PANGOLIN MINES AND MINERALS (PVT) LTD
and
SAN MINING SYNDICATE
versus
AFROCHINE SMELTING (PVT) LTD

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 28 October 2021 & 18 May 2023

Application for registration of arbitral award

Adv *F Girach,* for the applicant
Adv *T Mpofu with* Adv *T Magwaliba,* for the respondents

CHINAMORA J: The applicants approached this court seeking to register an arbitral award in terms of Article 35 of the Model Law, which is contained in the Arbitration Act [*Chapter 7:15*]. The application was opposed by the respondent. The background to this dispute is that: the applicants are holders of mining claims, known as the Pangolin claims. Sometime in 2015, the respondent encroached upon, and took some soil containing chrome ore. From these claims. The applicants discovered this and instituted proceedings under HC 7386/15. On 18 January 2018, by consent, the court (per CHIGUMBA J) referred the matter to arbitration by an order in the following terms:

> "IT IS ORDERED BY CONSENT THAT:
>
> 1. Defendant admits having removed soil from claims belonging to plaintiffs which soil contained chrome ore.
> 2. The dispute between the parties shall proceed by way of arbitration on the terms and conditions set out hereinunder.
> 3. Plaintiffs shall, within seven days of the date hereof, provide defendant with list of the persons to act as potential arbitrators.
> 4. Defendant shall, within seven days of the date of receiving the names referred to in paragraph 3 hereof, select one of the persons named and advise plaintiffs of the choice made.
> 5. The matter shall then proceed to arbitration before the person so named on the following issues:
>   a. The quantity of soil wrongfully and unlawfully removed by defendant from plaintiffs' claims.

b. The damages suffered by plaintiffs in consequence of such wrongful and unlawful removal, being the value of the chrome lost.

6. Plaintiffs shall prepare and forward to the arbitrator a bundle containing the pleadings in the instant matter together with the bundle of documents prepared by the respective.
7. The matter shall thereafter proceed in terms of directions as may be issued by the arbitrator.
8. The cost of this matter will be costs in the arbitration."

Pursuant to the above order, the matter was referred to arbitration for quantification, since On 6 June 2019, the arbitrator (Dirk Benade) made an award which required the respondent to pay the applicants the sum of US$378,628-20 together with interest at the prescribed rate from the date High Court proceedings were instituted. In addition, the respondent was also ordered to pay the costs of suit in both the arbitration and High Court proceedings. On 9 August 2019, the respondent paid the sum of ZW$435,422-43 to the applicants through their lawyers, but the applicants objected to the payment. The applicants then filed the present application in terms of Article 35 seeking to register the award. The respondent opposed the application, and maintained that a judicially established liability as at 18 January 2018, which was expressed in United States dollars, was made by the payment of ZW$435,422-43 (comprising the principal amount and interest). Its argument continued that it was obliged by section 22 (1) (d) of the Finance (No.2) Act of 2009 to discharge the said liability at the rate of one RTGS Dollar to one United States Dollar. I will hereinafter refer to this conversion as "the one-to-one conversion". Let me make it clear that section 22 (1) (d), aforesaid, provides as follows:

> "… for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars (other than assets and liabilities referred to in section 44C (2) of the principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States Dollar".

It was submitted for the respondent that its liability in United States currency having been determined on 18 January 2018 by the order by consent of CHIGUMBA J, payment was duly made at the one-to-one conversion. Thus, the respondent agued that the registration of the award so that payment could be enforced was contrary to public policy given the circumstances of this case. Reliance was placed on the decision in *Mandiringa & Ors* v *NSSA* 2005 (2) ZLR 329 (H), which confirmed that an arbitral award is binding and enforceable once registered with this court. Because of this, the respondent contended that it is contrary to public policy to register an award which has been fully satisfied. There is merit in this argument if we consider that in the case

of *Telone (Pvt) Ltd* v *Communication and Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 H, this court gave the following guidance:

> "In assessing the award, it is inevitable that one has to consider the substantive effect of the award and determine whether or not it is contrary to public policy in its effect".

At any rate, another way of looking at it is that, registration of an award where the amount has been paid smirks of a failure to apply one's mind to the facts, namely, that the amount has been settled. That in itself constitutes a ground for setting aside an arbitral award for being contrary to public policy. This conclusion finds support in *ZESA* v *Maphosa* 1999 (2) ZLR 452 (S) at 467E-G, where CHIDYAUSIKU CJ explained the law as follows:

> "Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable *moral* standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above." **[My own emphasis]**

On the other hand, the applicants contended that the payment by the respondent at the one-to-one conversion did not discharge the debt. They drew the court's attention to the date of the award, which was 6 June 2019, and submitted that the effective date for the purposes of the one-to-one conversion was 22 February 2019. In this respect, the applicants contended that s 22 of the Finance (No. 2) Act was to re-evaluate all assets and liabilities that were expressed in United States currency on/or before the effective date to be valued at the one-to-one conversion. Their argument was that, the award having been made on 6 June 2019, it was not a liability which was due on the effective date of 22 February 2019. Rather, so the applicants submitted, before the award was rendered, the debt did not exist and the respondent had no obligation to pay the applicant anything on the effective date. It is on that basis that the applicants asserted that the debt should be paid at the interbank rate, hence the rejection of the payment. This argument is supported by s 22 (1) (e) of the Finance (No. 2) Act which allows payment at the interbank rate for liabilities in United States dollars which arise after the effective date.

I observe that this matter was previously heard by this court under HC 6522/19, and a judgment (HH 782-19) was granted against the respondent. In essence, it was held that the

opposition to the application was ill-founded, and the respondent had to pay applicants the sum of US$378,628-20, with interest at the prevailing interbank rate at the date of payment. The respondent appealed the decision under SC 663/19, and the appeal was allowed. The Supreme Court set aside the High Court judgment and remitted the matter for determination of issues which were raised and not determined.

I must state that the application before me is for registration of an arbitral award. In terms of the applicable law, an application for the registration of an arbitral award is granted upon its mere presentation, authentication and production of the original arbitration agreement. See *Gwanda Rural District Council* v *Botha (SNR)* SC 174-20. The respondent, on the other hand, can object to the registration of the arbitral award. This is because the right to object is confined to the grounds of objection stipulated under Article 36. In particular, Article 36 (1) (b) (ii) stipulates that the recognition or enforcement of the award would be contrary to the public policy. This is the precise basis of the respondent's objection. To recapture the respondent's case. The contention is that i paid the sum of ZW$435,422.43 to the applicants as the full and final payment of its liability. This is dispute by the applicants.

An examination of the facts, especially the order by consent granted on 18 June 2018, shows that the respondent admitted liability on 18 June 2018, and para 1 of the order confirms this. However, the admission did not relate to liability to pay a specific amount to the applicants. In fact, the amount was still to be established. In this respect, para 5 of the order provides for the quantum of liability to be determined through arbitration. Specifically, para 5 (b) states that the process was to determine the damages suffered by the applicants as a result of the removal by the respondent of soil containing chrome ore. Because of the lack of a figure at this stage, the respondent's argument that s 22 of the Finance (No. 2) Act kicked in to authorize payment of the award based on a one-to-one conversion is untenable. The inevitable question to ask is: if no amount had been established by 22 February 2019, what was being converted at the rate of one-to-one? The answer is obviously that a conversion could not have been applied in the abstract. Consequently, I entirely agreed with the applicants the debt came into effect on 6 June 2019 when the award was made, since it could not have come into life before it was ascertained. I add that I am satisfied that the applicants have made a case for the relief that they seek, and I am inclined to grant the order they have asked for.

The order I make is as follows:

1. The arbitral award dated 6 June 2019 be and is hereby registered as an order of this court.
2. The respondent shall pay to the applicants the sum of US$378,628-20 at the interbank rate applicable on the date of actual payment, together with interest at the prescribed rate on that amount calculated from 3 August 2015 to date of full payment.
3. The respond shall pay the costs of arbitration and those of this application.

Honey & Blanckenberg, applicant's legal practitioners
I E G Musimbe & Partners, respondent's legal practitioners