurt by the award [or] 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 *casu* the applicant seems to me to be merely saying that the arbitrator's reasoning or conclusions are wrong in fact or in law in respect of whether or not there was a breach and whether the cancellation was properly done in terms of the agreement.

The applicant accepted through its witnesses, before the arbitrator, that it was in breach as confirmed by the emails between the parties produced before the arbitrator. See page 205 of record

wherein it is recorded that Mr Hassim admitted the non-payment of the rental and conceded that the applicant herein, but respondent before the arbitrator was in arrears. He even sought to argue supervening impossibility which was not pleaded.

A finding of breach based on the fact that the applicant had not paid both base (this fact was even accepted by Mr *Zhuwarara* before me) and adjusted royalties in full in the given notice period, in the circumstances does not show a palpable inequity that is so far reaching and outrageous in its defiance of logic or resultant grave injustice so as to constitute violation of public policy.

Equally regarding the cancellation, the first respondent addressed a notice to rectify breach within twenty one days from the 12th of March 2020 which also included a demand for payment of the outstanding amounts of royalties. See record p 53. Cancellation of the agreement was communicated by letter of 8 June 2020 (see record p 58-59) which indicated that two months later, the applicant remained in breach. On record p 59, it is clear that the applicant was given thirty days' notice of cancellation of the agreement. The letter states;

> "You are hereby given 30 days' notice of cancellation in terms of the agreement from the date of your receipt of this notice. You should utilize this notice period to move out of the claims."

In the circumstances of the very narrow remit of this court in matters of this nature, it is not for me to now revisit the findings of law and fact and assess their correctness as the applicant is inviting me to do.

The agreement between the parties was to automatically lapse on 30 April 2021. This issue was not pleaded in the papers but as Ms *Mabwe* pointed out, were the court to refuse registration of the award, it would in essence be drafting a contract for the parties and extending a lapsed contract.

The authorities cited by the applicant in support of the *pacta servanda* principle actually favour the registration of this award. Having been found to be in breach of the agreement and that cancellation happened in terms of the agreement, the applicant is bound to comply with the award.

The first respondent prayed for costs on a higher scale and justified these on the basis that the respondent's opposition to the application is *malafide* and simply meant to simply frustrate the enforcement of the award whilst the applicant continues to enjoy uncontrolled extraction of first respondent's granite blocks. My findings above support these contentions.

The first respondent is therefore entitled to the relief prayed for.

I accordingly make the following consolidated order:

1. Case HC 13/21 is dismissed with costs.
2. Case HC 3203/21 is upheld and the arbitral award handed down by the Honourable Arbitrator ABC Chinake on 20 December 2020 in the matter of Stonezim (Private) Limited v Quarrying Enterprises (Private) Limited is hereby registered for purposes of enforcement, as an order of this Honourable Court in terms of Article 35 of the Schedule to the Arbitration Act [Chapter 7:15]
3. The applicant (Quarrying Enterprises (Private) Limited) shall pay costs of suit on a legal practitioner and client scale.

Gill, Godlonton and Gerrans, Applicant's Legal Practitioners
Mhishi Nkomo Legal Practice, First Respondent's Legal Practitioners