ABSALOM NGANUNU SIBANDA
versus
NA JING ZHOU RESOURCES AFRICA (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 11 June & 31 August 2016

Opposed Matter

D Sigauke, for applicant
S Banda, for respondent

TAGU J: This is an application for registration of the arbitration award in terms of Article 35 of the Model Law, Schedule to the Arbitration Act [*Chapter 7:15*] to enable the applicant to enforce the same. The facts giving rise to this application are that the applicant instituted proceedings against the respondent before the Honourable Arbitrator Justice MH Chinhengo, (former Judge) claiming inter alia repayment of the outstanding amount, interest and bank charges on the loan the applicant obtained for respondent's benefit from Stanbic Bank, refund by respondent of the amount he had paid to Stanbic Bank towards the loan and costs of the arbitration proceedings on attorney –client scale including the arbitrator's fees. The claim and arbitration proceedings were pursuant to an Agreement entered into between the parties in September 2013.

The respondent is opposed to the registration of the said award on the grounds that it is contrary to public policy. The argument advanced by the respondent being that it was not open for the arbitral tribunal to rewrite a contract between the parties. See *Magodora* v *Care International* SC -24-14; *Wesley* v *South African Alumenite Company* 1927 AD 69 and Christie: *The Law of Contract in South Africa* (3rd ed.) at pp14-15.

In casu, the gist of the agreement between the parties is to be found in clauses 6 and 7 of the agreement. The clauses read as follows:

> **"6. REPAYMENT**
> NJZ Africa hereby undertakes to prioritize the repayment of the said sum of USD250 000 with interest thereon including administration and establishment fees (at the rate charged to Sibanda by the bank or financial institution) amortized over a maximum period of (12) twelve months from the date of availability of the loan to NJZ Africa.
> **7. ROUTING OF REPAYMENT FUNDS**

> NJZ Africa undertakes to open an export receipts account with Stanbic Bank to enable the Bank to directly deduct loan re-payments against NJZ Africa iron ore export proceeds to off-set Sibanda's personal loan with the bank."

The respondent submitted that there is no way in which it could be interpreted that before the proceeds from the said iron ore exports had been realised, the debt could become due and payable. It said therefore, that it was an affront to public policy that the learned arbitrator, with respect, proceeded to read into the agreement terms which were never agreed upon, not least purport to enforce them.

THE LAW

Recognition and enforcement of an arbitral award will only be refused on public policy ground if 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. Article 36 (3) of the Model Law, namely Schedule to the Arbitration Act [*Chapter 7:15*] provides guidance on what constitutes public policy. It reads:

> "For the avoidance of doubt and without limiting the generality of paragraph (i)(b)(ii) of this article, it is declared that the recognition and enforcement of an award would be contrary to 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."

The subject of public policy *viz a viz* the recognition and enforcement of arbitral awards was conclusively expounded in the classical case of *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (SC) where GUBBAY CJ had this to say at pages 465-466-

> "In my approach the opinion to be adopted is to construe the public policy defence as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize the basic objectives of finality in all arbitration and to hold such defence applicable only if some fundamental principle of the law or morality is violated.
>
> An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.
>
> Under Article 34 or 36 the court does not exercise an appeal power and either uphold or set aside or decline to recognise 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 inequality 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."

See also *Beezley No* v *Kabell and Anor* 2003 (2) ZLR 198 (S), *City of Harare* v *Harare Municipal Workers Union* 2006 (1) ZLR 491 (H) and *Godfrey Tatenda Gurira and Ors* v *Zimbabwe Council for Higher Education and Ors* HH-217-15.

The question that then arises *in casu* is whether the conclusion by the learned arbitrator that the loan which at any rate respondent had admitted being liable to pay was due and payable and not repayable from export proceeds, was not only incorrect or faulty, but was a manifest injustice that is shockingly bad and unendurable in our civilized society.

In paragraphs 5 and 12 of his arbitral award the learned arbitrator gave a detailed interpretation of the agreement. In my view the arbitral award sought to be registered and enforced by the applicant is very sound at law and well-reasoned. It cannot be faulted, let alone be impugned or deemed to constitute or palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards. No sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award. Its recognition and enforcement would not be contrary to public policy. The honourable arbitrator was very alive to the very fact that a written contract should be given its true meaning. In his disposition in para 12 of his award, the honourable arbitrator said-

> "The terms of the agreement are clear and unambiguous. They must be given effect. Both parties have referred to the authorities that make it clear that a written contract must be given its true meaning and effect."

This therefore demonstrated beyond doubt that the learned arbitrator did not rewrite the terms of the agreement between the parties. What he did was merely to interpret and enforce it.

The opposition to registration and enforcement of the arbitral award is a clear abuse of the process of this court, deserving of censure through an order against respondent for costs on attorney-client scale.

At the hearing of the application the applicant applied to file an amended draft order which application was not opposed by the respondent.

It is therefore ordered as amended that:

1. The arbitral award granted by the learned Arbitrator, Justice MH Chinhengo (former Judge) on 30th November 2015 in favour of the Applicant against the Respondent be and is hereby registered as an order of this Honourable Court.
2. Accordingly, it is declared that in terms of the Agreement entered into between the parties in September 2013, the respondent was obliged to pay the bank the loan obtained for its benefit by the applicant, together with interest thereon and other bank charges.
3. The respondent shall pay the applicant, by way of reimbursement, all the amounts that the applicant has paid or shall pay to Stanbic Bank in respect of the loan obtained by him from the Bank for the benefit of the respondent
4. The respondent shall pay to Stanbic Bank the outstanding, amount on the loan or may at its option pay that amount to the applicant. If the respondent pays the outstanding loan amount direct to the Bank, it shall be discharged from paying the same amount to the applicant.
5. The respondent shall pay the three quarters of the claimant's legal costs on the scale as between legal practitioner and client and shall also pay the arbitrator's fees.
6. The respondent shall pay the costs of this application on attorney –client scale.

Musengi & Sigauke, applicant's legal practitioners
Messrs J Mambara & Partners, respondent's legal practitioners