

RIOGOLD (PRIVATE) LIMITED
versus
FALCON GOLD ZIMBABWE LIMITED
and
THEMBINKOSI MAGWALIBA N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 28 July 2020 & 24 May 2021

Opposed Application – Setting aside of Arbitral Award

T. Mpofo with T.L. Mapuranga, for the applicant
D. Tivadar, for the 1st respondent

MUSITHU J:

INTRODUCTION

The applicant seeks an order setting aside an award rendered by the second respondent. The arbitral award was rendered following a dispute arising from the implementation of an agreement for the sale of shares between applicant and first respondent. Second respondent was the appointed arbitrator. Applicant and the first respondent are both mining entities of high repute. The application was made in terms of Article 34 (2)(ii) of the Model Law to the Arbitration Act.¹ The arbitral award is impugned on the basis that it offends the public policy of Zimbabwe. The relief sought is couched in the draft order as follows:

“IT IS ORDERED THAT:

1. The award by the second respondent dated 27th August 2019 be and is hereby set aside.
2. The first respondent bears costs of this application.....”

1st respondent opposed the application.

FACTUAL BACKGROUND

The applicant and 1st respondent entered into an agreement for the sale of shares on 30 September 2016 (the agreement). In terms of the agreement, 1st respondent sold to the applicant its entire issued share capital in an entity called Palatial Gold Investments (Private) Limited (Palatial), which operated a mine under the style Dalny Mine. Palatial owned the claims,

¹ [Chapter 7:15]

processing plant and other assets comprising the undertaking known as Dalny Mine. Palatial was formed in 2014 and it received transfer of the assets around October 2014. That transaction occurred about two years before the agreement between the applicant and the 1st respondent was consummated. At the time of the transfer of the undertaking to Palatial, operations at Dalny Mine had ceased in August 2013.

At arbitration, applicant sought to enforce 1st respondent's obligation to indemnify it against liabilities of Palatial that were not disclosed as required by the agreement. In the alternative, applicant sought relief based on alleged breaches of certain contractual warranties made by the 1st respondent.

THE CLAIM AND THE AWARD

Applicant herein was the claimant in the arbitration proceedings. Respondent herein was the respondent in the same proceedings. In his award, 2nd respondent summarised the relief sought by the applicant against 1st respondent as follows:

- “5.1 An award for the indemnification of Rio Gold and Palatial in respect of any claims or expenses or losses arising from the termination or intended termination of the employment of any person not named on annexure A to the statement of claim who claims to have been an employee of Palatial in and after September 2013. The claims, expenses or losses to which the indemnification applies include arrear emoluments *“found to be due”*, any compensation for loss of employment that *“may be found to be due”*, any liability of a fiscal nature arising from the existence or termination of such employment, the total of any dues owing or that may be owed to any social security fund, national employment, trade union, regulator or other body on account of such employment and the cost of legal and other professional services attendant upon the resolution of any issues arising from such employment, *“whether or not legal proceedings shall have been instituted or defended”*
- 5.2 an award indemnifying Rio Gold and Palatial in respect of all costs, losses or expenses attendant upon obtaining vacant possession of any house forming part of Dalny Mine village which as at 30 September 2016 was occupied by any person who is not either named in Annexure A to the statement of claim or a civil servant. Such costs, losses and expenses would include legal and other professional services whether or not legal proceedings shall have been instituted, the costs of securing alternative accommodation for Palatial's personnel who but for the occupation of the persons sought to be removed from occupation, would have resided in the houses in question and the costs of transporting any person from such alternative accommodation to their place of employment.
- 5,3 an award that Falcon Gold shall pay the costs of the arbitration and bear the fees and expenses of the arbitration tribunal.”

On its part, 1st respondent, insisted that it had made the relevant disclosures as were required under the agreement at the material time. This included the placement of the hundreds of workers on unpaid leave with effect from 30 August 2013, as well as the disclosure of the contracts of employment for the several hundreds of employees. The written employment

contracts between 1st respondent or Palatial and the employees were made available to the applicant prior to the completion date² specified in the agreement between the parties. It also averred that upon receiving the contracts, applicant could have ascertained the status of each employee and tell whether or not the employees were permanent.

In April 2017, before the completion date, *Mabeka* and 715 others who claimed to be employees of Dalny Mine lodged a claim with the Ministry of Labour in Kadoma. The notification which had a hearing date of 3 May 2017, was given to 1st respondent. 1st respondent in turn informed applicant so that it could attend the hearing. A representative of the applicant attended the hearing. With full knowledge of the potential claims, and before the completion date, applicant elected to proceed with the transaction for the purchase of shares. It did not serve a notice of breach as required under clause 17 of the agreement, nor did it claim damages or cancel the agreement. It did not opt to refuse to fulfil the conditions precedent and therefore allow the agreement to lapse. It chose to allow the agreement to proceed to completion.

In its financial statements for 2017, applicant did not make any provision for contingent liability arising from the labour claims. 1st respondent contends that this showed that the applicant did not consider the claims as having any merit at all. For its part, 1st respondent considered that Palatial did not employ the said persons and their contracts had been lawfully terminated. They were no longer employees of Palatial. It was only in February 2018 that a dispute was declared in respect of the claim by the 716 third parties.

1st respondent maintained that the claim in respect of the occupation of houses in the Dalny Mine Village by persons who alleged to be employees of Palatial was premature. No dispute had been declared in accordance with clause 18 of the agreement³. The dispute could not therefore be competently referred to arbitration at that stage. That position had been acknowledged by the applicant through a letter of 13 February 2018. The arbitration tribunal could not assume jurisdiction over the matter.

Having evaluated the facts and the evidence placed before him, 2nd made the following conclusion:

“49. In the result, I conclude as follows:-

² Clause 7 of the agreement on page 116 of the record.

³ Clause 18.1 provided that:

“In the event that any dispute shall arise between the Parties as to the coming into effect of this Agreement or its interpretation, or arising out of the implementation or termination of this Agreement or its cancellation, then such dispute shall be referred to arbitration by an arbitrator appointed for that purpose by the Parties or, failing their agreement in that connection within fourteen calendar (14) days of a dispute having been declared, appointed by the Commercial Arbitration Centre in Harare”

- 49.1 The Claimant cannot be awarded the claims for indemnification that it has made. They are accordingly dismissed in their entirety.
- 49.2 The Claimant shall pay the Respondent's costs of the arbitration including the fees and expenses of the arbitration tribunal"

Applicant's Case

Applicant summarised its present claims as follows. In *Robes Mabheka and 715 others v Dalny Mine*, 716 persons claimed to be employees of Dalny Mine. The claim was instituted in August 2017 by the National Employment Council for the Mining Industry. The total claim for salary arrears was US\$10 129 360 as at 2013. The second claim was by *Binoni Nkomo and 17 others v Falcon Gold Group and Rio-Zim (Pvt) Limited*. The claim was instituted in January 2018 by 18 persons who also claimed to be employees of Dalny Mine. They were allegedly not paid their salaries since 2013. Their total claim was US\$1 064 525.48. In 2017, applicant apparently discovered that Dalny Mine village houses were not occupied by civil servants as disclosed by 1st respondent. The houses were occupied by persons who claimed to be employees of Dalny Mine. Applicant claims that of the several hundreds of persons who claimed to be Dalny Mine employees, only 53 were disclosed. Their contracts were nevertheless not disclosed.

Applicant further contended that 1st respondent breached the duty to disclose "*full and accurate details of the identities, job titles, place of work, dates of commencement of employment of all employees*", during the due diligence exercise as required by the agreement. 1st respondent falsely warranted that it had made such disclosure when it had not done so. It also falsely warranted that it had disclosed employment documents including "*copies of all contracts which apply to the Company's employees*". The failure to make full disclosure of the status of 813 employees was at the heart of applicant's claim. Warranties were limited under clause 10.4 of the agreement.⁴ In relation to the 813 contract employees, 2nd respondent was required to determine whether there was fair disclosure in terms of the agreement. Applicant averred that in terms of clause 8.1.2.1 of the agreement, 1st respondent was required to provide applicant full access to information. 1st respondent violated this obligation as it allegedly failed

⁴ Clause 10.4 on page 122 of the record reads in part as follows:

"The Warranties are limited and qualified to the extent to which a fair disclosure of any fact or circumstances has been made in the, but only to the extent any such fact or circumstance has been fairly disclosed in the Disclosure Letter attached hereto as Schedule 9. For purposes of the foregoing a "fair disclosure" is one where all information, detail, facts and circumstances that are reasonably necessary to be disclosed to enable a proper appreciation and consideration by a purchaser of the relevant issue and attendant risks have been disclosed....."

to disclose hundreds of employment contracts within its possession relating to the 813 employees.

In terms of clause 9 of the agreement, applicant was expected to rely on information provided by 1st respondent on the status of the 813 contract workers. It indeed relied on that information. 1st respondent did not deny representing that the contracts of the 813 contract employees had ceased on 31 August 2013. This happened three years before applicant purchased Palatial Gold. Dalny Mine assets were transferred to the new entity. None of the employees were transferred to Palatial Gold.

Applicant contended that 1st respondent also gave contradicting versions of the state of the 813 employees even in its pleadings. On one hand it said the contracts of the said employees had terminated on 31 August 2013. On the other hand it sought to argue that, through questions posed by its counsel that the same employees were employees of 1st respondent as at the time the agreement was concluded. It was also suggested that the employees were on unpaid leave. Applicant submitted that it was legally and factually impossible for one to be a non-employee through the termination of their employment by effluxion of time and be on paid leave at the same time. In terms of the agreement, 1st respondent indemnified applicant against all loss, liability, damage or expense which it was likely to suffer.

It was applicant's further contention that 1st respondent breached other warranties with respect to the financial affairs of the company⁵. The take on balance sheet and the accounts of Palatial Gold did not reflect the contingent liability to the 813 contract workers. The accounts of the company did not give a true and fair view of the state of affairs of the company at the relevant accounting reference. The failure to make provision for contingent liabilities breached International Financial Reporting Standards. The Take On balance sheet understated actual or

⁵ Clause 7 of the agreement page 183 of record, 1st respondent warrants that:

“7.1 The accounts of the Company as at 31st March 2016 (the Accounts Date):

7.1.1 give a true and fair view of the state of affairs of the Company at the relevant accounting reference;

7.1.2 comply with the requirements of the Companies Act (as applicable) and all other relevant statutes or statutory instruments;

7.1.3 comply with the International Financial Reporting Standards (IFRS);

7.1.4 do not understate any actual or contingent liabilities of the Company that ought reasonably to have been provided for as at the Accounts Date; and contain reasonable reserves and/or provisions and/or notes, where appropriate, for capital commitments and liabilities (contingent, disputed and/or unquantifiable) to the extent this is required in order for the Accounts to give a reasonably justifiable view of the state of affairs and/or profits or losses of the Company”

Clause 8.2 on page 185 states that:

“As at the Effective Date the financial affairs of the Company will substantially be as reflected in the Takeover Balance Sheet and as far as the Seller is aware, no event, fact or matter has occurred or will occur which is likely to give rise to any such change except as shall be reflected in the Completion Balance Sheet”

Clause 9.1 states:

“All financial and accounting records of the Company have been fully and accurately prepared and maintained and constitute an accurate record of all matters required by law to appear in them and do not contain any material inaccuracies or discrepancies of any kind.”

contingent liabilities of the Company that ought to have been provided for as at the Accounts Date. The accounts did not give a reasonably justifiable view of the state of affairs of the Company. As at the effective date the financial affairs of the company were not substantially as reflected in the takeover balance sheet. It was also false to warrant that all financial and accounting records of the company were fully and accurately prepared and maintained, thus constituting an accurate record of all matters required by law to appear in them.

1st respondent allegedly failed to pay NSSA levies in breach of clause 11.4 of the agreement in which it made the undertaking that “*the company has not taken or omitted to take any action in respect of the business which has resulted in or may result in the company or the business being subjected to a fine or penalty*”. NSSA levies attracted fines or penalties. 1st respondent also warranted that there were no outstanding disputes, actions or claims or complaints in respect of the mine assets. At the time of making that guarantee, 1st respondent was allegedly aware that the mine complex was occupied by its former employees who claimed the right to occupy the village based on their employment.

Applicant asserts that 2nd respondent’s findings on the question of disclosure were not supported by the facts. He made a factual finding that 1st respondent had made a disclosure in respect of the labour strength including the more than 800 labour force. Such disclosure had been made to the auditors involved in the due diligence process. Applicant contends that 2nd respondent made an error in the process. Evidence showed that no such disclosure could have been made, as 1st respondent always insisted that such employees were not part of the Dalny Mine workforce. It treated them as non-existent. It defied logic to then conclude that they were disclosed as contemplated by the agreement when their very existence was an issue.

2nd respondent is also adjudged to have fallen into error by making a factual finding that contracts of employment had been provided, yet he had allegedly accepted that such contracts of employment had not been requested by the applicant. No evidence had been led by 1st respondent to refute applicant’s claims that it had done so. 2nd respondent allegedly ignored evidence that such contracts were requested but were not provided. Applicant had requested contracts of employment for all employees. 2nd respondent made a finding that not all contracts of employment were disclosed. His conclusion that such contracts were not requested was grossly unreasonable. The failure by 2nd respondent to apply his mind on the issue went beyond mere faultiness or incorrectness and constituted a palpable inequity which was so far reaching and outrageous in its defiance of logic that a sensible and fair minded person would not have reached the same conclusion.

Regarding the claim for indemnity, applicant submitted that the indemnity was due to the applicant once a claim was made. The indemnity clause in the agreement covered future events. The payment of amounts found to be due to employees was a separate event to the giving of the indemnity. Payment followed after the determination of the claims. It was not a requirement that employees' lawsuits must succeed first. Applicant submitted that it was not intended under clause 14 of the agreement that actual loss be suffered before indemnity could be claimed. Judgment would have to be taken against the applicant first. The judgment creditor would be entitled to execute immediately. 1st respondent would then resist a demand made by the applicant, resulting in the referral of the dispute to arbitration. In the meantime, the judgment creditor would have executed its judgment. Such an interpretation defied logic and was outrageous. Applicant submitted that at law, a claim was a "demand for something as due; and an assertion of a right to something". In *casu*, not only was a demand made, but litigation was instituted against the applicant.

2nd respondent's award is also impugned for finding that there was a discord between the relief sought and the dispute declared by the parties. Applicant contended that a dispute was declared in respect of the claims it received from former employees. The claims by former employees formed the basis of the claim as set out in the statement of claim and the evidence. The claims in respect of the occupation of the Dalny Mine Village were accessory to the issue of the existence or otherwise of the 800 employees. Applicant maintained that 2nd respondent's conclusion was wrong. It was the mere receipt of the claim on which applicant could be liable that entitled it to withhold further payments until the issue of the claims were resolved through arbitration.

According to the applicant clause 14.1 of the agreement, as read with clause 14.1.3 expressly included "*legal action being taken against the Purchaser or the Company by a third party in respect of which the Purchaser has relied on a Warranty given by the Seller*". Applicant averred that a reading of clause 14 in its entirety showed that the parties intended that the seller should indemnify the purchaser against claims brought but were not disclosed. The final determination of those claims was irrelevant. An undertaking to indemnify was sufficient for purposes of the agreement.

Applicant asserted that the housing claim was also part of the employment issue. As long as the employment status of the employees was not resolved, applicant continued to be denied access to the properties occupied by persons claiming to be employees. Applicant averred that 2nd respondent did not apply his mind in concluding that its claim was incompetent

since it was in essence one for a declaratory order, with no loss having been suffered. 2nd respondent's finding that the claim was for a declaratory order in respect of indemnification for possible future liability and not for loss suffered was misplaced. He allegedly ignored authority submitted to him with regards to the meaning of indemnification.

Applicant also contends that the finding that its claims exceeded US\$4 (four) million and therefore unawardable was grossly unreasonable. 2nd respondent should have awarded indemnity up to the maximum that applicant was entitled to under the agreement. 2nd respondent is adjudged to have made a serious error of law going beyond mere faultiness.

Applicant contended that 2nd respondent's error regarding the question of indemnity had the effect of denying it the protection provided for in the agreement. He set a new basis upon which the indemnity provisions were to be invoked. This went beyond mere faultiness. The court was urged to intervene and set aside the award as it was clearly in conflict with the public policy of Zimbabwe. Freedom of contract was an essential part of the public policy of Zimbabwe and agreements entered into were to be enforced as they were for as long as they were compatible with the public policy of Zimbabwe.

Respondents Case

In response, 1st respondent averred that for an arbitral award to be set aside on public policy grounds, it had to be demonstrated that it was outrageous in its defiance of logic or accepted moral standards and outrageously illogical or immoral in its reasoning or conclusions. It further averred that the applicant's founding affidavit sought to re-argue the matter from the start. It contained legal averments. It did not attack 2nd respondent on how he conducted the arbitration hearing. The 1st respondent's affidavit did not deal with the applicant's founding affidavit blow by blow. The affidavit focused on the key aspects of the dispute which were relevant.

1st respondent averred that Mr Bhekinkosi Nkomo's (the deponent to the applicant's founding affidavit) evidence under cross examination actually supported its case. The evidence contradicted applicant's own pleaded position. 1st respondent claimed that Nkomo's evidence was so damaging to the applicant's case to the extent that 1st respondent chose not to call its own witnesses in the aftermath of Nkomo's cross examination. It relied on the evidence extracted from Nkomo under cross examination. His evidence was crucial in demonstrating the correctness of the award.

1st respondent condemned applicant's affidavit for being too legalistic and ill-prepared. It was 18 pages long and had 480 pages of attachments. Be that as it may, applicant did not

make a single cross reference to the enclosed documentation. The enclosed documentation were not even introduced in Nkomo's affidavit. They were only found in the index. No reference was made to the parties' pleadings or to the documentation. An application had to stand or fall on the founding affidavit. It was incumbent upon applicant to explain the basis upon which the award was being attacked. With respect to the indemnity claim, 1st respondent argued that its position was always that the individuals who claimed to be employees of Dalny Mine were not employees of that entity as at the time of concluding the agreement. Consequently, the accounts of Palatial Gold did not reflect any contingent liability with respect to the 813 employees. This was because no such liability existed. If these 813 claimants were not employees of Dalny Mine, then the applicant's claim for indemnity fell away.

1st respondent claimed that Nkomo himself told 2nd respondent that the claimants were not Dalny Mine employees. The witness agreed with 1st respondent's case, and he could not seek to wriggle out of that position at this stage. The witness also conceded that applicant had not incurred any liability to pay these individuals at that stage. 1st respondent further averred that the applicant's defence in the labour proceedings was that these individuals were not Dalny Mine employees. For that reason, applicant could not argue in the current proceedings that these individuals were employees. Nkomo's evidence was that the issue of potential liability was assessed and recorded as zero. This meant that there was nothing to indemnify. 2nd respondent was therefore correct in concluding that there was nothing to indemnify.⁶ 1st respondent further contended that 2nd respondent was correct in finding that the labour dispute brought by claimants had been disclosed. 1st respondent referred to applicant's own pleaded position which it captured as follows:

"The Respondent stated that the bulk of the employees (800+) employed at the establishment were contract employees who had their contracts simultaneously terminated by August 2013 in accordance with the law, and that these specific 800+ employees were disputing the termination of their contracts"⁷

1st respondent further averred that there was ample evidence placed before the 2nd respondent for him to make a finding that there was adequate disclosure prior to the share sale agreement. However applicant wanted 2nd respondent to ignore all disclosures made during the due diligence process and focus on the disclosure letter alone. 1st respondent contends that such an approach would defeat the purpose of the due diligence process. There were also disclosures made to the auditors who were carrying out the due diligence process on behalf of the applicant.

⁶ Paragraph 29.4 of award on page 45 of record.

⁷ Paragraph 10 page of claimant's reply on 95 of the record

Although the applicant claimed that such matters were not brought to its attention, 1st respondent contended that these were valid disclosures even though the applicant may have been unaware of them. 2nd respondent was justified in finding that sufficient disclosure was made.

On the question of warranties, 1st respondents argued that the applicant failed to point out to any flaws in the 2nd respondent's findings. Further, applicant had not sought relief premised on a breach of warranties in its statement of claim. 1st respondent averred that applicant mentioned the breach of warranties as an alternative to the indemnity claim.

1st respondent submitted that the award did not offend the public policy of Zimbabwe. The applicant had failed to point to an illogical or immoral finding on the part of the 2nd respondent. It urged the court to dismiss the application with costs on the higher scale.

Applicant's Reply

In reply applicant denied misrepresenting issues before the 2nd respondent. Applicant insisted having set out the basis upon which the 2nd respondent's factual findings contradicted evidence placed before him. Nkomo denied that his evidence was damaging to the applicant's case as alleged. He also denied that his founding affidavit was legalistic and ill-prepared. He further averred that an attack on the award required a presentation of the issues and the evidence before the 2nd respondent and the legal conclusions that should have been reached. This what the applicant had done.

Regarding the indemnity claim, applicant submitted that the 2nd respondent's reasoning failed to appreciate a basic issue. Litigation was brought against applicant by the alleged 813 employees. Applicant was indemnified against the possibility of these claims succeeding. Once the claims were brought, then 1st respondent was required to indemnify the applicant. Applicant insisted that 1st respondent's position was contradictory. On one hand it argued that it had disclosed the 813 employees. On the other hand it sought to argue that these were not employees at the time of the sale. These were mutually exclusive positions. Applicant had defended itself against these claims with the assistance of 1st respondent. What remained a risk was that should the 813 employees be held to be employees of Dalny Mine, then applicant would become liable following its takeover of that undertaking. It was against this risk that indemnity should have been granted. There was no need for applicant to be first declared liable at law before it sought the indemnity.

Applicant asserted that it had dealt with the issue of the breach of warranty as attested by paragraphs 26, 31, 38, 39, 40, 44, 50, 52, 54, and 76-80 of its founding affidavit. Applicant

also insisted that 2nd respondent failed to properly interpret the contract thus depriving it of its rights under the same contract. 2nd respondent also stands accused of failing to apply his mind to the facts and making conclusions on the facts that were divorced from the evidence that no reasonable person applying his mind could have arrived at them.

THE ISSUES

The sole issue for determination is whether 2nd respondent's legal and factual conclusions were grossly irrational or outrageously immoral as to offend the public policy of Zimbabwe.

THE LAW

The application was made in terms of Article 34(2)(b)(ii) of the Model Law to the *Arbitration Act*⁸. It reads as follows:

- “(1).....
- (2) An arbitral award may be set aside by the *High Court* only if-
 - (a); or
 - (b) the High Court finds, that-
 - (i).....
 - (ii) the award is in conflict with the public policy of Zimbabwe”

The approach of the courts in applications of this nature was set out in *ZESA v Maposa*⁹ by GUBBAY CJ as follows:

“Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. 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 accepted 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”

The court is not required to interrogate the merits of the decision in order to determine its substantive correctness. An arbitral award will be interfered with in very exceptional circumstances at this stage. An applicant who seeks to have an award set aside on public policy grounds must demonstrate that the errors imputed on the arbitrator are so far reaching and outrageous in their defiance of logic that any fair minded person would consider them an affront to the conception of justice.

⁸ [Chapter 7:15]

⁹ 1999 (2) ZLR 452 (S) at page 466

THE SUBMISSIONS

For the applicant, Mr *Mpofu* submitted that 2nd respondent completely misconstrued the issues before him. He cited four key areas. These are: failure to appreciate the case, the law and the remedy sought; Failure to properly address the substantive issues of non-disclosure and the breach of warranties; Irregularity in the finding that the applicant's indemnity claims exceeded US\$4 million and could thus not be awarded; the failure to properly interrogate the evidence placed before the tribunal. Counsel then proceeded to deal with these matters *ad seriatim*.

Regarding 2nd respondent's failure to appreciate the case, the law, and the relief sought, Mr *Mpofu* submitted that there was no dispute between the parties as to what an indemnity entailed. A party that expected to be sued carried a risk that had to be passed to the party that agreed to assume that risk. He gave the analogy of criminal sanctions. There was no punishment without fault. The same principle extended to civil proceedings. There was no liability without fault. Indemnity was connected to the present and future actions. In its heads of argument, applicant defined indemnity as meaning "*to preserve, protect, keep free from; secure against (any hurt, harm or loss); to secure against legal responsibility for past or future actions or events; to give indemnity to*". The payment of any amount found to be due to the employees was a separate event to the giving of an indemnity. Payment followed the determination of the claims. However, the indemnity was due to the claimant once a claim was made. The indemnity in the agreement covered future payments. It was not necessary that employees' lawsuits first succeed. The fact that a party claimed indemnity did not necessarily mean they should not defend themselves when sued. The same applied when the party intended to sue. Costs would have to be incurred. Under the common law, a party had to claim indemnity through the agreement.

According to Mr *Mpofu*, an indemnity claim was not just available by operation of the common law, it was also available as a special procedure. Even if a claim against the applicant was without merit, indemnity still ought to be granted. It secured on behalf of the applicant, the full enjoyment of benefits of the contract. The contract was for US\$8 million, while the claims amounted to US\$13 million. If the claims succeeded, applicant would be required to pay an amount higher than the contract sum. Such a scenario would never have been in the contemplation of the parties. Counsel submitted that 2nd respondent misapplied the law on indemnity. He referred to paragraph 43 of 2nd award where he said "*Further, a claim for*

indemnity by its nature is a claim for loss suffered. Rio Gold having mounted its claim as a claim for indemnification cannot be indemnified for loss which has not eventuated"¹⁰. Mr *Mpofu* argued that such an approach was wrong.

To illustrate this point further, applicant's counsel referred to paragraph 30.7 of the 2nd respondent's award where he stated as one of his conclusions drawn from the evidence:

"30.7 That there was no loss suffered by Rio Gold as a result of the alleged non-disclosure of material facts in breach of the warranties. The claim by Rio Gold, in its statement of claim and in oral evidence was therefore one, not for the indemnification but for a declaratory order in respect of indemnification for possible future liability. This is contrary to the substance of the prayer which is summarised herein. The Claimant cannot therefore canvass a different claim at the hearing or in its papers"

Mr *Mpofu* submitted that the claim could not have been one for declaratory relief. He further submitted that section 16 of the Labour Act¹¹ contemplated that when an undertaking was sold, the purchaser inherited the former employer's liabilities. Any claim must be brought against the current employer, who was not responsible for the past debts unless there was some prior agreement. In *casu*, the current employer was asking the former employer to carry that burden. That was the point missed by 2nd respondent. That error denied applicant its contractual benefits. It constituted an affront to public policy. 2nd respondent was only expected to acknowledge the existence of the claim rather than assess its validity. It was wrong for 2nd respondent to consider the merits of the claim instead of the facts on which it was premised. Applicant was supposed to be protected in case the claim succeeded. It continued to incur costs in defending the claims. Applicant could not be saddled with costs that were not of its own making.

Mr *Mpofu* further submitted that the agreement required full disclosure. Clause 17.3¹² as read with clause 17.1 of the agreement was clear on what needed to be disclosed. Counsel also averred that 1st respondent failed to comply with section 12 (1) and (2) of the Labour Act. What clause 17.1 required to be furnished, was exactly what section 12 (1) and (2) of the Labour Act provided for. It was the 1st respondent that had employed the persons making the claims. It was also 1st respondent that had their employment contracts. It knew how much they were paid, and the extent of liability in the case of a claim. Full and adequate disclosure entailed advising applicant of potential claims and the merits of such claims. Such disclosure was

¹⁰ Page 60 of the record of proceedings

¹¹ [Chapter 28:01]

¹² Page 191 of the record

necessary as it affected the purchase price of the shares. It was not made and the indemnity claim kicked in.

Mr *Mpofu* further submitted that 1st respondent had the onus to show that it made full disclosure. Instead it chose not to lead evidence to show its compliance with clause 17(1) and (3) of the agreement. It presented contradictory positions on the status of the employees. There was only a disclosure of 53 employees, but their contracts were not even available. The claim was made in 2013 before applicant acquired Palatial Gold. If the claim was successful, it was for the 1st respondent's account. Applicant could not be denied its indemnity under the circumstances. A finding whose effect was to take away a benefit accorded under the contract was contrary to public policy. The court was referred to the case of *Delta Operations (Pvt) Ltd. v Origen Corporation (Pvt) Ltd*¹³, where the court emphasised the need to respect the sanctity of contracts. 2nd respondent granted a remedy outside the purview of the contract. Applicant was likely to find itself paying in excess of \$13 million for obligations incurred before the registration of Palatial Gold.

Concerning the 1466 residential units constituting the Dalny Mine village, counsel submitted that these were supposed to be used by the applicant for its business. 1st respondent represented that most of the housing units were occupied by civil servants, yet they were occupied by its former employees. The former employees were not prepared to relinquish possession until their dispute with the former employer was resolved. The effect of the impasse was that applicant had no access to the houses, and to gain that access, applicant had to institute proceedings to evict the occupants.

In respect of the finding that the claim for indemnity was above US\$4 million and therefore incompetent, Mr *Mpofu* submitted that 2nd respondent ought to have awarded an amount which fell within the cap, instead of completely dismissing it. Dismissing the claim was a misdirection. In its heads of argument, applicant observed that the amount of indemnity was limited to an amount equal to 50% of the Purchase Consideration but there were exceptions. The limit did not apply in respect of a breach involving fraud or corruption, and/or in circumstances where the seller repudiated the agreement.¹⁴ It also did not apply in the event of a wilful misconduct by the seller. Even after so finding, 2nd respondent should have ordered an indemnity of up to the maximum that applicant was entitled to under the agreement. 2nd respondent accordingly committed a serious error of law which went beyond mere faultiness.

¹³ SC 86/06

¹⁴ Per clause 15.1.2; 15.4.2; 15.4.3; 15.4.4

On the issue of evidence, Mr *Mpofu* highlighted the significance of evidence in providing a context to the contractual dispute. He submitted that three principles were key to the interpretation of contracts. These were: the text; the context and the purpose. Counsel referred to the case of *Old Mutual & Others v Peter Moyo*¹⁵. Only one party led evidence before the 2nd respondent. 1st respondent failed to discharge its onus. According to Mr *Mpofu*, the question that arose was where 1st respondent obtained the questions that it put to the applicant's witness. The essence of cross examination was for 1st respondent to put questions to the witness based on its own case. 2nd respondent made a finding in favour of a party that did not testify. How the 2nd respondent was able to measure the quality of 1st respondent's evidence was beyond reason. 2nd respondent allegedly preferred submissions made by 1st respondent's counsel, ahead of evidence led from the applicant's witness. Mr *Mpofu* argued that it was irrational for 2nd respondent to find in favour of a party that did not testify.

Mr *Mpofu* submitted that the applicant's affidavit provided a platform of what was necessarily legal immorality, something patently unjust. Two key points were made in the affidavit. These were failure to appreciate facts and the effect of the contract. If the court agreed with the applicant, then there was need to set aside the award. The intervention would not leave 1st respondent in a worse off position. It would leave both parties in safe positions. The court was urged to interfere with the award in defence of public policy.

For the 1st respondent, Mr *Tivader* submitted that an application stands or falls on the founding affidavit. He argued that applicant's counsel was raising new matters that were never pleaded in its case, and neither were they raised in the heads of argument. He pointed to the allusion to sections 12 and 16 of the Labour Act for instance. In any case, the dispute emanated from a sale of shares and the Labour Act was not applicable. Mr *Tivader* further submitted that applicant merely alleged that the award was immoral without pointing out the offending parts of the award. Counsel further averred that the application was ill-conceived as applicant had contractual remedies at its disposal.

Mr *Tivader* argued that the award was detailed and well-reasoned. The evidence of the applicant's only witness, Nkomo was contradictory as he continued to change his own version of events. Nkomo had told the 2nd respondent that there was no dispute pending, yet in his papers before this court he was claiming that there was pending litigation justifying the claim for indemnity. Counsel submitted that 2nd respondent measured Nkomo's evidence against

¹⁵ [A5041/19] [2020ZAGPJHC1 of 14 January 2020]

Nkomo himself. Nkomo was not just the applicant's witness. He was either party's witness. No further evidence was required once he had testified. 2nd respondent made key conclusions on the basis of Nkomo's evidence. Applicant was notified of the existence of former employees and their potential claims. 2nd respondent made a credibility finding that information was brought to the attention of the applicant. How could one ask about the 813 employees if they were not aware of their existence? Counsel submitted that Nkomo's evidence was that the alleged employees were not employees of Dalny Mine. 1st respondent pleaded that they were not employees. It followed that no one alleged that these were employees. Further, Mr Nkomo accepted that no contingent liability had been provided for in respect of these employees in applicant's accounts. In light of this averment, applicant could then not make an about turn and insist that liability existed. Counsel further submitted that the existence of the employees was disclosed as part of the due diligence exercise.

Mr *Tivader* submitted that the claim for indemnity was not the primary obligation. It was secondary. One only got indemnified for the loss actually suffered. In other words, one had to establish a primary obligation first. Counsel submitted that the applicant sought indemnity from 1st respondent on the basis of three propositions, namely that: the claimants in the labour dispute were employees of Dalny Mine at the time of the sale; the claimants' labour claim was valid; at the time of the sale, applicant was not aware that these individuals were employees of Dalny Mine. Put differently applicant claimed that the risk of the labour claim was not disclosed by 1st respondent. If any one of these prerequisites was not established, then it followed that applicant was not entitled to an indemnity in respect of the labour claims. The onus was on the applicant to establish that all the three prerequisites were present in this regard. Mr *Tivader* argued that the applicant had failed to discharge that onus.

In its heads of argument, 1st respondent submitted that applicant expressly pleaded in the labour proceedings that the claimant employees failed to bring valid proceedings. Through its legal practitioners of record, applicant pleaded that: the claimants' statement of claim was deficient; the claimants failed to substantiate that they were employees and were claiming salaries from 2013; only 268 of the 716 claimants filed affidavits. It meant that the other 448 claimants were not part of the proceedings; the alleged claimants' union did not have mandate to prosecute the claim; the entire claim ought to be dismissed; the claims for wages and permanent employee status had prescribed. In the proceedings before 2nd respondent, applicant sought to distance itself from its own pleaded position in the labour proceedings. This was

impermissible and it was rightly dismissed by the 2nd respondent. The applicant could not be allowed to approbate and reprobate.

Further, in its heads of argument 1st respondent submitted that the potential claim was disclosed to the applicant. Applicant admitted in its pleadings that during the due diligence process prior to the sale, 1st respondent disclosed that over 800 persons could bring a claim against the company challenging the termination of their employment. Applicant expressly stated that the 1st respondent had advised that “800 + employees were disputing the termination of their contracts”¹⁶. 2nd respondent could not ignore such admission. The court was referred to the authority of *Delta Corporation Ltd v Forward Wholesalers (Private) Ltd*¹⁷.

1st respondent argued that applicant could not amend or supplement the basis of its application. After receiving 1st respondent’s opposing papers, applicant sought to alter its original position in its answering affidavit as well as its heads of argument. To illustrate this point, 1st respondent referred to the admission by the applicant that “*The nature of the relief and the basis thereof are adequately summarised in the arbitrator’s award*”¹⁸. After 1st respondent recorded Nkomo’s admission of this point, he changed his evidence in the answering affidavit as follows: “*I deny that I accepted that the arbitrator correctly understood the relief sought. I stated that he adequately summarised the nature of the relief and basis*”¹⁹. 1st respondent argued that this was a desperate attempt by Nkomo to distance himself from the implications of the admission he had properly made. Mr *Tivader* submitted that the arbitrator could not “*adequately summarise*” the relief sought if he did not understand the relief that was being sought in the first place. The court was referred to the case of *Mutasa v Telecel International & Another*²⁰.

In its heads of argument, the 1st respondent took issue with applicant’s submission that the 2nd respondent deliberately ignored or disregarded the law. It submitted that the assertion was tantamount to an allegation of fraud against the 2nd respondent. The court was urged to disregard that submissions for reasons that: the application was not brought on the basis that the 2nd respondent deliberately, and therefore fraudulently went against the law; applicant adduced no evidence to show that the 2nd respondent deliberately set out to find against the applicant, irrespective of what the law said; consequently, 2nd respondent was denied an

¹⁶ See applicant’s reply at the arbitration proceedings at page 95 paragraph 10 of the record

¹⁷ [2017] ZWHHC 53

¹⁸ Paragraph 13 of the applicant’s founding affidavit on page 6 of the record.

¹⁹ Paragraph 12 of answering affidavit on page 541 of the record.

²⁰ HH 331/14

opportunity to respond to the allegation that he deliberately abused his office. 1st respondent further submitted that applicant's case ought to be confined to what it set out in its founding affidavit. It could not be allowed to patch up its case in the answering affidavit and heads of argument.

In reply Mr *Mpofu* submitted that 1st respondent misconstrued its remedies and the dispute at hand. Applicant was claiming indemnity in respect of claims made against it. The issue was not whether the 813 claimants were applicant's employees or not. These people had started to sue. As they sued, the applicant's assets were exposed to execution. 1st respondent position was untenable. It wanted applicant to be sued first, have a judgment and a writ granted against it and then approach the applicant. Mr *Mpofu* submitted that indemnity was a contractual benefit available to the applicant.²¹ It covered both loss and liability. Once it was accepted that there were claims against the applicants, then indemnity automatically set in. It was against public policy for 2nd respondent to deny applicant that benefit.

Counsel also submitted that it was folly to suggest that the sole witness was not applicant's witness alone. A witness came to testify under two circumstances: when called by a party who desired to lead evidence from that witness; when called by the court to clarify certain evidence for the court. 2nd respondent was dealing with the applicant's witness.

Mr *Mpofu* further submitted that the claim by NSSA was not dealt with by 1st respondent. So was the claim surrounding the Dalny Mine houses occupied by persons who claimed to be employees of Dalny Mine. Both claims were not disclosed. 2nd respondent was therefore wrong to withhold his jurisdiction, yet the jurisdiction had been set out in the statement of claim. Mr *Mpofu* further submitted that sections 12 and 16 of the Labour Act were raised as points of law, and there was nothing anomalous with that. He insisted that public policy considerations favoured the vacation of the award.

THE ANALYSIS

I deliberately regurgitated the factual background and the applicant's case *extensor*, just to illustrate the extent to which the applicant appeared to misunderstand the crux of its own application. The applicant seeks the setting aside of the 2nd respondent's award on public policy grounds, yet most of the averments in the founding affidavit appear more like an attempt at rearguing the claim afresh. The bulky of the affidavit addresses issues which ought to have been rightly argued before the 2nd respondent. The founding affidavit is unnecessarily long,

²¹ Clause 14.1 of agreement on page 127 of the record.

convoluted and all muddled up. It spans a good 18 pages. Out of the 97 paragraphs of the founding affidavit, only a few paragraphs attempt to relate to the cause of action before this court. Attached to the founding affidavit are acres of unreferenced material whose relevance was not explained in the affidavit. Affidavits must, for the benefit of the court, set out the background facts germane to the dispute with sufficient detail and clarity. The founding affidavit forms the foundation of the applicant's case.²² Annexures to affidavits should not just be attached as a formality. Their relevance must be explained with sufficient exactitude.

Perhaps it was with these deficiencies in mind that Mr *Mpofu*, cleverly adopted a somehow structured approach in his submissions, by seeking to have the arbitral award impugned on the following bases: failure to appreciate the case, the law and the remedy sought; failure to properly address the substantive issues of non-disclosure and breach of warranties; the irregularity of finding that applicant was not entitled to indemnity because its claims exceeded US\$4 million; the failure to properly interrogate the evidence placed before the tribunal. I now turn to deal with these in detail.

Failure to appreciate the case, the law and the remedy sought

The submission, as I understood it from applicant's counsel, pertained to the manner in which the 2nd respondent treated the indemnity claim. The 2nd respondent was impeached for the manner in which he treated the indemnity claim. Indemnity was due to the applicant once a claim was made against it. Applicant argued that it was not necessary that employees' lawsuits first succeed. 1st respondent on the other hand argued that one only got indemnified for the loss actually suffered. In other words, one had to establish a primary obligation first. In *casu* that did not happen. The claim for indemnity was premature. The claim for indemnity was founded on the indemnity clause.²³ It was in respect of any claims or expenses or losses arising

²² See Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa* 5th Ed p 440

²³ Clause 14 stated:

“14 INDEMNITY

14.1 Without prejudice to any of the other rights of the Purchaser arising from any of the provisions of this Agreement, the Seller indemnifies the Purchaser and the Company against all loss, liability, damage or expense which the Purchaser and/or the Company may suffer as a result of or which may be attributable to:

14.1.1 any other liability of the Company which is known or which reasonably ought to have been known arising prior to the Completion Date and not disclosed to the Purchaser prior to the Signature Date; and/or

14.1.2 any claims as a result of any breach of contract or delictual/tort act or omission by the Company occurring before the Completion Date and not disclosed to the Purchaser; and/or

14.1.3 a breach by the Seller of the Warranties, which breach shall include legal action being taken against the Purchaser or the Company by a third party in respect of which the Purchaser has relied on a Warranty given by the Seller, (each one a Claim).

14.2 The Purchaser will give fifteen (15) calendar days written notice to the Seller of any Claim to enable the Seller to take steps to resist the Claim, should it wish to do so.

14.3 The Seller will be entitled to resist any Claim in the name of the Purchaser or the Company and to control the proceedings in regard thereto, provided that:

from the termination or intended termination of the employment of every person who professed to be an employee of the company after September 2013. It was also in respect of any costs, losses or expenses attendant upon securing vacant possession of any house forming part of Dalny Mine Village, and such house was not occupied either by a person in annexure A of the claim or a civil servant.²⁴

To contextualise the applicant's argument, it is important to analyse the 2nd respondent's findings on this point based on the evidence that was placed before him. He made the following observations²⁵:

- “30. The following conclusions can be drawn from the evidence, both oral and written submitted for the parties:-
.....
30.4 That therefore to the extent that Rio Gold was informed in respect of the entire labour strength, in different categories, it was not denied any information which it would have wanted in order to make an informed decision. In fact, it was advised to make the necessary assessments in respect of the risk or potential claims arising from the known claims which had been made by certain employees within the context of all the other disclosed employees.
.....
30.7 That there was no loss suffered by Rio Gold as a result of the alleged non-disclosure of material facts in breach of the warranties. The claim by Rio Gold, in its statement of claim and in oral evidence was therefore one, not for the indemnification but for a declaratory order in respect of indemnification for possible future liability. This is contrary to the substance of the prayer which is summarised herein. The dispute which was declared related to a claim for indemnity. The claimant cannot therefore canvass a different claim at the hearing or in its papers.”

The findings as drawn from the evidence constituted the foundation of the 2nd respondent's decision on the merits. On the evidence, 2nd respondent found that the claim by applicant in its statement of claim and oral evidence was not one for indemnification, but one for a *declaratur* in respect of indemnity possibly for future liability. It was at variance with the substance of its prayer. The declared dispute related to a claim for indemnity. What was placed before the tribunal had nothing to do with the declared dispute. For that reason, 2nd respondent reasoned that applicant could not be allowed to canvass a different claim at the hearing.

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- 14.3.1. the Seller indemnifies the Purchaser and the Company in a manner and form reasonably acceptable to the Purchaser and the Company against all party and party or attorney and own client costs which may be incurred as a consequence of such proceedings and the Purchaser and the Company will be entitled to require the Seller to give security reasonably acceptable to the Purchaser and the Company against such costs;
14.3.2. the Purchaser and the Company will render reasonable assistance to the Seller, at the expense of the Seller, in regard to the proceedings; and
14.3.3. The Company and/or the Purchaser shall have the right to take cover the conduct of such litigation in the event that the Company and/or the Purchaser reasonably believe that it is in their best interest to do so and gives the Seller notice of their intention to do so.”

²⁴ See the claimant's prayer in its claim to arbitration tribunal at pages 73-75 of record.

²⁵ Pages 52-55 of the record.

In any case, the agreement itself regulated the manner in which indemnity kicked in. Clause 14.1 of the agreement provided that: *“Without prejudice to any of the other rights of the Purchaser arising from any of the provisions of this Agreement, the Seller indemnifies the Purchaser and the Company against all loss, liability, damage or expense which the Purchaser and/or the Company may suffer as a result of or which may be attributable to....”*. Clause 14.3 then stated that: *“The Seller will be entitled to resist any Claim in the name of the Purchaser or the Company and to control the proceedings in regard thereto, provided that:*

- 14.3.1. the Seller indemnifies the Purchaser and the Company in a manner and form reasonably acceptable to the Purchaser and the Company against all party and party or attorney and own client costs which may be incurred as a consequence of such proceedings and the Purchaser and the Company will be entitled to require the Seller to give security reasonably acceptable to the Purchaser and the Company against such costs;*
- 14.3.2. the Purchaser and the Company will render reasonable assistance to the Seller, at the expense of the Seller, in regard to the proceedings; and*
- 14.3.3. The Company and/or the Purchaser shall have the right to take cover the conduct of such litigation in the event that the Company and/or the Purchaser reasonably believe that it is in their best interest to do so and gives the Seller notice of their intention to do so.” (Underlining for emphasis)*

A reading of the above clauses in my view shows that the 1st respondent was expected to be actively involved in any litigation brought against the applicant in its position as the purchaser. It was also for that reason that clause 14.2 required the applicant to *“give fifteen (15) calendar days written notice to the Seller of any Claim to enable the Seller to take steps to resist the Claim, should it wish to do so”*. In my view that could only mean that at no point would the applicant be left exposed to any claim or potential claim on its own accord. Clause 14.5 of the agreement is also instructive. It stated that: *“Subject to clause 15, if the Purchaser or Company suffers any loss, liability, damage or expense in respect of which an indemnity is given in terms of clause 14, the amount of such loss, liability, damage or expense will be deemed to be the amount payable by the Seller to the Purchaser and the Company in terms of this clause 14”*. From the construction of the aforementioned clauses, I do not read the intention of the parties to have been that a claim for indemnity should be made before any loss was suffered or ascertainable.

2nd respondent also found that applicant was not denied any information which it would have required in order to make an informed decision. He also found that all the details that were reasonably necessary to enable applicant to make a consideration of the relevant issues and the attendant risk were availed by the 1st respondent. In light of the 2nd respondent’s findings, I failed to appreciate the relevance of section 12 of the Labour Act to which my

attention was drawn. I do not see how the findings of the 2nd respondent can be faulted in this regard. I find no merit in the submission.

Failure to properly address the substantive issues of non-disclosure and breach of warranty

Applicant's contention is that 1st respondent's failure to make full disclosure constituted a gross violation of its contractual obligations. It had the onus of proving that full disclosure had been made, but it chose not to call any witness. That failure to make full disclosure in turn resulted in a breach of the warranties that 1st respondent had made under the agreement. 2nd respondent made the following pertinent observations, regarding 1st respondent disclosure obligations:

- “30.1 That the labour strength, including the employees whose contracts of employment were not renewed on the 30th of August 2013 was disclosed to Rio Gold during the due diligence exercise. However, the letter which disclosed the status of these employees was not brought to the personal attention of Mr Nkomo by auditors who had received during the due diligence exercise.
- 30.2 That disclosure was undertaken prior to the completion or even the effective date of the contractual agreement for the purchase and sale of shares in Palatial. It was made during the due diligence exercise.
- 30.3 That therefore, neither Mr Nkomo nor the auditors requested the contracts of employment in respect of the 800 plus employees. Mr Nkomo could not have requested for these contracts because the letter disclosing them never came to his personal attention. The auditor to whom the letter was addressed is not alleged to have requested for the contracts. The necessity for the request was not spoken to by the auditor. To the extent that Mr Nkomo indicated that the contracts were requested. He could not have been saying the truth. He personally was not aware of the existence of the letter and therefore any such request would not have been done by him and if it was done, he was not informed.
-
- 30.5 There was therefore fair disclosure as contemplated by clause 10.4 of the contract. The details, facts and circumstances that were reasonably necessary to be disclosed in order for Rio Gold to make a proper appreciation and consideration of the relevant issue and attendant risk were heard by Falcon Gold.” (Underlining for emphasis).

The finding by the 2nd respondent that there was fair disclosure as contemplated by the agreement is unassailable. The 2nd arbitrator was influenced in his conclusion by the evidence that was placed before him. I agree with the submission by 1st respondent's counsel that the applicant failed to point out to any flaws in the 2nd respondent's findings on the alleged non-disclosures and the breach of warranties. The flaws in the applicant's case can be attributed to the manner in which it set out its claim in the founding affidavit. The claim was pleaded in a manner which leaves one wondering whether it was meant to be a repeat of the proceedings before 2nd respondent.

As regards the failure to disclose the potential claim by NSSA and the status of the of the Dalny Mine Village, the 2nd respondent found that “*There was no declaration of dispute, in terms of the contractual agreement in respect of the potential claim by NSSA or the claim in respect of expenses incurred for the caring of employees who could not occupy Mine houses*

*within the Dalny Mine village to the place of employment on account of the houses having been occupied by persons who claimed to be employees of Falcon Gold*²⁶. The 2nd respondent then further remarked that *“Accordingly, the sine qua non provided for in the contractual document, for liability, that is the declaration of a dispute and its reference to arbitration”* had not been fulfilled. 2nd respondent found himself constrained to deal with those issues under the circumstances. The 2nd respondent also found that no claim had been made by NSSA. Applicant suspected that NSSA may make a claim together with the employment council and other regulatory bodies arising from the 813 employees. The arbitrator then concluded that *“As a matter of fact therefore, it has not been proven in this arbitration that Falgold knew that it had not paid NSSA levies. I cannot therefore make a finding in favour of Rio Gold in the absence of any evidence of the existence of the fact. To do so would be to err”*²⁷

While the applicant alluded to these matters in the founding affidavit, still it failed to demonstrate in what way the 2nd respondent’s conclusion offended public policy so as to justify the setting aside of the award. I accordingly find that this submission is devoid of merit and it is dismissed.

Irregularity in the finding that the claims exceeded US\$4 million and could not be awarded

Applicant submitted that the finding that the indemnity sought was above \$4 million and therefore could not be granted was a serious error of law which went beyond mere faultiness. 2nd respondent ought to have awarded an amount which fell within the permissible limit applicant was entitled to under the agreement. In his findings, 2nd respondent reasoned that: *“if any liability should attach to Falcon Gold, such liability would be limited to a claim for the sum of \$4 000 000.00. Accordingly, therefore, the present claims by Rio Gold were in excess of the limitation of liability clause.”*²⁸ He however concluded that there had been no loss suffered by the applicant as a result of the alleged non-disclosure of material facts in breach of the warranties.

I did not read the 2nd respondent’s finding to mean that he declined to grant the indemnity on account of the fact that it was above the US\$4 million cap. He declined to grant it on the basis that applicant had not suffered any loss as a result of the alleged non-disclosures. That conclusion was reached on the basis of the evidence that was before him. I did not find

²⁶ Paragraph 30.8 of the award on page 54 of the record.

²⁷ Paragraph 44 of the award on page 60 of the record.

²⁸ Paragraph 30.6 of the award on page 54 of the record.

any fault with that conclusion to warrant that his decision be set aside on public policy grounds. The submission is without merit and must be dismissed.

Failure to properly interrogate the evidence placed before the tribunal

Mr *Mpofu* submitted that it was anomalous for the 2nd respondent to rely on the untested testimony of the 1st respondent and reject the evidence of the applicant's witness, Nkomo. Mr *Tivader* on the other hand submitted that Nkomo was any party's witness. He came and said everything that the parties wanted to hear, and it was left to the 2nd respondent to evaluate his evidence. The failure by 1st respondent to call any witness did not escape the 2nd respondent's attention. He addressed the issue as follows:

“25. It is important to underline the legal principle which applies where one party elects to lead evidence and the other does not. This principle was set out in the old case of **Siffman v Kriel** 1909 TS 538 where the court said that:-

“It does not follow, because evidence is not contradicted, that therefore it is true. Otherwise the court, in cases where the defendant is in default, would be bound to accept any evidence the plaintiff might tender. The story told by the person on whom the onus rests may be so improbable as not to discharge it.”²⁹

2nd respondent went on to cite the case of *Sheka Brothers v Besta*³⁰, which confirms the same principle and concluded by saying:

“In the circumstances therefore, the fact that the evidence led on behalf of Rio Gold was not contradicted by evidence led by Falcon Gold, because the latter did not lead any evidence but was content to simply challenge the evidence of Mr Bheki Nkomo through cross examination does not necessarily give any advantage to Rio Gold at all. The evidence must be assessed to see if it is sufficient, together with other evidence led for the Claimant to discharge the onus upon the Claimant.”

Having reached that conclusion on the law, the 2nd respondent went on to comment on the deportment of the witness as follows:

“30.10 A final conclusion must be made in respect of the demeanor of Mr Nkomo in his evidence. He did not answer questions in a manner that supported the claim. In cross examination he made statements which supported the case for the Respondent. He came out agitated when pressed on critical issues. While he was candid in his answers on questions of fact, he disagreed with the conclusions which can be drawn from his evidence.”³¹

With all due respect, I do not see how the 2nd respondent's analysis of the law on the uncontested evidence of a witness is reproachable. I have failed to find fault with his overall assessment of the demeanour of the witness and the credibility of his testimony. I am also not

²⁹ Paragraph 25 of the award on page 41 of the record

³⁰ 1952 (3) SA 664 (A) where at 670E Greenberg JA said:

“The evidence of these two witnesses, as was to be expected, has not been contradicted by any evidence led on behalf of the defendants, but this fact does not relieve the plaintiff of the obligation to discharge the onus resting on him”

³¹ Paragraph 30.10 of the award on page 54 of the record.

persuaded by Mr *Mpofu's* argument that first respondent's reliance on the testimony of the applicant's witness meant that it failed to discharge the onus reposed upon it. In evaluating Nkomo's testimony, 2nd respondent found that the answers that he gave under cross examination actually supported the 1st respondent's case.³² This court cannot interfere with the 2nd respondent's finding in that regard. His conclusions cannot be construed to be so gross as to constitute an affront to public policy. The court finds no merit in this submission.

CONCLUSION

It is this court's finding that the applicant has failed to set out a solid basis for the setting aside of the arbitral award on the basis that it is contrary to public policy. The approach of the courts in applications of this nature has always been to adopt a more restrictive interpretation of public policy in order to preserve the integrity of the arbitration process and its objectives. In *ZESA v Maposa* GUBBAY CJ, further stated as follows:

"In my opinion, the approach to be adopted is to construe the public policy defense, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objectivity of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. This is illustrated by dicta in many cases, of which the following is impressive:

In *Paklita Investment Ltd v Klockner East Asia Ltd*, reported in (1994) 19 Yearbook of Commercial Arbitration 664, the Supreme Court of Hong Kong remarked at 674:

"The public policy defence is construed narrowly and I deprecate the attempt to wheel it out on all occasions. As the US Court of Appeals for the 2nd Circuit said in *Parsons & Whittemore v RAKTA* 508 F 2d 969 (2d Cir 1974):

'...the convention's public defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice''³³

It is my finding that the applicant failed to demonstrate that the award is against public policy, or let alone show that the reasoning and conclusions of the second respondent were wrong in fact or in law. The complaints relied upon do not satisfy the threshold for the setting aside of an award on public policy grounds, more so considering the mix-up in the applicant's pleadings that I alluded to earlier on.

COSTS

Respondents sought the dismissal of the application with costs on the higher scale of attorney and client. The general rule is that the costs follow the event, and a successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the manner in which litigation was conducted. An award of costs on the attorney and client

³² Paragraph 30.12 of the award on page 55 of the record.

³³ *Supra* at page 465

scale is not lightly granted by the court and the tendency is to do so on rare occasions. Those occasions include cases where the conduct of a litigant necessitates such an award. Even though I have grave concerns with the manner in which the applicant pleaded its case, I am not persuaded to dismiss the application with an order of costs on the higher scale. I have also considered that counsel for the 1st respondent did not advance reasons to support the claim for costs on the higher scale.

DISPOSITION

Accordingly, it is ordered as follows;

1. The application is dismissed.
2. Applicant shall pay 1st respondent's costs of suit.

Wintertons, legal practitioners for the applicant
Atherstone & Cook, legal practitioners for 1st respondent