RICHARD ALWYN MATTHEWS
versus
THE HONOURABLE MR JUSTICE A. EBRAHIM
and
UMESHKUMAR DWARKADAS KOTECHA
and
DHIRUBHAI MAGANLAL DESAI

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 22 October 2013 and 11 February 2015

Opposed Application

A P de Bourbon, for the applicant
T Magwaliba, for the 2nd & 3rd respondents

ZHOU J: This is an application in terms of Art 34 of the Schedule to the Arbitration Act (*Chapter 7:15*) for the setting aside of an arbitral award dated 20 December 2011. The award was rendered by the first respondent in a dispute between the applicant, the second and third respondents. The application is opposed by the first and second respondents.

The background facts are largely common cause and are ably set out in the arbitral award. They are as follows:

In 2003 a trust was constituted by the applicant under the name "The Matthews Family Trust" (hereinafter referred to as "the Trust". One Peter Lewis Bailey was the trustee. The beneficiaries were the applicant and his children. The Trust was the sole shareholder in four companies referred to in the papers as "the Craster Group of Companies". In September 2008 the Deed of Trust constituting the Trust was amended by making the applicant and the second and third respondents the beneficiaries. A Memorandum of Agreement was signed between the Trust represented by the applicant and the second and third respondents. The agreement was signed on 25 September 2008 but its commencement date was 1 September 2008. In terms of that agreement the applicant was to surrender his control of the company to

the two respondents over a period of three years as detailed in Clause 3 of the memorandum which provided the following:

> "3. NEW BENEFICIARIES FROM EFFECTIVE DATE
>
> Mr Kotecha and Mr Desai shall be declared and noted as additional beneficiaries, from the effective date onwards, to all assets and future net income of the Trust and companies, shall be recorded as follows:
>
> (i) Mr Richard Alwyn Matthews and/or his family as detailed in the new "Letter of Wishes"
> 49% - from 01 September 2008 to 31 August 2009.
> 32% - from 01 September 2009 to 31 August 2010
> 16% - from 01 September 2010 to 31 August 2011
> 0% - from 01 September 2011 onwards
>
> (ii) Mr Kotecha and/or his nominee
> 38.25% - from 01 September 2008 to 31 August 2009
> 51% - from 01 September 2009 to 31 August 2010
> 63% - from 01 September 2010 to 31 August 2011
> 75% - from 01 September 2011
>
> (iii) Mr Dessai and/or his nominee
> 12.75% - from 01 September 2008 to 31 August 2009
> 17% - from 01 September 2009 to 31 August 2010
> 21% - from 01 September 2010 to 31 August 2011
> 25% - from 01 September 2011"

Clause 7 of the memorandum of agreement provided as follows:

> "7. RISK AND PROFIT
>
> 7.1 Notwithstanding any other clauses in this agreement, the control and management of the companies, by way of the "Letter of Wishes" of the Settlor of the Trust and permission of the Trustee by signing this agreement, shall vest in the additional beneficiaries as follows:
>
> a. 51% from the effective date.
> b. 68% not later than 31 August 2009.
> c. 84% not later than 31 August 2010.
> d. 100% not later than 31 August 2011.
>
> From these dates the risk in the companies and the property shall pass onto the additional beneficiaries. The profits in the companies shall be shared as follows:
>
> e. 50% each to Mr Richard Alwyn Matthews and the additional

beneficiaries for the first twelve months from the effective date.

f. 75% to the additional beneficiaries and 25% to Mr Richard Alwyn Matthews during month 13 to month 36 from the effective date.

g. 100% to the additional beneficiaries after 36 months from the effective date.

7.2 On the effective date, all debtors, liquid assets, creditors, inventory, guarantees for fulfilment of obligations, foreign creditors and any other liabilities shall be disclosed by the existing shareholder and appended to this agreement and shall be received and liquidated, as the case may be, by Mr Matthews and the additional beneficiaries on a 50/50 basis. Any other liabilities that emerge after the effective date shall be for the account of Mr Richard Alwyn Matthews if the liabilities arose before the effective date."

The liabilities of the Craster Group of Companies were not disclosed at the time that the agreement became effective. They were only availed on 26 August 2009. The figures availed at a meeting of 4 September 2009 revealed that a loss of US935 626-40 had been incurred for the period 26 August 2008 to 31 July 2009. A dispute arose as to how, if at all, the loss referred to above should be shared, as well as the quantum of the loss. That is the dispute which was referred to arbitration before the first respondent. The applicant's case before the arbitrator, which he persists with *in casu*, was that the agreement had no provision for the sharing of losses. On that basis his contention is that he should be absolved from liability for the said losses. On the other hand the second and third respondents contended that the losses should be shared in the proportions set out in Clause 7.1 of the agreement. The first respondent came to the conclusion that the trading losses be shared in the same proportions as the risk. Thus the losses were, according to the arbitral award, to be shared as follows:

"51% - 49% from September 2008 to 31 August 2009;
68% - 32% from 1 September 2009 to 31 August 2010;
84% - 16$ from 1 September 2010 to 31 August 2011."

The arbitrator also ordered that the parties should agree on the quantum of losses within thirty days of the award being rendered. In the event that they failed to reach agreement as directed the issue of the quantum was to be referred for determination by a Chartered Accountant to be appointed by the President of the Institute of Chartered Accountants. The Chartered Account would be acting as an expert and not an arbitrator in rendering the determination on the quantum. The applicant takes issue with that relief as

well.

The applicant's case is that the award is in conflict with the public policy of Zimbabwe.

Article 34 (2) (b) (ii) of the UNCITRAL Model Law contained in the Schedule to the Arbitration Act (*Chapter 7:15*) provides as follows:

> "An arbitration award may be set aside by the High Court only if –
>
> (a) …
> (b) The High Court finds that –
> (i) …; or
> (ii) The award is in conflict with the public policy of Zimbabwe."

Article 34(5) provides the following:

> "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 affected by fraud or corruption; or
> (b) A breach of the rules of natural justice occurred in connection with the making of the award."

The approach of the courts has been to interpret the above provisions restrictively in order to give efficacy to the need for finality in arbitrations. In the case of *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S) at 465 C-D, that approach is underscored in the following terms:

> "In my opinion, 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 law or morality or justice is violated. This is illustrated by *dicta* in many cases . . ."

See also *Beezley NO* v *Kabell & Anor* 2003 (2) ZLR 198 (S); *City of Harare* v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H) at 493 A-C.

Consistent with the interpretive approach articulated above, the court recognises that in exercising the powers given in terms of arts 34 and 36 it is not sitting as an appellate court.

It is not, therefore, required to embrace what it would consider to have been the correct decision. It is only when "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" that the court would interfere with the award on the ground of it being contrary to the public policy of the country. *ZESA* v *Maposa* (*supra*) at 466 E-G; *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* 2007(2) ZLR 81 (S) at 85 C-D; *Beezley NO* v *Kabell & Anor (supra*) at 201 D-E; *Muchaka* v *Zhanje & Anor* 2009 (2) ZLR 9 (H) at 11 E-G.

What emerges from the authorities referred to above is that not every mistake, be it of fact or law, warrants the setting aside of an arbitral award in terms of art 34 on the grounds of it being contrary to the public policy of Zimbabwe. For it to merit the intervention of the court the incorrectness must be so serious as to constitute a subversion and negation of justice and fairness.

The agreement between the applicant and the second and third respondents did not expressly deal with the question of the sharing of losses. What is clear, however, is that the applicant did not immediately relinquish his control of the business of the Craster Group of Companies when the agreement was concluded. Instead, he opted to relinquish his control in stages as detailed in the agreement itself and observed in the arbitral award. Put in other words, for a period of three years after the agreement was concluded he benefited from the companies in the proportions set out in the agreement. This is not a case in which the arbitrator failed to realise that risk in a contract of sale passes once the contract is perfecta. This was not an ordinary agreement of sale. The consideration paid was for the purposes of making the second and third respondents beneficiaries of the Trust rather than for a sale of a *merx* in the ordinary sense of the word. Further, the agreement itself provided for the passing of risk. It did not leave that aspect to be regulated by the common law principles. What the agreement did not do was to expressly state how the losses of the companies in which the Trust was the sole shareholder were to be shared. The arbitrator determined that the risk should pass in the same proportions and on the same dates as the control of the companies of the Trust. He then held that the losses be shared in the same proportion as the risk. That conclusion, in my view, does not constitute a palpable inequity warranting the setting aside of the award.

The second complaint by the applicant relates to the portion of the award in terms of which the arbitrator deferred the quantification of the losses to an expert in the event of the parties failing to reach agreement thereon. The dispute, as outlined by the parties in the pre-arbitration meeting of 4 October 2011, related to how, if at all, the losses incurred by the companies owned by the Trust were to be apportioned, as well as the extent of the losses. The arbitrator answered the first part by specifying the proportions in terms of which the losses were to be shared. He then deferred the second part to an expert. Article 26 of the Schedule to the Arbitration Act provides as follows in relation to the appointment of an expert by an arbitrator:

> "(1) Unless otherwise agreed by the parties, the arbitral tribunal –
>
> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to any relevant document, goods or other property for his inspection.
>
> (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points in issue."

In terms of the above provision it is the arbitrator who has the authority to appoint an expert. The expert appointed is to report to the arbitrator on the specific issues to which the appointment relates. Those issues would then have to be determined by the arbitrator. Further, if a party so requests or the arbitrator considers it necessary, after delivery of his report to the arbitrator the expert is then required to take part in the hearing and may be asked questions by the parties. The parties are entitled to lead expert evidence in respect of the matters for which the expert was appointed. It is only when the parties agree otherwise that the arbitrator is excused from complying with the requirements of sub - articles (1) and (2). The reason for requiring an expert to be appointed by the arbitrator to report to the latter is to ensure that the arbitral tribunal remains seized with the matter until it is finalised. Permitting the parties to put questions to the expert and/or to lead their own expert evidence is meant to ensure that the proceedings comply with the rules of natural justice, particularly the *audi*

alteram partem rule, by giving the parties an opportunity to cross-examine the expert witness and to lead their own evidence either to support or to contradict the evidence of the expert appointed by the arbitral tribunal. When the arbitral tribunal leaves it to a third party to appoint an expert, as was done *in casu*, then he loses control of the matter. If there is disagreement on the determination rendered by the expert the parties would not know what to do to resolve that disagreement. More fundamentally, the appointment of the Chartered Accountant would clearly be contrary to the provisions of the law. Also, if the expert is appointed for the purpose of making a determination on the quantum then clearly his determination is not meant for consideration by the arbitrator but is intended to be binding on the parties. That approach elevates the expert to the position of an arbitrator then, contrary to the statement in the arbitral award that the Accountant would not be acting as an arbitrator. For the foregoing reasons, I am convinced that the award is contrary to the public policy of Zimbabwe. It was made contrary to the express provisions of the law to the extent that it delegates the power to appoint an expert to the President of the Institute of Chartered Accountants and makes no provision for that accountant to report to the arbitrator. Also, the award makes no provision for the parties to put questions to the expert so appointed or to lead their own evidence from other experts. See *Delta Operations (Pvt) Ltd* v *Origen Corp (Pvt) Ltd* (*supra*) at p 87A.

Accordingly, the award must be set aside. In terms of the law the court will leave it to the parties to determine the future course of the matter. *ZESA* v *Maposa (supra)* at p 467 B; *Origen Corporation (Pvt) Ltd* v *Delta Operations (Pvt) Ltd* 2005 (2) ZLR 349 (H) at 356 E-357A.

In the result, IT IS ORDERED THAT:

1. The arbitral award rendered by the first respondent on 20 December 2011 be and is hereby set aside.
2. The second and third respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved.

Atherstone & Cook, applicant's legal practitioners
Dube Manikai & Hwacha, second and third respondents' legal practitioners