DISTRIBUTABLE

MUVUTI INVESTMENTS (PRIVATE) LIMITED
versus
OLD MUTUAL PROPERTY INVESTMENTS (PRIVATE) LIMITED
and
THE HONOURABLE ARBITRATOR, AMOS MASARIRE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 23, 24 May 2018 & 25 July 2018

Opposed Matter

F Girach, for the applicant
T Mpofu, for the 1st respondent
No appearance for 2nd respondent

DUBE J: An arbitrator's role ends when he has rendered an award. Where an arbitrator has made a mistake in issuing an award, he becomes *functus officio* as regards questions decided by his award. He may not reconsider his decision or amend and or modify the award without the consent of the parties. He may amend only patent mistakes apparent on the face of the award that relate to mathematical and grammatical mistakes. An arbitrator, who has made an award, has no jurisdiction to change his mind. An Arbitrator who changes his award issues a new award.

The applicant seeks an order setting aside the operative part of an award and seeks an order in the following terms,

Terms of order sought

1. Paragraph a) of the operative part of the arbitral award handed down by the 2nd respondent on 5th May 2015, be and is hereby set aside.
2. Paragraph a) of the operative part of the aforementioned award be substituted of the following or alternatively this application be stayed pending the quantification of the main award by a different arbitrator as to whether or not it is correct that:

a) The resultant of the total amount of Z$8 392 901 454 255.23 payment by the applicant to the respondent as rent, converted at the official RBZ rate, is found to be US$10 542 159.26 standing to the applicant's rent account.
b) The applicant is deemed to have paid to the respondent US$125 716.00 being arrear rentals for the period 1st of September 2004 to January 2009.
c) The applicant is deemed to have paid to the respondent US$148 636.00 [being the difference between US$172 836.00 (awarded to the applicant in terms of the main arbitral award) and US$24 200.00 (paid by the respondent before)] as arrear rentals for the period 1st of February 2009 to 31st January 2012.
d) The applicant is deemed to have paid the respondent arrear rent of US$222 262.00 for the period from February 2012 up to February 2015.
e) All the amounts deemed paid to the applicant in terms of paragraph (b) to (d) above in the sum of US$496 614.00 are so deemed paid and deducted from US$10 542 159.26 standing to the respondent's rent account having a balance of US$10 045 454.26 standing to the respondent's rent account.
f) From the balance of US$10 045 545.26, the respondent shall deduct and remit statutory 15% Value Added Tax and the balance thereafter shall stand to the credit of the applicant's rent account with the respondent and be applied by the respondent to recover the rent and any other liability from February 2015 until the whole amount has been exhausted.

3. Each party to bear its own costs of suit.

The background to this application is as follows. The first respondent took the applicant to arbitration alleging that he was not paying rentals for premises he occupied. It is common because that on 8 November 2011 the second respondent delivered an arbitral award in a dispute between the parties over rentals and operating costs. The arbitrator called upon the parties to quantify the rentals for the period prior to the multi-currency system. The second respondent [hereinafter referred to as the Arbitrator], made an award prescribing a formula for converting the rentals paid by the applicant to US Dollars on 8 November 2011. All rental payments made by the applicant for the period 1 September 2004 to 31 January 2009 were to be converted to United States dollars using the Reserve Bank of Zimbabwe Exchange Rates at each date of payment and be credited to the first respondent's account and the balance paid to the applicant. The applicant applied the formula as directed by the arbitrator and came up with a figure of USD$10 542 159.26. The applicant sought to have the award registered by this

court. This court remitted the matter to the Arbitrator to quantify it. The parties submitted the second respondent's first award for quantification .On 5 May 2015; the Arbitrator handed down the quantification award. The Arbitrator found that the resultant conversion of Z$ 8 392 901 454 255-23 to US$10 542 159-26 is unreasonable and unrealistic. He refused to endorse the quantification based on the formula he had prescribed. He deemed the applicant to have paid up the first respondent for the period 1 September 2004 to 31 January 2009 and refused to credit the applicant's rent account with the figure.

The applicant is aggrieved by the Arbitrator's finding and alleges that the Arbitrator changed its award. It submitted as follows. The Arbitrator was simply asked to quantify the award and not asked to consider whether it was reasonable or acceptable to credit the applicant with the conversion result. He did not quantify the award. The arbitrator's decision to deem the applicant to have paid up the first respondent for the period 1 September 2014 to 31 January 2009 is grossly unreasonable and defies logic. The applicant claims that it is saddled with rental arrears using the rates that the Arbitrator prescribed, for the period 2009 to date amounting up to $148 000.00. Further, it maintains that the second respondent's finding that the figure of $10 542 159.26 was unreasonable and unrealistic as to warrant refusal to credit the applicant's rent account with the figure is grossly unreasonable in its defiance of logic that a sensible person would consider that the concept of justice in Zimbabwe would be intolerably hurt by the award. It submitted that the award offends public policy. It contended that it is the first respondent that took the applicant to arbitration on the basis that it was not paying rentals and urged the second respondent to consider both the Zimbabwe dollar and the multi-currency era in determining the rent payable by the applicant. Following the award, the first respondent agreed to apply the formula prescribed in the award but later abandoned the formula. It submitted further that the respondent used the money paid and added value to its business and the applicant remains potentially saddled with rental arrears to be arrived at using the rate that the Arbitrator prescribed. The applicant seeks an order setting aside para (a) of the operative part of the quantification award and asks that it be substituted or stayed pending the quantification of the main award by a different arbitrator.

The first respondent [hereinafter referred to as the respondent], defends the application. The respondent took the point that the application before the court was labelled as an application for review of an arbitral award brought in terms of Article 34 when it was in fact one for the setting aside of an award ,which relief is not available to it in terms of Article 34 of the Arbitration Act. It urged the court to dismiss the application. On the merits, it submitted

that what the arbitrator did was to restate the effect of the award and the effect was that the applicant owes the respondent. The respondent contended that there is nothing wrong with the award. It should not matter that the arbitrator's reasoning is bad and that the arbitrator made a mistake. The award cannot be contrary to public policy simply because the reasoning or conclusions of the arbitrator are wrong in fact or law. All that the court has to answer is whether the award is contrary to public policy. It argued that the fact that the award is wrong is irrelevant; the award remains valid and is not contrary to public policy.

Article 34 of the Arbitration Act [*Chapter 7:15*]. hereinafter referred to as the Act, lays out the grounds upon which an award may be set aside. It reads as follows,

> "ARTICLE 34
>
> **Application for setting aside as exclusive recourse against arbitral award**
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> (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).....
>
> (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."

An award may be set aside by way of an application to court. An arbitral award is binding and final in its nature. The courts will sparingly interfere with arbitral awards in the spirit of finality to ligation and will upset them only in deserving cases. An award may be set aside by way of an application to court. Article 34 does not make provision for appeals against arbitral awards. It provides only for the setting aside of an award. The grounds for setting aside an award are laid out under Art 34 (2) and are limited to these. The article limits judicial intervention with arbitral awards. Clearly, one of the grounds for setting aside an award is where an award is in conflict with the public policy of Zimbabwe. The only recourse open to a party who is successful in an application under article 34 is the setting aside the award challenged. The article envisages a situation where the entire award will be set aside. Article 34 does not empower the court to substitute its own findings for those of the arbitrator nor does the court have the power to remit the award to another arbitrator.

In *Zimbabwe Post Pvt Ltd* v *Commission and Allied Services Union* SC 20/16 the Supreme Court held as follows,

> "The applicant might have been confused as to the form that it was meant to take but the legal principle upon which the award was challenged was clearly stated and identified in the founding papers. The heads as of argument filed in support of the application states clearly and succinctly that the challenge to the award was predicated on the ground that recognition of the award would be contrary to the public policy of Zimbabwe. The essence of the application was not lost upon the learned judge who commented that "…….. The gravamen of the application is essentially for the setting aside of an arbitral award." It becomes obvious that the learned judge understood the contention of the application and premise upon which it had been brought. It is then difficult to fathom the rationale for refusing to entertain the same on the premise that it was a review to the High Court.
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> The view that I take is that there was no application for review before the court a quo. What was filed was an application to set aside an arbitral award under the model law. It was for these reasons that we allowed the appeal and issued an order……"

This case is instructive. The court was not concerned with the form in which the application was brought but its substance. This is the same approach that the court will adopt. It is clear that this award was challenged on the basis that it is contrary to public policy. The application is brought in terms of Act 34 which permits the setting side of an arbitral award. The authority for bringing this application has been cited and identified in the applicant's founding papers. The heads of argument filed are supportive of the fact that the applicant seeks the award to be set aside on the basis that it is contrary to public policy. The fact is that this is an application for the setting aside of an arbitral award. There is no application for review before me. The fact that a wrong label was placed on the application does not detract from the fact that this is an application to set aside an award brought in terms of Article 34. The respondent's point *in limine* fails.

An award is contrary to public policy if it makes justice to turn on its head. See *Pamire & Ors* v *Dumbutshena N.O & Anor* 2001 (1) ZLR 123 (H). In the case of *Zesa* v *Maphosa* 1999 (2) ZLR 452 (S) at 465 the court stated as follows:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact at 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 faultings or incorrectness and constitutes a palpable inequality that is so far reaching and outrageous in 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 will be contrary or against the public policy to uphold it."

A court dealing with an application to set aside an award need not evaluate the merits or correctness of the award. An applicant in an application to set aside an award need not show that the arbitrator made a mistake. The courts will set aside awards where there are 'glaring instances of illogicality, injustice and moral turpitude in the arbitral proceedings, See *Peruke Inv Pvt Lt* v *Willoughby's Inv(Pvt) Ltd* SC208 /14. An award will be set aside on the basis that

it is contrary to public policy only in exceptional circumstances. It must be shown that there are exceptional circumstances which warrant the court interfering with the award. When a court is examining an award with a view to determining whether it is contrary to public policy, it examines the substance of the award. A court will not refuse to recognise an award on the grounds of public policy simply because of a procedural irregularity, errors of law and fact or because the rules of natural justice have not been followed. It must be shown that the award goes beyond mere faultiness or incorrectness. An award will be set aside where it is arbitrary, irrational, and unfair and where it offends notions of justice. Accordingly, when a court sits to determine whether an award is contrary to public policy, it must be shown that the award is at variance with an acceptable degree of legal order. The award must be illegal or repugnant to the orderly functioning of society and constitute a palpable inequity that is far reaching and outrageous in its defiance of logic or accepted standards that a fair minded person would consider that the perception of justice would be intolerably hurt by such an award.

> Paragraph (a) of the first award reads as follows,
> "a) the rentals for the premises occupied by Muvuti Investments (Pvt) Ltd situated at stand 14947 Salisbury Township for the period 1 September 2004 to 31 January 2009 is US$2 372 net *per* month i.e. a total sum of US$125 716.
>
> All rental payments made in Zimbabwe dollars by the respondent to the claimant in respect of the premises for the period 1 September 2004 to 31 January 2009 are to be converted to United States dollars using the Reserve Bank of Zimbabwe Exchange Rates at each date of payment and be credited to the respondent's rent account. The balance, if any, is due and payable to the claimant.
> b) -----
> c) The claimant is to provide the respondent with supporting evidence of the operating cost amount of US $97 636, 84"

This is the award that the Arbitrator was required to quantify. None of the parties challenged this award. The award is still extant. A mathematical computation of the rentals was required to be done using the formula prescribed by the Arbitrator. The computation was going to enable the Arbitrator to determine if the applicant owed any rentals to the respondent and the balance due to it if any. After hearing submissions from both parties, the arbitrator made the following award,

> " (a) The rent due from the respondent to the claimant, in the sum of $125 716.00 for the period 1 September 2004 to 31 January 2004 has been fully paid i.e. no arrears exist for the period.
> b)The initial award relating to the operating costs is hereby re-confirmed i.e The claimant is to provide the respondent with supporting evidence of the operating cost amount of US $97 636.84."

The arbitrator refused to adhere to the formula he had prescribe and remarked as follows,

> "In My view, whereas the respondent is correct in insisting on using the formula stipulated in the award, the resultant value of $10542 159.26 is so out of touch with reality that it calls for reasonableness on the part of the respondent .The respondent's insistence on being credited with the whole of the resultant amount is unreasonable and unrealistic……..
>
> Thus, using the official Reserve Bank of Zimbabwe exchange rates as stipulated in the award the rental payments made by the respondent to the claimant, in the sum of
> Z$8 392 901 454 255.23, equals to US$10 542 159.26. It is clearly unrealistic to consider such that such a rental value could have been paid by the respondent for the 53 months concerned for the nature of the subject premises and also bearing in mind the respondent's submissions that it was paying an equivalent of $600 *per* month.
>
> Recognising the unrealistic nature of the value achieved by the prescribed formula, acknowledging that the relevant part of the award was not in favour of the respondent but was only intended to establish the arrears owed to the claimant and accepting the claimant's proposal to write-off arrears for the period, I determine that a fair, reasonable and just quantification is that the rental due from the respondent to the claimant for the period 1 September 2004 to 31 January 2009 has been fully paid i.e. there are no arrears of rent due to the claimant for the period."

The Arbitrator is the one who prescribed the formula to be followed. Having applied the formula, the Arbitrator found the conversion of the Zimbabwe Dollar using the prescribed formula untenable. He found that the amount of US$10 542 159.26 arrived at is out of touch with reality. He noted that the application of the Reserve Bank of Zimbabwe's rate he had suggested to the parties had resulted in an anomaly. The arbitrator then says that the formula he suggested is outrageous and that it is unrealistic to consider that such a rental value could have been paid by the applicant for the 53 months in issue when one regards that the plaintiff was paying the equivalent of $600 per month. The Arbitrator's view was that the applicant was seeking to take advantage of the anomaly and the unrealistic result produced. The Arbitrator ruled that the rent due to the respondent had been fully paid.

My observation is that an unrealistic and absurd value was going to be achieved as a result of the application of the prescribed formula. The problem emanates from the first award. Looking at the approach adopted with the first award, my view is that the approach of converting the Zimbabwe dollar payments into US Dollars was a noble one. The Arbitrator did not seem to realise the effect the formula would have. Having tried to quantify the award four years later, the Arbitrator recognised the realities of the matter and realising the absurd outcome of the application of the formula, the arbitrator decided to do some fire -fighting. It is the course that the Arbitrator took and the effects it has on the award that is of grave concern to the court.

The Arbitrator sought to correct the effects of his award by ruling that the applicant no longer owes the first respondent. The problem with this approach is that his decision and conclusion is not based on any actual quantification. The finding that the rentals were to be considered as fully paid was not based on any quantification carried out. The arbitrator violated his terms of reference. He acted *ultra petita* .The Arbitrator was required to quantify and set out the figures and do no more. He did not do this .The Arbitrator had no factual or legal basis for making a finding that all rentals had been fully paid. The terms of reference of the arbitrator were clear and ought to have been followed.

The refusal to endorse the figure realised out of the formula prescribed had the effect of changing the original award. The Arbitrator effectively modified his award. He in effect changed his award. Having made the first award, the Arbitrator was *functus officio*. An arbitrator may only correct and interpret his award in terms of Article 33 which reads as follows;

> "Correction and interpretation of award; additional award
> (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties—
> (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.
> If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.
> (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the date of the award."

Article 33 permits the arbitrator to correct or interpret his award *mero motu* or upon request by the parties. The law allows an arbitrator to correct only patent errors and mistakes in the award. He may in a bid to interpret his award in terms of Article 33 (b), clarify or remove any ambiguity saddling his award He has no power to change the award or reopen proceedings after he has made a determination on the issues he was asked to determine. The respondent sought to argue that the Arbitrator simply restated the effect of his award and that there is nothing wrong with the award. I do not agree. The arbitrator reconfirms part of the first award that dealt with operating costs in para (b) of the second award. That is not the theme of the entire award. He comes out with a new finding in para (a) of the award, which constitutes his decision. He did much more than just reconfirms the first award. The award rendered is not within the terms of reference of the arbitrator. He changed the award and came up with a

different award. I am unable to find that the Arbitrator only reaffirmed the first award. The arbitrator was not entitled to change his first award. He went beyond the scope of his mandate. What he did is more than just correcting a patent error. He stepped outside his jurisdiction by changing his award. It was not open to the arbitrator to change his mind regarding the formula he had proposed. The Arbitrator came up with a new award. He made a mistake. The arbitrator had no basis at law to make such an award and did not exercise his powers in terms of Article 33. An arbitrator may not change his mind after he has made an award. The arbitrator exceeded his jurisdiction.

No one knows why he found that the rentals had been fully paid. There is simply no basis for such a finding. The award and in particular the operating part of the award is unjust, inequitable and unconscionable, and it defies logic. An injustice will occur to the applicant because it will never get to know the equivalent it paid in US Dollars, there having been no quantification as directed by the court. The award is repugnant to society and is objectionable. We cannot have a situation where an arbitrator makes an award, tries to quantify it, says the award or quantification is unrealistic and changes it. That is simply outrageous. The award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity. The finding that the rentals have been paid up in a case where an arbitrator is required to quantify an award regarding the same award is likely to bring the integrity of the arbitration process in this country into disrepute. There must be certainty in arbitration proceedings. If this award is allowed to stand it will not appear that there is certainty in the arbitration process in this country and litigants will lose faith in the process of arbitration. An objective bystander or fair minded person would consider that justice in Zimbabwe would be intolerably hurt by the award and would not have confidence in the outcome of the award The conception of justice in Zimbabwe would be intolerably hurt. Whatever the yearnings of the parties, public policy is more important than the individual desires of the parties. The award is contrary to public policy.

The applicant requested the court to set aside only one paragraph of the award. The parties addressed the court on the nature of the relief sought in light of the fact that Article 34 does not envisage a set-up where the award sought to be set aside may be severed. The spirit of Article 34 is that once an award is contrary to public policy, it ought to be discarded. Article 34 envisages that the entire award will be set aside. The applicant asked the court to set aside para (a) of the award only which the applicant asserts is the operative part of the award and not the entire award. It argued that paragraph (b) is no more than a restatement of part of the first

award that deals with operating costs and that there is no need to set aside that part of the quantification.

Generally an operative part of an order or award is the disposive part. It is the part that contains the decision of the court or arbitrator over what was required to be determined. It sets out what the court or arbitrator has decided, what he has awarded and what is to be paid. When a court sets aside an award, it in essence sets aside the decision of the arbitrator, that is, the award challenged. It is accepted that an award or order may contain the operative part of the award and non-material matter as well as the background of the matter. The arbitrator was required to quantify the award and he included para (b) as part of his award, stemming from the first award. It is correct that the effect of para (b) of the award is to restate part of the first award that deals with operating costs. It was not necessary for the arbitrator to restate that part of the award. Para (b) of the award does not form part of the decision made on quantification. It is not part of the operative order and is therefore not the decision challenged in these proceedings. Para (b) is of no consequence as it is simply a restatement of an earlier award. It constitutes part of the background to the award. It however physically remains part of the first award. The relevant part of the award that gives rise to these proceedings is para (a) of the award which is realistically the award. It is the offending paragraph. If para (b) is set aside together with the offending paragraph, such a course has no effect on the first award as that paragraph is already part of the first award. If on the other hand, the court sets aside the operative part of the award alone, it will have severed the award and such a course is undesirable in view of the provisions of Article 34. My understanding of the relief sought is that the applicant is asking the court to set aside the operating part of the award which constitutes the award and hence it asked the court to set aside the award. The court will grant the relief that is merited on the facts of the matter and one permissible in terms of the law.

The court was asked to substitute the award or alternatively to stay the application pending quantification of the main award by a different arbitrator. Article 34 makes provision for the court to aside of the award only. It does not repose on the court the power to substitute the findings of an arbitrator with its own or to remit the matter to a different arbitrator to deal with the arbitration proceedings afresh. A court which has set aside an award on the basis that it is contrary to public policy may not substitute the findings of an arbitrator with its own. The court cannot accede to the request to substitute the findings of the Arbitrator with its own. Once the award has been set aside, it is permissible for the parties to commence arbitration

proceedings afresh. It is not competent for the court to remit the matter to another arbitrator to commence the proceedings afresh.

Consequently, it is ordered as follows,

1. The quantification award of AG Mazarire dated 5 May 2015 be and is hereby set aside.
2. The defendant shall pay the applicant's costs.

Mhishi, Nkomo Legal Practice, applicant's legal practitioners
Gill Godlonton & Gerrans, respondent's legal practitioners