PREMIUM LEAF ZIMBABWE (PRIVATE) LIMITED
versus
TILROY ENTERPRISES (PRIVATE) LIMITED
and
ADVOCATE FIROZ GIRACH

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 28 July, 2021 and 20 January, 2022

COURT APPLICATION

D Ochieng, for the applicant
R Stewart, for the 1st respondent

MANZUNZU J: This is a court application seeking to set aside an arbitral award issued by the second respondent on 25 February 2021 for the reason that it is contrary to public policy.

The application is made in terms of Article 34 (2)(b)(ii) of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, which is set out, with modifications, in the First Schedule to the Arbitration Act [*Chapter 7:15*] (the *Model Law*), which provides that;

> "(2) An arbitral award may be set aside by the High Court only if—
> (a) …
> (b) the High Court finds, that—
> (i) …
> (ii) the award is in conflict with the public policy of Zimbabwe."

The applicant is a tobacco merchant. It lends money to competent growers who raise crops and then sells the whole crop to the applicant and the purchase price of the tobacco is then set off against the loan. The applicant borrows money from offshore creditors to fund the farmers.

The applicant contracted the first respondent to raise a crop in the 2018/19 tobacco farming season. Under the commercial tobacco growers' contract, the applicant provided the first respondent with working capital in United States dollars. Clause 11 of the agreement provides a dispute resolution mechanism through arbitration.

The respondent was ultimately liable to pay applicant the sum of US$510 388.39 as at 30 September 2019. While the first respondent accepted liability to pay, it contended that it was liable to pay the portion of the debt that arose from advances made up to 22 February 2019 in Zimbabwean dollars at the rate of 1:1. In respect to the advances after 22 February 2019, the first respondent accepted liability in United States dollars but argued it was repayable in Zimbabwe dollars at the prevailing Reserve Bank of Zimbabwe auction rate of exchange.

Furthermore, the first respondent argued the insurance premium paid on its behalf was to be recovered from it in Zimbabwe dollars.

These material facts are basically common cause.

Following the declaration of a dispute, the matter was referred to the second respondent for arbitration. All the necessary documentations were filed with the second respondent.

The dispute to be resolved in the arbitration between the parties was really one of law. This is whether or not a tobacco merchant who made advances to a grower in United States dollars from funds that the merchant had sourced offshore is entitled to repayment in United States dollars despite the provisions of SI 33 of 2019.

The second respondent identified three issues for determination between the parties which more or less boil to the issue as identified above. The second respondent examined the evidence placed before him and the applicable law and made the following award on 5 February 2021;

> "(a) it is declared that the portion of the claimant's debt to the respondent which accrued prior to 22 February 2019 was, by operation of law, converted to a debt sounding in Real Time Gross Settlement Dollars at the rate of one-to-one.
> (b) Accordingly, the claimant shall pay the respondent the following sums:
> (i) RTGS$198 226.74, together with interest thereon at the rate of charged by the respondent's bankers from time to time from 1 October 2019 to the date of payment in full; and
> (ii) US$312 161.65 together with interest thereon at the rate of 9.5% per annum from 1 October 2019 until the date of payment in full, which sum shall be payable in Zimbabwe dollars at the interbank rate prevailing on the date of payment."

This court settled the position of the law in *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Mushayakarara* HH 220/20 when it said the repayment must be in United States dollars the decision of which was upheld by the Supreme Court.

The applicant said the *Mushayakarara* case was on all fours with the dispute between the applicant and first respondent. The judgment came out on 18 March 2020 after the parties had filed their submissions with the arbitrator. However applicant availed a copy of the judgment on 27 March 2020 and later the order of the Supreme Court dated 16 November 2020

to the respondents. This necessitated the filing of amended statement of agreed facts and issues by the applicant and first respondent on 29 June 2020.

The applicant said it was apparent the first respondent was seeking a relief that was contrary to the express pronouncements of the regulator and contrary to the judgment of this court that was upheld by the Supreme Court. The second respondent was then urged to follow the decisions of this court and dismiss the first respondent's claim.

The question for determination is whether the award was in conflict with the public policy of Zimbabwe.

In para 20 of the founding affidavit the applicant stated in part;

> "However, there had been placed before the second respondent a judgment of this court confirming what that effect was, together with a record of that decision having been upheld by the Supreme Court. The award does not include any reasoning whatsoever that addresses these decisions. The indication is that the second respondent did not apply his mind to that vital material and thus proceeded grossly irrational." (my emphasis*).*

In response the first respondent said,

> *"*… It is categorically denied that the second respondent failed to apply his mind to the matter….."

This was said without demonstrating how the second respondent applied the *Mushayakarara* case in the award.

The applicant argued that the second respondent was bound by the decision in *Mushayakarara* case as a matter of public policy. Further that the second respondent had no right to ignore the pronouncements of the law as that is against public policy.

Article 34 (5) defines conflict with the public policy in the following words;

> "(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."

This means the term conflict with the public policy is not only limited to the above definition. The test to be applied in determining whether an award is in conflict with the public policy of Zimbabwe was set out by the Supreme Court in *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) where it was held that;

> " the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, 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. 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. 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. The same consequences apply 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."

The applicant argued that by ignoring the pronouncements of the law in *Mushayakarara* case the award is against public policy. See *Delta Operations (Pvt) Ltd* v *Origen Corporation (Pvt) Ltd* 2007 (2) ZLR (S). While the applicant accepts that the arbitrator could be right or wrong about the law it argued that the arbitrator must consider the authorities placed before him in which case he can agree or distinguish them from the circumstances of the applicant and first respondent. That was not done.

The second attack on the award as against public policy is the finding that;

"that contract makes no mention of the currency in which payment is to be effected."

Contrary to this finding, reference was made to Clause 9.3 of the agreement which refers to schedules of funding and repayment with figures denominated in United States dollars.

The third attack by the applicant was that the award "would patently fail to meet the justice of this case." See *Zimbabwe Development Bank* v *Zambezi Safari Lodges (Pvt) Ltd & Ors* 2006 (2) ZLR 118 (H) at 125E-F.

In response the respondent largely argued on the interpretation of the law provided for in SI 33 of 2019 and the Finance Act (No. 2). The first respondent further argued that the *Mushayakarara* was distinguishable from the parties' case. That may well be so but the issue by the applicant is that the arbitrator did not recognise its existence.

The applicant and first respondent in many respects argued their cases as if this court were an appeal court. The decision of the arbitrator is not contrary to public policy because the reasoning or conclusions were wrong in fact or in law. There must be a violation of "some fundamental principle of the law or morality or justice." See *Maposa* case *supra*.

In case u I say the award by the arbitrator is contrary to public policy in the following respects;

a) The arbitrator did not consider the precedent presented before him in the case of *Zimbabwe Leaf Tobacco Company (Pvt) Ltd* v *Mushayakarara* HH 220/20. The arbitrator did not follow the *ratio decidendi* in that case neither did he distinguish it from the facts of the case before him. He ignored the case as if it does not exist yet the tribunal is bound by the decisions of the superior courts.
b) The finding by the arbitrator that; "the contract makes no mention of the currency in which payment is to be effected." is contrary to Clause 9.3 of the agreement which refers to schedules of funding and repayment with figures denominated in United States dollars.

Disposition:

IT IS ORDERED THAT

1. The award issued by the Second Respondent dated 25 February 2021 is declared to be contrary to public policy and is hereby set aside.
2. The first respondent shall pay the applicant's costs.

Coghlan, Welsh and Guest, applicant's legal practitioners
Whatman and Stewart, 1st respondent's legal practitioners.