MCR VENGESAI AND AGNES VENGESAI
(Carrying on business in partnership under the
name VENGESAI ARCHITECTS)
versus
ZIMBABWE MANPOWER DEVELOPMENT FUND ("ZIMDEF")

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 31 October 2016 and 30 November 2016

Opposed Matter

S Zhuwarara, for the applicants
K Kachambwa, for the respondent

DUBE J: The applicant seeks an order registering an arbitral award in terms of Article 35 of the Arbitration Act, [*Chapter 7:15*], hereinafter referred to as the Act. The respondent has countered this application by filing an application to set aside the arbitral award in terms of Article 34 of the Act, on the ground that the award is contrary to public policy. The applicant is a firm of Architects and the respondent is Zimbabwe Manpower Development Fund, [ZIMDEF]. The second respondent is an arbitrator. He has chosen not to oppose the application. For ease of reference the parties before me in both applications, will be referred to as applicant and respondent respectively.

Sometime in 1998 the respondent entered into a contract with the applicant for the provision of architectural services in respect of the respondent's headquarters. Work was stopped in 2005 after completion of the contract and project stage and for which the applicant was paid. Work resumed in the year 2011 when the applicant rendered further architectural services to the respondent .A dispute arose in 2014 in regard to the calculation of fess for work done by applicant in the final stage of the project. The dispute was referred to arbitration and on 17 December, 2015 the arbitrator, Mr. Mordecai Mahlangu handed down an award in favour of the applicant in the sum of $476 093.92. It is this award that the applicant seeks to register.

The respondent is opposed to the registration. The respondent has filed a counterclaim in a bid to set aside the award and in opposition to the registration. The respondent submitted that the award is contrary to public policy and that if the court were to accede to the application to register an award that is contrary to the law, it would be sanctioning an illegality. It contended that the arbitrator erred in finding that the first respondent's architectural charges are consistent with the provisions of The Architects (Conditions of Engagement and Scale of Fees) By-laws, SI 829/1980, a statutory instrument that provides for the charging of fees by architects. The respondent maintained that the applicant was entitled, after carrying out all three stages of work being, the project, contract and supervision stages to charge 6% of the total cost of works. The respondent maintains that the applicant having been paid 4.5% for the contract and project stage, was not entitled to fees for the supervision stage at the rate of 6%. That allowing the award to stand, will result in the applicant being paid more than 6% of total works. The respondent argued that any payment above 6% of works would be a violation of the statutory instrument and would be contrary to public policy as it would be sanctioning on illegality. The respondent maintains that the applicant is entitled to only 1, 5 % of the total works at the supervision stage. The extra work done constituted completion of outstanding works already designed and paid for. The respondent maintained that there was no basis for the claim for extra works. The respondent argued that the arbitrator's findings constitute a misinterpretation of the law and permits the applicant to be unjustly enriched for work already completed and paid for contrary to public policy which does not condone unjust enrichment. The respondent submitted that the funds involved were public funds and that public policy of Zimbabwe mandates that all public funds be accounted for and payment out of public funds only be made when lawfully due. Lastly the respondent submitted that the arbitrator erred in finding that the respondent's counter claim had prescribed.

The applicant opposed the counterclaim. Its position is that the award ought to be registered and that there is nothing that stands in the way of its registration. It submitted that the award is correct and not contrary to public policy and that the respondent has failed to establish so. It argued that by submitting that the award is wrong the respondent is asking for a re-hearing of the matter and the court is being asked to sit as an appeal court. It contended that the respondent has not shown the existence of a palpable inequity. It argued further that no

justification has been laid for an order setting aside the award. It insisted that applicant charged 6% of the total cost of works, only 1, and 5% being levied at the supervision stage. It denied charging 6% at the supervision stage. The applicant resisted the idea that there was unjust enrichment on its part. The applicant maintained that the claim has prescribed. It contended that the counterclaim was properly dismissed as applicant was not responsible for the construction site which was under the contractor which had taken over the building. Further that the damages sustained to the building were not due to applicant's fault. The applicant refuted that there was any unjust enrichment on its part.

The counter application was brought in terms of Article 34 (2) (b) (ii) of the Arbitration Act which is modeled along the lines of UNCTRAL Model Law on International Commercial Arbitration, 1985.The ground advanced for setting aside the award advanced is that the award is contrary to public policy . Article 34 (2) (b) (ii) reads as follows;

> "RECOURSE AGAINST AN AWARD
> ARCTICLE 34
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the High Court only if—
> (a) the party making the application furnishes proof that …….; or
> (b) the High Court finds that—
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or
> (ii) the award is in conflict with the public policy of Zimbabwe.
> (3) ……
> (4) …….....
>
> (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."

Article 34 provides a procedure for setting aside an arbitral award and the grounds for doing so. Article 34 acts as a mechanism to check the powers of arbitrators so that they do not carry out their functions outside the scope of their authority. The provision restricts the grounds for challenging an award to a setting where the award is contrary to the public policy of Zimbabwe, and for lack of jurisdiction, where the subject under arbitration is not capable of settlement by arbitration under the laws of Zimbabwe. The leading case on the application of

public policy in Zimbabwe is the case of *Zimbabwe Electricity Supply Authority* v *Maphosa* 1999 (2) ZLR 452 (S),where @ 456 D-E the court defined an award that is contrary to public policy as follows:

> "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 aside the award. Under article 34 or 36 the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequality 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"

This case was followed in *Peruke Investments (Private) Limited* v *Willoughby's Investments (Private) Limited & Anor* SC 11/15 where the court held that courts are generally loath to invoke public policy as a ground for setting aside an award unless in the glaring instances of illogicality , injustice or moral turpitude. See also *Groupair (Pvt) Ltd* v *Cafca Ltd and Anor* HH 606/15 and Wei *Wei Properties (Ltd)* v *S & T Export and* Import (Pvt) Ltd HH 336/13.

A court entertaining an application to set aside an arbitral award is not concerned with the correctness of the award. See *Pioneer Transport (Pvt) Ltd* v *Delta Corporation Ltd and Anor* HH 18/12 where the court held that Article 34 is not focused on the correctness of the decision arrived at. Courts are reluctant to interfere with the discretion of the arbitrator and will only do so where the award has been shown to be contrary to public policy. See *Oasis Medical Centre (Pvt) Ltd* v *Beck and Another* HH 84 /16. The onus rests on the party seeking to set aside an award on the basis that it is contrary to public policy to prove so.

The law governing setting aside of awards on the ground of public policy is settled. An arbitral award cannot stand where it is shown to be in conflict with the public policy of Zimbabwe. The meaning of the word 'public policy' is not given in the Act. Courts have had to rely on interpretations of the word given in case law. The intention of the legislature in allowing awards to be set aside on the grounds of public policy, was to permit a situation where if an award was shown to be manifestly incorrect and was considered to be objectionable and repulsive to the people of the country, would be set aside. The courts are slow to interfere with the discretion of arbitrators. A court dealing with an application to set aside an award has to be satisfied that the decision and conclusions reached by the arbitrator reaches a faultiness which

constitutes a palpable inequity and is outrageous in its defiance of logic or acceptable moral standards that the public good would be injured and that the enforcement of the award would be offensive to ordinary and reasonable thinking Zimbabweans. It must be shown that the award goes against standards of logic and morality. A court will only set aside an award on the grounds of public policy where a litigant has shown more than a mere wrong statement of the law. The litigant must show the existence of some illegality or immorality that amounts to a violation of public policy which constitutes a palpable inequity. The task of upsetting an arbitral award is fairly onerous and the standard of proof very high. The fact that an arbitrator failed to interpret the law does not suffice for a defense of public policy.

The role that a court is required to play with regard to the findings of the arbitrator needs to be understood. A court seized with an application to set aside an arbitral award does exercise appeal powers. Its focus is not on the correctness or otherwise of the award. A court entertaining an application to set aside an award, while being entitled to see the record, may not examine intuit does not sit as an appeal court over the arbitrator's conclusions. An award is not aside on the basis that an arbitrator overlooked or misapplied the law. The court has no jurisdiction to address the merits of the dispute and the correctness of the arbitrator's findings. It does not venture into any patent or glaring errors of fact or law made by the arbitrator. It may not analyze and re-assess evidence presented at the arbitration hearing afresh or re-examine the deductions and conclusions reached by the arbitrator. The court will only interfere with the discretion of the arbitrator where it has been shown that some fundamental principle of law was violated or morality or injustice is violated. The court may not substitute the finding of the arbitrator for its own. The decision may not be interfered with even where there is an error. The approach to be adopted by a court entertaining an application to set aside an award is to refrain from re-examining the thought process of the arbitrator or the reasonableness of the reasons for the award.

The respondent's counter argument is that the award is against public policy because applicant will be unjustly enriched if the respondent is required to comply with the award .The respondent's position is that the arbitrator erred in finding that applicant's fees were consistent with S.I 829/80 and that applicant carried out all three stages of work. Secondly that the arbitrator erred by upholding the defense of prescription raised by the applicant. The

counterclaim is premised on challenges related to the arbitrator's findings on questions of law and fact. The respondent went to town about the correctness of this award. Its contention was that the arbitrator erred at law and that such errors are in conflict with the public policy of Zimbabwe. The respondent concentrates on analysis of evidence led and the arbitrator's reasoning and conclusions reached in respect of the calculation of fees payable. .It cited extensively examples of instances where the arbitrator erred and the reasons why it believes that the award is wrong. It strongly argued that the arbitrator failed in his appreciation of the statutory instrument that governs the charging of fees by architects. The respondent lost the plot. The respondent has treated this application as if it is an appeal. The respondent is effectively asking for a re-hearing of the matter and asking the court to substitute its own findings for those of the arbitrator. A court dealing with an application to set aside award will not set aside the award even in the face of glaring errors and may not substitute its own findings for those of the arbitrator. The option open to a litigant in such a scenario is to appeal the decision. By choosing the arbitration route, the respondent did so at its own peril. A litigant who chooses arbitration as a mechanism for dispute resolution is implied to have accepted the outcome of the arbitration even if it turns out to be wrong, for as long as the arbitrator followed the correct procedures. The motivation for arbitration proceedings is to bring disputes to finality leaving an aggrieved party with the option to appeal the decision. The binding nature and finality of an arbitral award was emphasized in *Amalgamated Clothing and Textiles Workers Union of South Africa v Veld Spum (Pty) Ltd* 1994 (1)SA 162(A).This is the reason why the courts are loath to interfere with awards even if they may be wrong. The mere faultiness of an award is not a defense to an application for registration of an award. The respondent was required to show that the faultiness reaches a faultiness which constitutes a palpable inequity. The respondent has even asked the court to remit the matter back to another arbitrator for re-hearing on the basis the arbitrator misdirected himself on questions of law and fact. No good basis has been shown for remitting the award.

The allegation that the applicant will be unjustly enriched arises from the assertion that calculation of the architectural fees is wrong and that if the award is not interfered with, the applicant will claim more than it is entitled to. The applicant submitted that the award was not based on sound legal principles and that allowing any finding or ruling based on grossly unsound appreciation of fact and such fundamental legal principles to stand would be an aberration of

justice and contrary to public policy .The respondent argued that the arbitrator's reasoning and conclusions in respect of the calculations of fees due goes beyond mere faultiness or incorrectness and constitutes an affront to the conception of justice. It relies on the case of *Pamire & Ors* v *Dumbutshena NO* 2001 (1) ZLR 123 (H) for the proposition that it is against public policy to grant a party damages in spite of its failure to meet all its obligations under a contract as it would violate the elementary notions of justice. In this case, the court dealt with an arbitral award where a party was granted full damages notwithstanding its failure to perform all its contractual obligations and held that the award was contrary to the public policy of Zimbabwe. The applicant in this case approached the court by way of review seeking an order setting aside the arbitration award on the grounds of unreasonableness, in terms of ss 26 and 27 of the High Court Act .The application was dealt with on the merits and additional evidence admitted in the form of a supplementary affidavit in support of the allegation that the award was contrary to public policy. The court re-examined the evidence led at the arbitration and reassessed it. It dealt with the award itself and examined the findings of the arbitrator. A finding was actually made to the effect that the award was wrong. This case is distinguishable from the *Pamire* case as different procedures were used to address the awards under challenge. A review under the High court Act permits a court to reassess the evidence led and examine the correctness of the award challenged. Article 34 on the other hand does not allow a court to adopt that approach. A court entertaining an application for setting aside of an award under Article 34 on the basis that it is contrary to public policy is not concerned with the correctness of the award. This court is not equipped to say the award is either correct or wrong based on the law or fact. The court's focus is on whether the award is contrary to public policy. It need not reassess the evidence afresh. The respondent chose to bring the counter application under Article 34 and he has to live with the consequences of procedure he selected.

It is plausible to find that an award is faulty and contrary to public policy purely on the basis of the status of the institution complaining against an award. A good example is the case of *Zimbabwe Posts (Pvt) Ltd* v *Communications and Allied Services Workers' Union of Zimbabwe* HH 60-14 where an award was found to be in conflict with the public policy of Zimbabwe for the simple reason that the award was likely to drive an employer into liquidation. The arbitrator had been aware that the applicant was operating at a loss, and would continue to do so in the

future and had no ability to pay in terms of the award. The award was set aside on the basis that it was contrary to public policy. The effect of the award was clearly contrary to public policy. It is not in the interests of public policy to let a company to go down simply because the workers want to be paid terminal and outstanding benefits.

We are told that the respondent is a public body whose revenue is derived from levies exacted from employers' payrolls. The respondent is an entity with a separate legal existence and capable of suing and being sued. It should not mean that whenever a public body loses at arbitration it has an entitlement to challenge enforcement of an award by invoking Article 34. Whilst it is accepted that the respondent is a public body, where a public body has contractual obligations, it cannot escape the consequences of a contact or the effect of prescription simply because it is a public body and deals with public money. The concept of *caveat subscriptor* is equally applicable to public bodies. More has to be shown in order to be able to set aside an award.

By alleging that a wrong finding regarding prescription and in respect of the counterclaim was made, the respondent is basically saying that a wrong decision was made. The finding of prescription standing alone, even if wrong, cannot be so bad that it goes beyond mere faultiness to constitute a palpable inequity. That the arbitrator committed an error in law or fact should not be the focus of an application of this nature. In the absence of further and better particulars on the likely effect of the award, I am unable to find that it has been shown that the award is so bad that it goes beyond mere faultiness and constitutes a palpable inequity. The respondent's recourse lies in an appeal.

I must conclude that respondent has failed to discharge the onus on it to show that the award is outrageously illogical or immoral or that it constitutes a palpable inequality that defies logic and offends the conception of justice. The respondent has failed to show that the award is contrary to public policy thereby entitling the court to set aside the award. The applicant has satisfied the requirements for registration of the award. Nothing stands in the way of the registration of this award. The opposition to the registration of the award is devoid of any merit and must fail. The applicant is entitled to registration of the award.

In the result it is ordered as follows:

1) The respondent's counterclaim is dismissed with costs.

2) The arbitral award of Mr. M. Mahlangu dated 17 December 2015 in the sum of $476 093.92 be and is hereby registered as an order of this court.
3) The respondent is to pay the costs of the application for registration of the award.

Kanter & Immerman, applicant's legal practitioners
Hussein Ranchod and Company, respondents' legal practitioners