Case 1 (HC 5162/22)
TSAMBIKA BAKARIS N.O.
(In her capacity as Executor Dative of the
Estate Late Constantinos Bakaris)
versus
NANAVAC INVESTMENTS (PVT) LTD t/a
CHOPPIES ZIMBABWE

Case 2 (HC 5505/22)
NANAVAC INVESTMENTS (PVT) LTD t/a
CHOPPIES ZIMBABWE
versus
TSAMBIKA BAKARIS N.O.
(In her capacity as Executor Dative of the
Estate Late Constantinos Bakaris)
and
HON ARBITRATOR T.R. MAFUKIDZE

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 10 October 2023 & 5 April 2024

Opposed Applications

HC 5162/22
Mr *G Ndlovu*, for the applicant
Advocate *G R J Sithole*, for the respondent

HC 5505/22
Advocate *G R J Sithole*, for the applicant
Mr *G Ndlovu*, for the respondent
No appearance for the 2nd respondent

MHURI J: On 18 May 2022, the Arbitrator Hon Mafukidze issued an arbitral award in a matter between Tsambika Bakaris and Nanavac Investments (Pvt) Ltd t/a Choppies Zimbabwe.

These two applications before me (HC 5162/22 and HC 5505/22) arise from this arbitral award. HC 5162/22 is an application for the registration of the award whereas HC 5505/22 is an application for setting aside the arbitral award.

The two applications were consolidated and were therefore heard together. Both parties counsel were in agreement that the resolution of one resolves the other application.

I will deal first with the application for the setting aside of the award (HC 5505/22). The ground upon which applicant is seeking setting aside of second respondent's award is that the award is contrary to public policy in that:

1. the second respondent formulated the issue for determination himself. The five issues he came up with were not agreed terms by the parties.
2. second respondent had no jurisdiction to arbitrate over the matter.
3. there was a breach of the rules of natural justice in that applicant was not afforded equal treatment and fairness.

To substantiate these grounds, it was applicant's submissions that in terms of Article 34(2)(a)(iii) of the Model Law, it is not permissible for an arbitrator to preside over a matter whose terms of reference for determination have not been defined and agreed to by the parties. In the present matter, second respondent was not favoured with the issues for determination, he went on a frolic and determined the matter whose terms had not been submitted to him. Reference was made to paragraphs 15 to 16.6 of the award which are the issues second respondent determined.

On the jurisdiction issue, it was submitted that as applicant had pleaded statutory tenancy, and his ejectment was based on this, he was protected by s 22(2) of the Commercial Premises (Rent) Regulations 1983 whose legal import was that an order for ejectment could only be sought in a court of law and not through arbitration.

As regards the third ground, it was submitted that there was unfairness and unequal treatment of the parties by second respondent in that when applicant raised points of law, that is *res judicata* and lack of jurisdiction, second respondent could not hear them on the basis that they were not pleaded and whereas when first respondent raised points of law to do with an order by CHINAMORA J in HC 333/21 in which sections 22 and 23 of the Commercial Premises (Rent) Regulations were struck down on the basis that these sections were *ultra vires* the Commercial

Premises (Lease Control) Act [*Chapter 14:04*], second respondent did not raise issue with it on the same basis that the point had not been pleaded in the pleadings. Second respondent went ahead to consider the point. This was contrary to Article 18 of the Model Law which requires that parties should be treated equally.

As per its Draft Order, applicant prayed that the arbitral award by the second respondent issued in favour of first respondent on 18 May 2022 be set aside on the basis that it is contrary to public policy and that first respondent pays the costs.

First respondent's response to the grounds raised by applicant were that both parties were aware of what the dispute was. The dispute was clear and both parties knew what issues would resolve the dispute. These were clearly laid out in the statement of claim, statement of defence and various replications and heads of arguments. The second respondent then adopted the issues as raised in the pleadings.

Secondly, it was submitted that the parties in the lease agreement between the two parties submitted themselves to the arbitrator's jurisdiction as the primary dispute resolution mechanism. Further, that the Arbitration Act in section 4(3) is clear that the fact that an enactment confers jurisdiction on a court or other tribunal should not be construed as preventing the matter from being determined through arbitration.

Thirdly, it was submitted that the two issues that were raised by applicant were dismissed not because of any malice or unfairness but because they were defences which ought to have been raised as a special plea. The second respondent went further and gave reasons why the points had no merit. As regards the order by CHIMAMORA J it was submitted, drawing the court's attention to a recent judgment is distinct and distinguishable from raising a preliminary objection. Further that the second respondent was not influenced by the Order in making his award.

On the basis of the above submissions, first respondent's prayer was that the application be dismissed with costs on a higher scale.

Article 34 of the Arbitration Act [*Chapter 7:15*] provides for the setting aside of an arbitral award.

Subsection (2) thereof provides as follows:-

"An arbitral award may be set aside by the High Court only if –

a) (i) ……
(ii) ……
(iii) ……
(iv) ……

b) The High Court finds, that –
(i) ……
(ii) the award is in conflict with the public policy of Zimbabwe.

Subsection (5) thereof provides as follows:-

"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."

Patel JA (as he then was) acknowledging the decision in the case of:

ZIMBABWE ELECTRICITY SUPPLY AUTHORITY
versus
MAPOSA 1999 (2) ZLR 452 had this to say in the case of:-

OK ZIMBABWE LTD
versus
ADMBARE PROPERTIES LTD & ANOR SC 55/17

"It is now axiomatic that the concept of public policy as well as what might be perceived as being in conflict with that policy, within the meaning of Articles 34 and 36, must be construed narrowly so as to attain the objective of finality in commercial arbitration as contemplated by the Model Law ……"

The issues which applicant is taking issue with as having been considered by the second respondent without them having been agreed to by the parties and referred to him are that:-

1. Did the respondent become a statutory tenant under the Commercial Premises (Rent) Regulations, 1983 (S I 676 of 1983) as amended?
2. Did the respondent fail to pay rentals when due?
3. Did the respondent sublet the premises to Champions Insurance?
4. Did the respondent fail to pay rates and taxes to Ruwa Local Board?
5. Should the respondent be ejected from the premises?
6. What is the effect of CHINAMORA J's order striking down sections 22 and 23 of the Rent Regulations?

Over and above these issues, the second respondent also determined two other issues which he indicated had been raised in argument by applicant and these are that:-

a) the arbitrator could not order ejectment as the Regulations only permitted a court to do so.

b) this dispute was *res judicata*.

The question is, did the second respondent go on a frolic of his own and came up with issues and considered the issues which had not been agreed to and referred to him by the parties? The answer is in the negative. The parties entered into a lease agreement of certain property situate in Ruwa. It is the leasing of this property which gave rise to the dispute that was then referred to second respondent for arbitration. Clause 12 of the lease agreement reads:-

> "Where a dispute arises between the parties hereto in regard to the interpretation or application of this agreement or any matter relating to or arising from the agreement and is not resolved within seven (7) days of its having arisen, either party shall be entitled to refer the dispute for arbitration ……."

That, reference of this matter to arbitration was voluntary in terms of the above clause and that both parties consented to this is not in dispute.

A reading of the parties' pleadings and in particular applicant's statement of defence clearly shows that all the issues applicant is complaining about are clearly covered in the pleadings. None of the issues is outside what is in the pleadings. All second respondent did was streamline them for purpose of considering them. Paragraph 1 of applicant's statement of defence before second respondent speaks to contravention of the provision of the Commercial Premises (Rent) Regulations. Paragraph 4 speaks to rentals.

Paragraph 6 speaks to payment of statutory obligations (rates bills). Paragraph 11 speaks to subletting of the premises to a third party. Paragraph 14 speaks to eviction of applicant.

This statement of defence was so detailed and was in response to first respondent's claims. Further, the parties heads of argument covered all the issues which the second respondent dealt with. I therefore do not find where second respondent went on a frolic of his own. Article 34(2)(a)(iii) of the Arbitration Act does not assist applicant in this matter. Applicant's first ground therefore cannot be upheld.

Did second respondent lack the jurisdiction to hear the matter before him? I do not agree with applicant's submission that he did not.

Firstly, clause 12 of the lease agreement as alluded to earlier, gives second respondent the jurisdiction, which the parties consented to.

Section 22(2) of the Commercial Premises (Rent) Regulations, applicant relies on reads as follows:-

"(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lessee having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee –

(a) ………
(b) (i).……
(ii)……"

Article 34 sets out the grounds upon which an arbitral award can be set aside by this court. It is clear that jurisdiction is not one of them. The case of CATERING EMPLOYERS ASSOCIATION OF ZIMBABWE
versus
ZIMBABWE HOTEL & CATERING WORKERS UNION & ANOR 2001 (2) ZLR 388 (S) put it aptly at page 392 E that:-

> "In my view, Article 34 (2) of the Model Law sets out the sole ground on which an arbitration award may be set aside by the High Court. That is what Article 34 (2) says and that is what this court said in *Zimbabwe Electricity Supply Authority* v *Mapasa* 1999 (2) ZLR 452 (S) at 458 F."

MALABA DCJ (as he then was) echoed the same sentiments by stating that:-

> "The salient feature of the provision is that it prohibits any recourse against an arbitral award other than in terms of its requirements and limits the grounds on which the award can be assailed. The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are to be followed. <u>The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34 (2)</u>." (emphasis added)

ALLIANCE INSURANCE
versus
IMPERIAL PLASTICS (PVT) LTD & ANOR SC 30/17

Further, regard is had to section 4 of the Arbitration Act.

It reads in subsection (1) and (3) that:-

"(1) Subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.

(2) ......

> (3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration."

Subsection (2) lists those matters that are not capable of determination by arbitration, eviction is not one of them.

The same Act also provides for the procedure when one intends to challenge the arbitrator's jurisdiction. Section 16 (2) provides:-

> "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence ……."

This is not what happened *in casu*. The issue was raised after the filing of the statement of defence.

Applicant's ground is also without merit.

Did the second respondent treat the parties unequally and unfairly? Applicant submitted that it raised issues, of *res judicata* and lack of jurisdiction and second respondent refused to hear them, thereby flouting the rules of natural justice whereas the issue raised by first respondent was entertained.

Section 18 of the Arbitration Act provides:-

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

Although applicant did not motivate this point in its heads of argument, I am not persuaded by its argument that it was not heard. Second respondent's view was that these matters were not pleaded by applicant which means he considered them and came to the decision that he made and as per the applicant's averment,

> "the arbitrator bemoaned the fact that such points had not been pleaded, and for that and other reasons the points would be dismissed."

CHINAMORA J issued an order which was in respect of the Commercial Premises (Rent) Regulations which Regulations had a bearing on the dispute before the second respondent. This was an order of the court, which was brought to the attention of second respondent for his benefit in determining the matter. Unlike the issues raised by applicant which had to be specially pleaded, the order was not to be specially pleaded as it was a judgment of this court.

As alluded to earlier, the jurisdiction issue was not raised as per the provision of section 16. The *res judicata* issue was not pleaded.

> "In the ordinary case, of course, the defence of *res judicata* must be specifically pleaded and supported by evidence of the previous judgment and if it is not pleaded the defendant is taken to have waived it."

per BLAIKE-JOHNSTONE v P HOLLINGSWORTH (PTY) LTD 1974 (3) SA 392 at 395 C – D.

In view of the above, I find that second respondent did not flout the rules of natural justice at all.

Having considered all the points as raised by applicant, I do not find that the arbitral award was contrary to public policy of Zimbabwe. In the result, the application to set aside the arbitral award cannot be granted. It is in the circumstances be and is hereby dismissed with costs.

The dismissal of applicant's application under HC 5505/22 automatically means the application under HC 5162/22 for the registration of the arbitral award is to be granted.

The parties counsels both agreed at the beginning of this hearing that the resolution of one resolves the other. Mr *Ndlovu*, abided by his submissions filed of record in support of the registration of the arbitral award.

To that end, I will grant the application for registration of the award as per the Draft Order filed.

It is therefore ordered that:-

1. The arbitral award in respect of the parties herein issued by Arbitrator T. Mafukidze on 18 May 2022 be and is hereby registered as an Order of this court.
2. Respondent shall pay costs of this application on a legal practitioner and client scale.

Dube-Banda Nzarayapenga & Partners, applicant's legal practitioners
Gill Godlonton & Gerrans, first respondent's legal practitioners