DISTRIBUTABLE (15)

ARCHIPELAGO (PVT) LTD
vs
(1) LOCAL AUTHORITIES PENSION FUND
(2) ADDINGTON CHINAKE

SUPREME COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JA & PATEL AJA
HARARE, MAY 14, & JULY 9, 2013

L. Uriri, for the appellant

F. Girach, for the respondent

PATEL AJA: This is an appeal against the decision of the High Court (HH 147-2012) handed down on 4 April 2012. The appeal was dismissed at the end of the hearing of the matter. The reasons for that dismissal are as follows.

BACKGROUND

Since 1978 the appellant has occupied the basement at the first respondent's premises in Linquenda House, Harare, and operates a nightclub thereat. The last lease agreement between the parties was concluded in October 1997.

In 2009, the parties were unable to agree on the rentals to be paid for the premises. The matter was then referred to one Angelbert Nyandoro to determine a fair rental. He proceeded to do so and set out his determination in a report. In the report he refers to himself as a "Valuer acting as an Expert". He also chronicles his appointment by the Chairman of the Royal Institute of Chartered Surveyors, Harare Group, "to act as an expert in the settlement of the dispute between [the parties] regarding basic rentals payable". According to the report, he wrote to both parties and requested submissions on each party's position. Thereafter, following various communications and meetings, he made his determination based on commercial open market rentals in Harare's Central Business District.

This rent determination was not challenged by either of the parties and has never been set aside by any legal process. In any event, the appellant did not pay any rentals whatsoever, not even in the amounts that it believed it should have paid.

In August 2010, the first respondent cancelled the lease for non-payment of rent. The appellant disputed the arrear rentals claimed by the first respondent and the cancellation. The first respondent then invoked clause 31(b) (iv) of the lease agreement and the matter was referred to arbitration by consent. The issues for determination by the arbitrator, the second respondent, related to the cancellation of the lease agreement, the rentals due and the eviction of the appellant.

The second respondent handed down his award on 30 March 2011. He found that Nyandoro's rent determination was binding on the parties and that the appellant was in breach of the lease agreement by reason of its failure to pay rentals and operating costs. He awarded the payment of outstanding arrear rentals, operating costs and holding over damages, as well as all legal costs and arbitrator's fees incurred by the first respondent. He also ordered the appellant to give vacant possession within one month, failing which it was to be evicted by due process.

Subsequently, the first respondent applied for the registration of the second respondent's award in Case No. HC 4137/11. Conversely, the appellant applied through Case No. HC 5575/11 to set aside the same award. Both matters were consolidated by consent.

The High Court found that the rental due had been properly determined by Nyandoro and that the appellant had fully participated in that process. That determination had not been set aside and was therefore binding. The court also found that the second respondent had properly determined all the issues referred to him for arbitration with the full participation of both parties. It was therefore held that his award did not offend public policy and that there was no basis for setting it aside. Consequently, the application in Case No. HC 5575/11 was dismissed and the award was registered as an order of the court under Case No. HC 4137/11.

The present appeal is lodged against those decisions. Despite the rather vague and catch-all phraseology employed in the notice of appeal, it was accepted by both counsel that the only issues for determination in this appeal are whether the first respondent's award was founded on the existence of a proper rental payable by the appellant and, if it was not, whether it offended public policy.

DETERMINATION BY EXPERT VALUER

As the record shows, and as was correctly conceded by Adv. *Uriri*, the appellant fully participated in the rental assessment proceedings before Nyandoro, as an expert valuer, as well as the arbitration proceedings before the second respondent. Adv. *Uriri* also concedes that Nyandoro's determination was not reviewed or set aside before the matter was referred to the second respondent.

In these circumstances, it does not matter that Nyandoro chose to designate himself an expert valuer, rather than as an arbitrator, or that he did not conduct the proceedings before him within the strict confines of the Model Law (Schedule to the Arbitration Act [*Cap 7:15*]). Arbitration is an alternative form of dispute resolution designed to avoid the technicalities and formalities of litigation. In essence, it is a flexible process that is controlled by the parties involved. That is precisely what occurred in this instance.

In keeping with his mandate, Nyandoro invited submissions from both parties and duly made his determination. I fully endorse the submission by Adv. G*irach*

that the appellant cannot both approbate and reprobate proceedings in which it fully participated and the outcome of which it did not challenge on review. It is therefore clear that there was a rental dispute between the parties, within the meaning of clause 5(a) of the lease agreement, and that the rent was duly determined by an arbitrator appointed for that purpose.

ARBITRATION AWARD BY SECOND RESPONDENT

Turning to the arbitral award itself, what was referred to the scond respondent is spelt out in his terms of reference, which I have alluded to earlier. Nyandoro's status, *qua* expert valuer or arbitrator, or the correctness or otherwise of his rental assessment were clearly not matters that were referred to the second respondent for determination. Consequently, he was perfectly entitled to proceed on the basis that it was a binding assessment for the purpose of resolving the issues before him. His decision, in this regard and in all other material respects, is unassailable.

Accordingly, there is absolutely no basis for setting aside his arbitral award in terms of Article 34 of the Model Law. By the same token, I can perceive no ground for impugning its registration under Article 35 of the Model Law. It follows that the decisions of the court *a quo*, dismissing the application to have the award set aside and granting the application for its registration, are unimpeachable and must be upheld.

For the aforestated reasons, the appeal was held to have no merit and was therefore dismissed with costs.

MALABA DCJ: I agree.

ZIYAMBI JA: I agree.

Venturas & Samukange, appellant's legal practitioners

Gill Godlonton & Gerrans, respondent's legal practitioners