JOSEPH TAPERA AND 17 OTHERS
versus
FIELD SPARK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 4 April 2013

Opposed Application

L.M. Chimutashu, for the applicants
Ms B.S. Nhliziyo, for the respondents

MATHONSI J: This is an application for registration of an arbitral award made by arbitrator N.M. Tichiwangana on 6 February 2012 which award remains extant. The application is opposed by the respondent and the thrust of such opposition is contained in para 4 of the opposing affidavit of Peter Matemba which reads;

> "The quantum of damages payable to the applicants is strongly disputed by the respondent. The respondent failed to timely (*sic*) submit its submissions for quantification of damages in issue. The award referred to was only granted in default. Subsequently, the respondent filed an application for rescission of default judgment before the arbitrator. The application is still pending. In light of this, the present chamber application is premature as the applicants were duly served with the application for rescission of default judgment. In-stead of responding to the application for rescission of default judgment the applicants chose to register to prematurely register the award (*sic*) which has the potential of being adjusted if the application for rescission of default judgment is successful."

I find myself having to repeat what I stated in *Greenland* v *Zimbabwe Community Health Intervention Research Project (Zichre)* HH93/13 at p 3, that;

> "A party which finds itself faced with an arbitral award it is challenging should take advantage of the provisions of s 92 E (3) of the Labour Act [*Cap 28:01*] which empowers the Labour Court to make an interim determination for the stay or suspension of an arbitral award. Where the award has not been stayed or suspended in terms of s 92 E (3) and remains extant, this court will, as a matter of principle,

register the award for enforcement unless there are grounds for not doing so as provided for in Article 36 of the model law contained in the Arbitration Act [*Cap 7:15*]."

Article 36 of the Model Law provides that recognition or enforcement of an arbitral award may only be refused at the request of the party against whom it is invoked if that party shows the court proof that;

1. A party to an arbitration agreement was under some incapacity or the agreement was invalid under the law to which the parties subjected it to or under the law of the country where the award is made.
2. The party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case.
3. The award deals with a dispute not contemplated or not falling within the terms of reference to arbitration.
4. The composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place;
5. The award has not yet become binding on the parties or has been set aside or suspended by a court of law.
6. The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe or recognition or enforcement will be contrary to the public policy of Zimbabwe.

The grounds for opposition set out by the respondent, which I have reproduced above, are not covered by Article 36. It is myopic for the respondent to think that an application for rescission of judgment submitted to the arbitrator, who clearly is *functus officio* and cannot reverse his own decision, can prevent the registration of an arbitral award which is extant. The respondent should have sought the suspension of the award.

There is therefore no merit in the opposition. In result I make the following order, that.

1. The arbitral award of N.M. Tichiwangana dated 6 February 2012 is hereby registered as an order of this court.
2. The respondent shall pay the applicants the respective sums set out in that award totalling the sum of US$38 851-00.