HARRISON HOLDINGS (PVT) LTD
versus
MUNAKIRI TOBACCO (PVT) LTD
and
SIMBARASHE MUNAKIRI

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHIRAWU MUGOMBA J
Harare, 19, 28 March, 1 April 2025

P. MULEYA, for the applicant
J. MAPURANGA, for the respondents

OPPOSED COURT APPLICATION

CHIRAWU MUGOMBA J: This matter is an application for the registration of an arbitral award in terms of the provisions of the Arbitration Act, [Chapter *7:15*]. It is not an ordinary application. It is one that raises a fundamental issue in relation to arbitration proceedings that in instances where part of an award is set aside and another portion is upheld. This will become evident as I narrate the background to the application.

On the 5th of October 2021, an arbitral award was issued in favour of the applicant in *casu*, (the claimant in the arbitration proceedings), as follows:-

1. First and second respondents shall pay to the claimant the amount of USD109 434.00 being arrear rentals in respect of first respondent's occupation of 35 Simon Mazorodze Road, Ardbennie, Harare, jointly and severally, the one paying the other to be absolved.

2. First and second respondents shall pay to the claimant holding over damages at the rate of USD200.00 per day for the period 1 May 2021 to date of vacation or eviction from 35 Simon Mazorodze Road, Ardbennie, Harare, jointly and severally, the one paying the other to be absolved.

3. First respondent and all those claiming occupation through the first respondent be and are hereby evicted from 35 Simon Mazorodze Road, Ardbennie, Harare.

4. First and second respondents shall pay to the claimant interest at the rate of 15% per annum from due date of each amount, jointly and severally, the one paying the other to be absolved.

5. First and second respondents shall pay claimants costs of the arbitration proceedings as stipulated by law.

On the 18th of May 2023, the Supreme Court of appeal set aside paragraphs 1 and 2 of the award, captured above and upheld paragraphs 3, 4 and 5. In essence the Supreme Court upheld part of the High Court judgment in HH834/22 wherein an application to set aside the above award was dismissed and one to register it was granted. In October 2023, the parties placed the dispute on the issues pertaining to the portion of the award set aside by the Supreme Court before a different arbitrator. Having analysed the submissions placed before her , the arbitrator crystallised the issues for determination as follows:-

A. Whether or not these proceedings are competent because the same claim was heard and dismissed by the High Court?

B. The quantum of holding over damages calculated from April 2021 to 27 June 2023 arising from the first Respondent's occupancy of the property?

Issue A above was dealt with as a preliminary point. The arbitrator analysed it based on the doctrine of *res judicata.* I will proceed to extract some of the salient issues as expressed by the arbitrator.

1. *The Respondents claimed in the present case that this was the exact same matter that had been argued before the first Arbitrator, and which the High Court had dismissed when Claimant made an application to register the arbitration award. Further, when the Claimant had appealed to the Supreme Cout1, the court had upheld the decision of the High Court, save the order for eviction of the first Respondent.*

2. *The question therefore, before the present Tribunal is whether the case before the Tribunal is the same one that was heard in the previous Tribunal and which was dismissed in the High Court and the Supreme Court, save for the eviction of the first Respondent.*

3. *The Tribunal looked at the judgment of the High Court which was attached to Claimant's Replication Annexure A in order to assess whether the High Court had made a judgment on the merits of the present matter. The judgment is instructive as to what was decided by the higher court concerning the matter before it. Per Chirawu J at paragraphs 25-27 on pages 7-8, she holds the following-* **(the arbitrator proceeded to analyse the court's reasoning).**

4. *The Respondents stated in their Statement of Response at paragraph 1.6 that when the matter went before the Supreme Court: "For the avoidance of doubt, the Supreme Court initially proposed that the parties go back to arbitration for purposes of amendment of figures claimed. The court however did not give an order to that effect because counsel for the Respondents raised the point that the variations of an arbitral award can only be done within a period of 2 months.*

5. *.I, therefore, conclude that in so far as its claim had not been extinguished by prescription, the Claimant is permitted to bring its claim for holding over damages in this Tribunal for adjudication - the first Award having been Ms (1 21/94 20/42 22/115 set aside in the higher courts - and accordingly, this Tribunal has the jurisdiction to hear this matter.* **(The conclusion)**

Following this conclusion, the arbitrator went on to deal with the merits of the matter and awarded the claimant the sum of USD186 300 or the ZWG equivalent, interest and thereafter USD6,900 or the ZWG equivalent per month calculated from the 30th of April 2021 to date of payment in full.

Having read the parties heads of argument, I was not convinced that they had fully addressed the issue of whether or not the portions of the award of the first arbitrator, that had been set aside could be brought back to arbitration. I thus directed that they file supplementary heads of argument on this point.

The applicants' supplementary heads of argument capture the issues well as follows,

a. What is the legal implication when a court sets aside an arbitral award?

b. Will the party in whose favour the award was made have the liberty to institute another arbitration proceeding?

c. After the first award, was there a live dispute upon which an arbitrator could entertain?

Applicant made the following submissions. In Munemo v Muswera 1987 (1) ZLR 20 (SC), for example the Supreme Court found that res judicata, or cause of action estoppel would not apply to a judgment that is in effect one for absolution in the instance. This is because by its nature such a judgment is not intended to be a complete bar to future proceedings. If the basis for setting aside the award is based on a substantive finding, then *res judicata* applies. See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 835F-G, *Banda and Ors v ZISCO Steel*, 1999 (1) ZLR 340 (S) and , 1999 (1) ZLR 333 (SC). If the finding was technical, then the contrary position applies. Further that, the attitude of the Courts was summed up by GWAUNZW JA(as she then was) in *Ropa v Reosmart Investments (Pvt) Ltd & Anor* 2006 (2) ZLR 283 (S) at 286B-C as follows,

> "In addition to this, I found to be persuasive the submission made for the respondent, that the effect of the arbitral award is to bring to finality the dispute between the parties. The respondent relied for this submission on the following passage set out in Butler and Finsen Arbitration in South Africa; Law & Practice‖ at p 271: "The most important legal consequence of a valid final award is that it brings the dispute between Page 3 of 9 102/115 the parties to an irrevocable end; the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless the arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become res judicata and neither party may reopen those issues in a fresh arbitration or court action."

As long as the merits of the amount claimed had not been determined, the issue remained a live one and hence could be taken again before another arbitrator.

On the other hand, the respondents submitted as follows. The first arbitral award was final, definitive and binding on the parties to the extent that it rendered the dispute between the parties *lis finite*. The matter could only be referred back to arbitration in limited circumstances which applicant failed to meet. In this jurisdiction and the world over, the position is settled that an arbitral award is final and binding on the parties. This explains the approach that an arbitral award cannot be appealed against and the Courts rarely interfere with the substance of the award. The English position on this point was aptly summarized in Halsbury's Laws of England 4 ed vol 2 para 611:

> "As between the parties to the arbitration agreement, the award gives rise to an estoppel inter partes with regard to the matters decided therein"

Further that, the issuance of an arbitral award exhausts an arbitral tribunal's jurisdiction completely. Consequently, a party who elects to go for arbitration takes the risk that she or

she will not get a second bite of the cherry once the award is set aside. Once arbitration is concluded, a matter can only be referred back to an arbitral tribunal only limited circumstances stipulated in Article 33and Article 34 (4) of the Model Code. Article 34 (4) confers the Court with discretion to refer the matter back to arbitration in order for the arbitral tribunal to allow it to rectify or eliminate the impugned portion of the award. It is also clear that neither the High Court nor the Supreme Court directed that the matter referred back for arbitration. There is no longer a live dispute between the parties once an arbitrator has made their decision. The parties having agreed that the first arbitration was irrevocably final, the matter could go back for arbitration as that clearly violated the agreement. It is note-worthy that the clause uses the word "shall". It is trite and settled that the use of the word shall does not provide a discretion because it is mandatory. See also *Jonathan Nathaniel Moyo & 2 Ors v Austin Zvoma N.O. & Anor* SC 28-10 p17.

In my view, a determination of the *res judicata* principle as it applies to this matter is crucial before a determination on the merits.

Res judicata is a Latin term meaning a matter judged. The doctrine prevents a party from re-litigating any claim or defence already litigated. It ensures the finality of judgments and converses any judicial resources by protecting litigants from multiple litigation involving the same claims. The requirements for a plea of *res judicata* were set out in *Kawondera v Mandebvu* 2006 (1) ZLR 110 (S)as follows:

> *"The requisites for a successful plea of res judicata based on a judgment in personam are threefold, namely, that the prior action: must have been between the same parties or their privies; must have concerned the same subject matter; and must have been founded on the same cause of action."*

In the first award , the Supreme Court set aside the claim for rental arrears and holding over damages from the month of April 2021 to June 2023 and upheld eviction, interest and cost of arbitration as already stated. The applicant argues that despite the fact that the parties are the same, the award from the previous tribunal and the rulings from the High Court and Supreme Court did not address the same issue and were not based on the same principles as the claim before the current tribunal. Furthermore, even if they did, the High Court and Supreme Court's decision to set aside part of the arbitral award meant that it was no longer in

effect. Hence it was brought it back to another arbitrator as a live dispute which had not been resolved between the same parties. The applicant submitted that the suit had not been brought to an end. In, *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45 E-G, the court discussed the essentials as follows,

> *"There is nevertheless no room for this exception (of res judicata) unless a suit which* ***had been brought to an end*** *is set in motion afresh* ***between the same persons*** *about* ***the same matter and on the same cause for claiming****, so that the exception falls away if one of these three things is lacking."*

The English viewpoint on estoppel in arbitration was succinctly summed up in Halsbury's *Laws of England* 4 ed vol 2 para 611 as follows,

> *"As between the parties to the arbitration agreement, the award gives rise to an estoppel inter partes with regard to the matters decided therein"*

The difficulty faced by this court is that there were no reasons for the Supreme Court order. I note that it was granted by consent of the parties. Although a narration was given about the submissions made in the Supreme Court and ultimately the order granted, such record was never placed before this court. In any event, what matters is the final order granted. In my view the second arbitrator assumed that just because the Supreme Court agreed with part of the setting aside of the award, this meant that it agreed with the *ratio* of the High Court. In my view, this amounts to mere speculation. It is not unheard of for the Supreme Court to uphold a High Court ruling but for different reasons- see *Ndewere vs. the President of the Republic of Zimbabwe and ors*, SC-13-23. Given that as they say, the matter could not be remitted back to the arbitrator for a determination on the figures, the parties ought to have carefully considered the issue of the order by 'consent'.

In my view, the first award rendered the dispute between the parties *lis finita.* In *Durco (Pvt) Ltd v Dajen (Pvt)* 1997 (2) ZLR 199 H, the court stressed that the principle equally applies to arbitration proceedings. *Russell on Arbitration* 18 ed p 312 states that –

> *"A valid award on a voluntary reference operates between the parties as a final and conclusive judgment upon all matters referred unless there is an express provision in the arbitration agreement that it shall have a temporary effect only, or, it is an interim award."*

When an arbitral award is issued, the arbitral tribunal's jurisdiction is fully exhausted. As a result, a party that chooses to use arbitration runs the risk of losing out on a second chance

after the award is overturned. This rule admits no exceptions. Even if an arbitrator makes a mistake, the arbitration tribunal will not be able to correct it because its jurisdiction will be completely exhausted upon handing down the arbitral award. Under Article 33 of the Arbitration Act [*Chapter 7:15*], the only corrections allowed are those which are clerical or typing errors and within a stipulated time:

> *"(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."*

It is not in dispute that this matter did not go back for arbitration in terms of Article 33.

The Model Code's Article 34(4) establishes an extra justification for returning a case to arbitration. It states the following,

> *"The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."*

Article 34(4) gives courts, the authority to send a case back to arbitration so that the arbitral panel can correct or remove the contested part of the ruling. It is evident that neither the Supreme Court nor this Court ordered the case to be remitted for arbitration. I find that there is no live issue for a new arbitrator to determine after order by the Supreme Court. The issue of rental arrears and holding over damages was set aside and consequently; the arbitrator had no live issue to determine. In *Zesa Holdings (Pvt) Ltd v Utah* 2018 (1) ZLR the Supreme Court held as follows,

> *"Thus, when an arbitrator makes an award, his position is akin to a court of law. A court is defined to mean all its judges sitting alone or with other judges. This is because they have the same powers and exercise parallel jurisdictions. Arbitrators are no different in this respect. Accordingly, the res judicate and functus officio legal principles will apply should the matter be brought before the same or a different judge or, in this case, arbitrator."*

The issue that then emerges is whether a party who receives a judgment that is overturned or rejected upon appeal or review has the right to start the lower court processes over. The answer to this is in the negative as the lower court is not permitted to hear a case again after it has been decided by a higher court. The learned authors Herbstein & Van Winsen in "*The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*" 5th Ed state that:

> *"The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that the court thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of court has been made, it is final and they can arrange their affairs in accordance with that order."*

The parties specifically agreed that an arbitration tribunal's decisions would be final and binding on them, and that the applicant would have to live with the repercussions of the initial arbitration award as per Clause 23 of the arbitration agreement that reads as follows:

> *"The parties hereby irrevocably agree that the decision of the Arbitrators in any such arbitration shall be final…"*

I therefore agree with the submissions made by the respondent as per the *Moyo & 2 Ors v Austin Zvoma N.O. & Anor* on the meaning of the word , "shall".

Disposition

The issue of holding over damages was clearly *res judicata* from the perspective of whether or not a new arbitrator could make a determination on it. Once the Supreme Court agreed with the High Court and set aside the award, there was no live dispute between the parties, especially in the absence of a judgment from the Supreme Court, the appeal order having been obtained by consent. The arbitrator's finding that she could adjudicate on the dispute in my view was not correct. She had no jurisdiction to do so over a matter that had already been

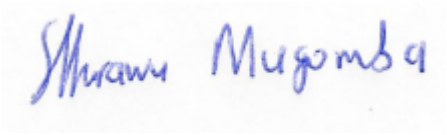
determined. It shall not be necessary for me to make a determination on whether or not the award is contrary to public policy.

On costs, it is trite that these follow the cause.

Accordingly, it is ordered as follows,

1. The application be and is hereby dismissed.

2. The applicant shall pay the costs.



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