KISCUT INVESTMENTS (PRIVATE) LIMITED
and
CHRISTINA DUMBA
versus
OLD MUTUAL PROPERTY INVESTMENTS
CORPORATION (PRIVATE) LIMITED
and
HONOURABLE ARBITRATOR DAVID WHATMAN N.O

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 26 May 2016 & 3 August 2016

Opposed Matter

L T Muringani, for the applicants
T Pasirayi, for the respondent

MTSHIYA J: Following a dispute over rent relating to Shop 62, Ground Floor, Highglen Shopping Centre, Willowvale, Harare (the property), the parties went to arbitration.

The property was leased to the applicant by the first respondent.

Before the arbitrator, namely the second respondent, the first respondent, as Landlord, made the following detailed claim:

> "1. The cancellation of the lease agreement in terms of which Claimant leased to 1st Respondent the premises known as Shop 62 Ground Floor, Highglen Shopping Centre Willowvale, Harare is here y confirmed.
>
> 2. The 1st respondent shall vacate the Claimant's premises within 10 days of the handing down of this award.
>
> 3. In the event that he 1st respondent fails to vacate applicant's premises in terms of the award, 1st respondent shall pay damages in the sums of $389-00 per month for rent and $210-00 for operating costs from 1 July 2015 to date of 1st respondent's vacation.
>
> 4. The respondents shall pay to Claimant jointly and severally the one paying the other to be absolved.
>
> 4.1. The sums of US$6 567-19 and US$4 593-87.

4.2. Interest on the sums at the rate of 14.25% per annum form 1 July 2015 the date of payment in full.
4.3. Claimant's Collection commission costs in terms of the Law Society of Zimbabwe By Laws.

5. The Claimant's costs at legal Practitioner and Client scale.

6. The Claimant's costs for the arbitration at Legal Practitioner and Client Scale".

In response to the above claim, the applicant *in casu*, stated, in the main, that the lease agreement had been obtained through misrepresentation and that there was a condition precedent to the effect that the occupancy rate at the first respondent's premises where the applicant wanted to conduct business would be 100%. That did not happen, resulting in failure on the part of the applicant to raise the agreed rentals. The applicant also claims that on 8 October 2014, the rental had been reduced from the original figure in the lease to $50-00 per month. It said as at end of June 2015, it had cleared all rental arrears.

The applicant had therefore, before the second respondent, prayed that:

"a) The Claimant's claim be dismissed with costs.
b) That US$50-00 be confirmed as the duly agreed rentals subject to amendments or variations by agreements in writing by both parties.
c) That respondent occupies and use those premises up until the lease expires."

Unfortunately for the applicants, on 26 August 2015, the second respondent made the following award in favour of the first respondent herein:

"AWARD

In the matter submitted to Arbitration by the parties, I hereby make the following award:

1. That the lease between the Claimant and the 1st respondent in respect of Shop 62, Ground Floor, Highglen Shopping Centre, Willowvale, Harare (the premises) is confirmed as cancelled with effect from the 30th March 2015.

2. That the 1st respondent and anyone claiming occupation through it do vacate the premises within ten days of the date of this Award.

3. That the respondents, jointly and severally, pay the Claimant the sum of $9 180-68 in respect of unpaid rentals, operating costs and accrued interest upto 31st March 2015.

4. That the respondents, jointly and severally, pay the Claimant the sum of $599-88 per month in respect of holding over damages for every month or pro-rata part thereof for the

period 1`st April 2015 until the date upon which vacant possession is restored to Claimant.

5. That the respondents, jointly and severally, pay interest on th amount of $9 180-68 and upon the amount of holding over damages, or the reducing balance, at the rate of 14,25% per annum, compounded monthly, with effect from the 1st April 2015 until payment in full.

6. That the respondents pay claimant's legal costs on the legal practitioner and client scale and also repay claimant the Arbitrator's fee."

It is the above award that the applicants seek to have set aside. In their application filed on 2 September 2015, the applicants prayed as follows:-

"1. That the Arbitral Award by Honourable David A Whatman dated 26th August 2015 be and is hereby set aside.

2. That the 2nd respondent be and is hereby ordered to hear the matter de novo within (14) days of receiving this order.

3. That the 1st respondent shall pay costs of suit."

On 11 September 2015, before the applicants' application was determined, the first respondent applied for the registration of the award as an order of this court in HC 8682/15.

On 26 May 2016, the parties, by consent, agreed to the consolidation of HC 8318/15 (i.e. the application to set aside the arbitral award) and HC 8682/15 (i.e application to register the award). Consolidation was proper because if the award is set aside, the latter application will fall away as there will be nothing to register.

The application to set aside the award is premised on Article 34 of the Arbitration Act [*Chapter 7:15*] (the Act) which article, in full, provides as follows:-

"ARTICLE 34

Application for setting aside as exclusive recourse against arbitral award

(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 –
(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties

have subjected it or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

[Subparagraph amended by Act 14/2002]

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Model Law;

Or

[Subparagraph amended by Act 14/2002]

(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) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) 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.

(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."

It is important to note, from the outset, that this is neither an appeal nor review of the award. To that end, I can only interfere with the award if the ground(s) set out in Article 34 above, for setting aside an award, exist.

In *casu* reliance is basically on ground 34 (2) (a) (ii) above, namely that:

"the party making the application was not given proper notice……. of the arbitral proceedings or was otherwise unable to present his case."

To that end, in para 13 of the founding affidavit, the applicants aver as follows:

"This is an application for the setting aside of the Arbitral Award in terms of Article 34 (1) (2) (ii) of the Model law in that no proper notice was given to the Applicants to attend the arbitral

proceedings and as such there was a breach of the rules of natural justice which occurred in connection with the making of the award which is against the public policy of Zimbabwe."

The above makes reference to the public police of Zimbabwe. Indeed Article 34 (2) (b) (ii) states that this court can set aside an award if it finds that:

"the award is in conflict with the public policy of Zimbabwe."

Furthermore Article 18 of the Act also provides as follows:

"The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

In *casu* the applicants' main argument is that they were not given adequate or proper notice for the oral hearing and were therefore denied the opportunity to present their case.

However, the first respondent avers, in detail, in the opposing affidavit, as follows:

"7. On 17 August 2015, 1st respondent's legal practitioners responded to the applicant's legal practitioners and 2nd respondent indicating that the only way that the matter could be resolved was in terms of an award by consent and that if this was not possible they had instructions to proceed with arbitration. The response is attached as annexure 'O'.

8. On 17 August 2015 the applicants' legal practitioners wrote a letter requesting a postponement of the hearing to any date during the week beginning 24 August 2015. The letter is attached as annexure 'p'.

9. On the same date the applicant's legal practitioners wrote an email to the 2nd respondent and applicant's legal practitioners indicating their email addresses. The email is attached as annexure'R1'.

10. On 17 August 2015 2nd respondent indicated that he had no problem with a postponement of the matter to 25 August 2015 and requested both parties to confirm whether this was acceptable. The email is attached as annexure 'R2'.

11. On 18 August 2015 1st respondent's legal practitioners confirmed to all the parties that they had no problems with the postponement and would attend the hearing on 25 August 2015. The letter is attached as annexure 'S'.

12. On 20 August 2015 Applicant's legal practitioners wrote a letter to the parties indicating that they had proposed for applicant and 1st respondent to meet on 28 August 2015 for a roundtable conference. The letter is attached as annexure 'T'.

13. On 23 August 2015 1st respondent's legal practitioners responded to applicants legal practitioners to their letter dated 20 August 2015 indicating that their request for a meeting was not accepted in light of the hearing that was scheduled to take place on 25 August and further indicated that the matter would be settled in terms of an award by consent failing which they would wait for the arbitrator's determination. The email is attached as annexure 'U'.

14. On the same date the 2nd respondent wrote an email indicating that since 1st respondent was no agreeable to a further postponement the matter would proceed by way of hearing on 18 August 2015 at 9:00am. It appears that this was a typographical error in light of the fact that the hearing date had been scheduled for 25 August 2015. The email is attached as annexure 'V'.

15. On 25 August 2015 1st respondent's legal practitioners wrote an email indicating that they would attend the hearing as scheduled. The email is attached as annexure 'W'." (my own underlining)

There is indeed evidence of the correspondence exchanged between the parties. From the said correspondence, it is clear to me that, as at 23 August 2015 the second respondent had made up his mind that the matter would proceed on 25 August 2015. This was because settlement had failed. He had then communicated that position to all parties through the email addresses provided. He wrote:

> "As the claimant is not agreeable to a further postponement in the absence of any firm settlement offer, I direct that the matter proceed by way of hearing on Tuesday 18 August at 9 am at any offices. Please confirm your attendance."

The above email was sent on 23 August 2015 and accordingly the hearing could only be scheduled for a date beyond 23 August 2015. Reference to 18 August was a clearly a typographical error as observed by the first respondent and not challenged by the applicants.

Notwithstanding their negotiations, the parties were fully aware that the second respondent had agreed to postpone the hearing from 18 August 2015 to 25 August 2015. The applicants had indicated that they were not opposed to any date after 24 August 2015. That led to the date of 25 August 2015 set and confirmed by the second respondent. All parties knew of that date and a senior legal practitioner of the applicants was advised of the hearing before it took place on 25 August 2015. The question of the absence of a proper notice does not therefore arise.

The applicants were not discriminated against or ignored. They chose not to attend the hearing. The applicants were given the opportunity to be heard and accordingly there is nothing in the procedure adopted by the second respondent that offends the public police of Zimbabwe. No provision of the Act was violated. I therefore do not find any merit in this application. The award cannot be set aside.

Having endorsed the award, I find nothing militating against its registration as applied for by the first respondent.

I therefore order as follows:

1. The application to set aside the arbitral award is dismissed.
2. The award made by the second respondent on 26 August 2015 be and is hereby registered as an order of this court; and
3. The applicants shall pay costs in respect of the consolidated matters, namely HC 8318/15 and HC 8682/15.

Mageza & Nyamwanza, applicants' legal practitioners
Gill Godlonton & Gerrans, 1st respondent's legal practitioners+30