

POMELO MINING (PVT) LTD
versus
ANNANDALE TRUST
and
ADDINGTON BEXLEY CHIKOMBORERO CHINAKE N.O

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 29 November 2018 & 23 January 2019

Opposed Application

R.R. Nyapadi, for the applicant
T.S. Manjengwah, for 1st respondent
No appearance for 2nd respondent

MUZOFA J: The applicant and the first respondent entered into a joint venture agreement ‘the agreement’ to explore, prospect, extract and beneficiate minerals. The first respondent was the registered owner of the entire issued share capital in a company known as Beatrice Mine (Pvt) Ltd “the company”. In terms of the agreement, the applicant was the primary financier. Clause 4.1 of the agreement provided that upon signing of the agreement the applicant was to advance a loan to the company in the sum of \$500 000 in defined tranches for the completion of phase one of the project. In terms of Clause 4.4 upon payment of the initial loan the first respondent was to off load 74% of the shares in the company to the applicant so that the shareholding structure was 26% for the first respondent and 74% for the applicant. After the completion of phase one, the applicant was supposed to advance to the company a sum of \$4 000 000-00 (four million dollars) for capital and working capital requirements to commence and complete phase two of the project. The applicant provided the initial \$500 000 and the 74% shares were duly transferred to it. When phase one was complete, the first respondent alleged that the applicant failed to provide the \$4 000 000 -00 for the second phase. The first respondent subsequently cancelled the agreement on account of the breach. A dispute thereafter arose as to

whether there was a breach of the agreement. The dispute was referred to arbitration in terms of the agreement. The second respondent was the appointed arbitrator.

The parties appeared before the second respondent and the applicant raised preliminary issues challenging the appointment or suitability of the second respondent. The preliminary points were dismissed. In the main the second respondent confirmed the cancellation of the agreement and granted the consequential relief. The applicant, dissatisfied by both the procedural and substantive findings by the second respondent, filed two applications with this court HC 4914/18 in terms of article 13 of the Arbitration Act (*Chapter 7:15*) 'the Act' and HC 9967/18 in terms of article 34 of the Act. The first respondent also filed an application for registration of the arbitral award in terms of article 35 of the Act. By consent of the parties the three matters were consolidated. This judgment therefore relates to the three matters and HC 4914/18 shall be treated as the main matter and parties shall be referred accordingly.

At the hearing of this matter the applicant raised a preliminary issue that the first there was no first respondent before the Court. It was submitted for the applicant that the deponent to the first respondent's opposing affidavit was not properly authorized to represent it. Applicant insisted on the production of the first respondent's Trust Deed to verify whether the alleged trustees who authorized the deponent to the first respondent's affidavit were indeed trustees. Further that one HRJ Skinner said to be a trustee was not properly appointed therefore he could not authorize the deponent to represent the applicant. Mr. Manjengwah for the first respondent attempted to sanitize the process by explaining over the bar that the other trustee had resigned in April 2017 it became necessary to appoint another trustee.

The Trust Deed and a document confirming the appointment of HRJ Skinner as a trustee were produced. The Trust Deed has two trustees Martin Meyer Miedler 'Miedler' and Lionel Arthur John Skinner. Nothing was produced to show that Miedler had resigned. The document produced is vague it is worded,

'16th June 2017

A meeting was held at No 3 Thornburg Avenue, Harare to appoint Mr. HRJ Skinner as a trustee of Annandale Trust.

Mr. H.R.J Skinner resides at No 236, Dandaro, Borrowdale, and Harare.

The trustees are therefore Mr. L.A.J. Skinner and Mr. H R J Skinner.'

It was then signed by the said trustees. The letter leaves two things to conjecture, was it the resolution appointing HRJ Skinner or not, who were the participants in that meeting? However it was not specifically denied by the first respondent that HRJ Skinner took part in his appointment. That being the case, I accept that the appointment process was flawed and therefore his appointment was null and void. LAJ Skinner therefore cannot rely on a resolution that was not properly made. I note in passing that the Trust Deed provides that in the event that one trustee remains, it is competent for that one trustee to appoint trustee(s) clause 7.2 thereof. That should not be the end of the matter; the Court should satisfy itself whether it is truly the applicant that is litigating. It is trite that the principles applicable to Corporations on representation do not apply to Trusts see *Mafirambudzi Family Trust v Madzingira and others* HH 338/18. The court should ask itself if indeed LAJ Skinner is representing the applicant.

The court accepts that a Trust may be sued in its name in terms of O 2 r 7 and 8 of the High Court Rules. A trustee can represent a trust by virtue of his position as a trustee. The Court has to satisfy itself that it is the Trust that is pursuing the matter. LAJ Skinner is a trustee in terms of the Trust Deed. That should cloth him with the authority to represent the applicant. It was submitted for the applicant that LAJ Skinner did not indicate that his authority is derived from being a trustee but that his authority is derived from the resolution. Since he was not properly authorized the matter should be dismissed on that basis. I do not agree with the submission, it is clear from the Trust Deed that LAJ Skinner is a trustee and the Court cannot just disregard that fact. Even if it is not specifically indicated in the affidavit that the authority is derived from the fact he is a trustee, the Trust Deed confirms so and he can therefore ably represent the applicant. Secondly the applicant and the first respondent's relationship dates back to November 2014 when the agreement was signed. LAJ Skinner represented the first respondent and all the obligations placed on the first respondent were to be undertaken by LAJ Skinner. The applicant did not question LAJ Skinner's authority then. It is my considered view that even discarding the inadequate authorization through the resolution which is not applicable to Trusts, LAJ Skinner has authority to represent the applicant by virtue of being a trustee. The Court is satisfied that it is the applicant litigating in this matter. The preliminary point is dismissed.

In HC 4914/18 the applicant requests this court to decide on the challenge brought before the second respondent which was dismissed. According to the applicant's founding affidavit the

second respondent was not properly appointed as an arbitrator in terms of clause 14 of the agreement, he lacked the qualifications agreed to by the parties , he was compromised in the arbitration proceedings and that the first respondent's legal practitioners were conflicted.

The first respondent denied all the allegations raised by the applicant. In its pleadings the first respondent stated that notice was given in terms of the agreement and the applicant was aware of the referral to arbitration, that the second respondent possessed the required qualifications, that the second respondent was not compromised the applicant failed to substantiate its claim of bias and that the perceived conflict of interest in respect of first respondent's legal practitioners is not relevant to this application. Nothing was filed for the second respondent.

Where a party seeks to challenge a tribunal, Article 13 of the Act provides for the challenge procedure. Parties are at large to agree on a procedure to challenge an arbitrator. In the absence of such an agreement a party who intends to challenge an arbitrator shall do so within fifteen days after becoming aware of the constitution of the arbitral tribunal. Where such a challenge is made the arbitral tribunal shall decide on the challenge. In terms of subsection (3) thereof in the event that the challenge is dismissed the aggrieved party may request this court to decide on the challenge. A reading of that article implies that the challenge is exclusively meant to challenge the arbitral tribunal only. Applicant's challenge that first respondent's legal practitioners are conflicted is not provided for in terms of article 13 and therefore irrelevant for the purposes of this application as correctly pointed out for the first respondent. I shall deal with the issues raised in the application.

Whether adequate notice was given in terms of the agreement

Clause 14 of the agreement provides,

'In the event of any dispute, claim or disagreement of whatever nature or however arising in relation to the agreement contained herein, the aggrieved party shall be entitled, after giving the other party seven days notice, to refer the matter to the Commercial Arbitration Centre in Harare

14.1 the President for the time being of the Centre shall appoint an arbitrator to hear the dispute...."

The applicant alleged that it was not given the seven days notice. The first respondent alleged that the notice was given in November 2017. In any event a challenge in terms of Article

13 of the Act should be confined to the grounds as set out in Article 12 (2) of the Act. I did not hear Mr *Nyapadi* controvert this submission. The wording of Article 12 (2) implies that an arbitrator may be challenged only where there are doubts in respect of his impartiality, independence or does not possess qualifications as agreed by the parties. See *Mukuruva v Hon Ms E Mganyani and Anor* HH 87/17. The challenge based on the time lines that parties agreed to does not fall within the contemplation of the said article.

Even if the court were to assume for a moment that the challenge is within article 12 (2) of the Act, the applicant still has no case. It is not in dispute that on 23 November 2017 the first respondent's legal practitioners wrote a letter to the applicant's legal practitioners. In that letter the first respondent expressed its intention to cancel the agreement due to the breach of agreement. The last paragraph of the letter indicated,

“In the event that your client disputes the cancellation of the joint venture Agreement, please kindly let us know so that we may refer the matter to the Commercial Arbitration Centre for the appointment of an arbitrator.”

By letter dated 30 November 2017, the applicant's legal representatives replied and indicated that there has always been a dispute regarding the breach and noted,

“We thus advise that you proceed in terms of the agreement.”

In essence the response by the applicant's legal practitioners shows that there was a dispute and the first respondent was at liberty to refer the matter to arbitration. The letter dated 23 November 2017 coupled with the first respondent's response was notice that the matter will be referred to arbitration. It is not envisaged that a notice should be elegantly drafted; a notice is simply that, to advise the other party of the intended referral. The first respondent cannot allege that it was not aware that the matter was to be referred to arbitration anytime after the lapse of seven days from the 30th of November 2017. The first respondent referred the matter to arbitration on the 13th of December 2017 when the seven days had lapsed. The first arbitrator was appointed on 15 December 2017. The court accepts that adequate notice was given to the applicant in terms of clause 14 of the agreement.

Whether the second respondent possessed the qualifications agreed by the parties.

The applicant submitted that the pleadings filed of record show that the parties agreed to appoint a retired judge to arbitrate over the dispute between the parties as provided for in Art 11

(2) of the Act. For the first respondent it was submitted that the parties did not agree to such qualifications and alternatively the parties engaged on the appointment of a retired judge but did not agree.

In the agreement the parties agreed that the sitting President of the Commercial Arbitration Centre ‘the Centre’ shall appoint an arbitrator to hear the dispute. No specific qualifications are provided. The agreement has a variation clause which provides that any variation of the agreement shall be binding only if reduced to writing and signed by each of the parties. The applicant contended that clause 14 was varied but the court was not shown the signed variation. The pleadings show that the matter was referred to the Centre and the President appointed Mr Lloyd on 15 December 2017 to arbitrate. There was no engagement or talk of a retired judge then, even as far back as November 2017 when the applicant was put on notice about the referral. According to the second respondent, he was appointed on 26 January 2018. This was properly done in terms of the agreement. On 30 January 2018 the applicant’s legal representatives wrote to the first respondent’s legal representatives advising that their client preferred a retired judge to preside over the matter. At the time the applicant engaged the first respondent with a view to have a retired judge appointed the second respondent had been appointed in terms of the agreement. The communications between the parties show that the parties engaged but no agreement was reached. There is no variation to talk about firstly because the parties did not reduce anything into writing as per the agreement secondly the engagements were not conclusive. The parties did not therefore agree to any qualifications. The second respondent was appointed in terms of the agreement.

Impartiality of the second respondent

In evaluating bias or partiality on the part of an arbitrator the applicable test is an objective one. The question is whether there is a real likelihood of bias, whether a reasonable or right thinking man would believe that there was such likelihood. The court does not have to consider the subjective circumstances of the arbitrator that he could still conduct himself partially where some improper conduct is shown to exist. In *EBA Zimbabwe (Pvt) Ltd v Old Mutual Unit Trusts (Pvt) Ltd and Another* HH 556/09 Patel J (as he then was) cited the case of *International Airport Authority of India v Bali & Another* (1988) LRC (Comm) 583 at 587-588 wherein the court elaborated the approach to be taken that ,

“It is well said that once the arbitrator enters into arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; the arbitrator must not do anything which is not in itself fair and impartial.

It is well settled that there must be a real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceedings is disqualified by interest. ... There must be reasonableness in the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on the mere apprehension of any whimsical person.

The apprehension should not be remote or far- fetched it must be real to a reasonable man. The onus is on the applicant to demonstrate such bias. In this case the following issues were raised.

- That the second respondent is currently engaged by NSSA as its legal practitioner, NSSA is interested in 51% of the shares in Beatrice Mine (Pvt) Ltd.
- That one Vela the NSSA Chairperson then offered to buy the shares and is a friend to the second respondent.
- That the second respondent refused to release the audio recording of the hearing of May 10, 2018.
- That the second respondent did not respond to the applicant’s objections and the legal representative’s correspondence raising issue with his appointment.

In response the first respondent denied the allegations.

- That NSSA did not intend to buy the shares in Beatrice Mine (Pvt) Ltd, the minute produced show that alternative funding partners were being engaged.
- That the applicant failed to show that Vela and the second respondent were friends. In any event there is no evidence that Vela had offered to buy the shares. The dispute between the applicant and the first respondent relates to the breach of contract and not the sale of shares.
- That the audio file was irrelevant to the proceedings and thus the application for its production was correctly dismissed.

It is common cause that neither NSSA nor Vela was before the second respondent. A reading of the minutes wherein NSSA was referred to, in my view does not confirm that NSSA was interested in 51% of the shares in the company. It is recorded at p 95 of HC9967/18 that;

“Mr. Holme asked whether Annandale had other funding options that had not been shared with Pomelo. Mr LAJ Skinner confirmed that there had been discussions with the NSSA Fund and that these discussions had been shared with Pomelo verbally.”

The minutes do not show any interest by NSSA in the 51% shares as alleged. The funding model was not disclosed whether it was by way of a loan or acquisition of the shares. The minutes do not show that the discussions had materialized into something tangible. In my view even if the respondent was NSSA’s legal representative, the issue about NSSA’s interest is remote and fanciful to be relied upon to establish bias.

It is indeed correct that the minutes indicate that NSSA was being engaged for funding. In its submission before the second respondent the first respondent actually submitted that Vela had offered \$7 000 000 for the shares in the company. The offer was made on the 23rd of August 2017 there was no evidence that Vela was still interested. The applicant submitted that Vela and the second respondent were friends. It was challenged to provide the basis of the submission before the second respondent but nothing was produced except that as NSSA’s legal practitioner it used to get instructions from Vela. That in my view is not enough to establish the friendship as alleged. That was just a professional association. In the absence of further information on Vela and second respondent’s personal association I find it difficult to believe that the friendship was established. Even before this Court I did not find anything to suggest that Vela and the second respondent were very good friends. This is an allegation based on conjecture and is not sustainable. I noted that at one point the first respondent alleged that Vela did not make the offer for the \$ 7 million but JCI. There is a contradiction there, but nothing turns on it, the bottom line is that it was not shown that Vela is a good friend to the second respondent. In any event in its written submission before the second respondent, in paragraph 7.4.1 the applicant unconditionally withdrew the suggestion that second respondent was a good friend of Vela.

Indeed the objective test is premised on the mythical uninterested bystander’s impression after hearing the facts. In my view the facts set out should have substance; there must be some veracity in the facts. Bias cannot be based on suspicions or some spurious allegations otherwise

adjudicators may cease to function. In this case NSSA had no vested interest in the outcome of the arbitration process, at least from the facts before the court. There was therefore no likelihood of bias on the part of the second respondent even if he was professionally linked to NSSA. The friendship with Vela was not shown. I find no merit in the point.

The audio recording

According to the applicant the pre-arbitration hearing of 10 May 2018 was audio recorded by the second respondent. The applicant requested for the recording, the request was declined. The audio recording was important to the applicant so that it may know and confirm what transpired in order to furnish its counsel with the particulars of the hearing. Applicant said such refusal was extremely unreasonable and dubious. No further information was provided to substantiate applicant's conclusion.

I agree with first respondent's submissions, the refusal is of no relevance. The applicant does not allege anything that transpired at the pre-arbitration hearing that substantiates the second respondent's bias as alleged. There is no allegation that the written ruling did not capture the true essence of the proceedings or that it is inadequate without the audio recording. I find nothing in the refusal to provide the audio recording to support the bias alleged. Nothing turns on this point.

Response to objections

Applicant submitted that it wrote letters to the second respondent objecting to his appointment but no response was received from second respondent therefore there was a likelihood of bias.

In terms of Article 13 (2) of the Act, within fifteen days of becoming aware of the constitution of the arbitral tribunal or after becoming aware of circumstances set out in Article 12 (2) an aggrieved party is at liberty to send a written statement of the reasons challenging the tribunal. Where the arbitrator does not withdraw from such office the arbitral tribunal shall decide on the challenge.

It is on record that the applicant raised issues with the arbitral tribunal, the second respondent. In his ruling in respect of the preliminary points he clearly indicated that he gave

directions for parties to appear twice but the applicant did not appear. On the third pre-arbitration meeting the applicant appeared and formally presented its objection.

I do not read article 13 (2) to oblige an arbitrator to respond to the written statements of objections without hearing parties. In this case it is not evidence of bias for the second respondent to require the parties to appear and formally be heard on the preliminary objections. It is still within the tenets of the *audi alterem partem* to hear both parties. I do not see how the failure to respond is a show of bias. In terms of Article 13 (2) the second respondent was obliged to decide on the challenge. The second respondent decided to hear both parties before making a determination and I cannot fault him for the procedure adopted.

After an analysis of all the factors raised by the applicant, it is clear that the general impression is that there was no likelihood of bias. The second respondent's decision cannot be impugned.

In HC 9967/18 the applicant challenges the arbitral award in terms of Article 34 of the Act that the applicant was unable to present its case that the arbitral procedure adopted was not as agreed by the parties and the model law, that the award is against the public policy of Zimbabwe and that the arbitrator may have been corruptly induced.

Article 34 (2) (a) (ii) gives this court power to set aside an award where a party was unable to present its case. In terms of Article 25 (b) where respondent, without sufficient cause fails to communicate its statement of defence the arbitral tribunal shall continue with the proceedings.

In this case it is evident from documents filed of record that after the second respondent dismissed the preliminary points raised by the applicant; he gave directions on how the matter should proceed. The applicant was to file its response/statement of defence by no later than 4.00 pm on 28 May 2018. Instead of doing so, the applicant filed an urgent chamber application with this court seeking a stay of the arbitral proceedings, which was within its rights to do. On 11 July 2018 the application was dismissed. That meant the matter was to proceed before the second respondent. Apparently the second respondent had set down the matter for trial on 11 July 2018 at 9.00 a.m the date the urgent chamber application was heard. Parties appeared before the second respondent and the matter was postponed to 16 July 2018 by consent. It is in dispute whether this was for trial or not. That issue is not relevant in the determination of this point. The

applicant wrote to the second respondent objecting to the fact of the notice of set down for trial. It indicated that its legal practitioner of choice would be before the High Court in an urgent matter and therefore would not be able to attend the arbitration proceedings at the appointed date and time. True to its letter there was no appearance for the applicant on 16 July 2018 neither was there a statement of defence filed.

Article 18 and 19 of the Act provides the fundamental procedural aspects of the proceedings before an arbitral tribunal. Parties must be treated equally and should be given full opportunity to present their cases pursuant to the right to be heard. Procedurally the parties are at liberty to agree on the procedure to be followed in the absence of such an agreement, subject to the model law the arbitral tribunal may conduct the proceedings in such a manner as it considers appropriate. The tribunal can exercise its discretion as long as parties present their cases fully.

The applicant filed a request for further particulars on 18 June 2018, well after the date within which it was supposed to file its statement of defence. Apparently the first respondent did not file any response but wrote a letter to the applicant declining to provide such further particulars. I will revert to the request for further particulars in due course. The applicant was aware of the date of 16 July 2018 wherein it was supposed to appear. The arbitral tribunal's sittings are of equal power and force. They are not supposed to be disregarded simply because applicant was appearing before the High Court. The applicant did not even seek the arbitral tribunal's indulgence for a postponement in its letter or even by appearance. It is common practice that even if a letter is written it is mandatory that a party either in person or through its legal representative appears to make a formal application for a postponement. Failure to appear before an arbitral tribunal has its attendant legal consequences. Before this court the applicant argued that everyone has a constitutional right to be represented by a legal practitioner of its choice. That is the correct position of the law. That right does not give a litigant the right to disregard proceedings or not comply with directions. It is within the arbitral tribunal's powers to give directions which are generally designed to expedite the proceedings in accordance with his arbitral brief and in particular , with the provisions of Article 25(d) of the Model Law which empowers him to ' give directions ,with or without conditions , for the speedy determination of the claim'.

Since the applicant did not request for a postponement, there was no way the second respondent could have granted a postponement. The applicant was given an opportunity to present its case but it snubbed it, it cannot cry foul before this court. It was for the applicant to appear on 16 July and seek a postponement or make a case based on its request for further particulars. There was no one to motivate the request for further particulars and I cannot hold the second respondent to task for not considering the request for further particulars. Indeed the award does not indicate that a request for further particulars was made. However the determinant factor is not that, the determinant factor is that the applicant did not appear on 16 July to motivate its case. The arbitral tribunal would not have had any option but to proceed with the matter.

There was no good and sufficient cause for the applicant not to act to protect its rights.

In its heads of argument the applicant included numerous issues to bolster its case. That the award misrepresented that applicant was present. This is irrelevant, it is clear in the body that the applicant was not in attendance. That the applicant and its legal practitioner's names are on the face of the award cannot be construed strictly to mean they were in attendance.

The applicant referred to the correct position at law on the status of a request for further particulars *NEC Construction Industry v Zimbabwe Nonteng International (Pvt) Ltd* SC 59/15 and how a response to such should be made, it cannot be by way of correspondence *Allied Bank Ltd v Celeb Dengu & Another* SC 52/16. The fact that the applicant had requested for further particulars did not entitle it or cannot be a good and sufficient reason not to appear before the second respondent. In the absence of the proper filing of the further particulars the applicant had options available to it to pursue, it chose not to. The applicant was given opportunity to present its case and unilaterally decided not to be heard.

The second challenge is in terms of Article 34 (2) (a) (iv) that the arbitral procedure was not in accordance with the parties' agreement and the model law. In its heads of argument applicant literally threw in a lot more contentions that there were no reasons for the award, that there was no notice of the second respondent's appointment, that the *audi alterem partem* rule was not observed. I have addressed most of the issues in this judgment, the applicant was given notice. The second respondent set out the basis for proceeding in the absence of the applicant on page 17 of the record the last paragraph thereof, the second respondent recorded.

“No papers have been filed on the merits for and on behalf of the respondent (applicant herein). Respondent also willfully absented itself from the resumed hearing that had been set down by the consent of the parties’ respective legal practitioners of record. Respondent has chosen to keep its case (if any) to itself.”

In my view that paragraph shows that the applicant did not appear and the second respondent found that the non appearance was willful. That should be sufficient for the purposes of arbitration to show the reason why the process proceeded. Although some elaboration could have helped but it cannot be said there were no reasons. The applicant alleged that there was no notice of the second respondent’s appointment. It is evident that such notice was given. The applicant’s letter dated 30 January 2018 to Wintertons confirms such notice to have been given the first paragraph noted;

“we refer to the email from the commercial arbitration centre to your office and ours dated January 17 and 23, 2018 respectively.”

The email referred to is the notice from the Centre. In its heads of argument the applicant said it did not participate in the appointment of the second respondent. Indeed the applicant did not participate because the parties agreed that the Centre through its President shall appoint an arbitrator. It is trite that Courts do not make contractual terms for parties; its role is to hold each party accountable according to the agreed terms. On the right to be heard, this court has disposed of that issue. There is no merit even on those numerous points raised under article 34 (2) (iv) of the Act.

The third challenge is that the award violates the public policy of Zimbabwe because the second respondent ordered cancellation of the contract and no restitution was ordered. Applicant underscored the principle of restitution in integrum that a party cancelling an agreement is obliged to tender back what it received from the guilty party on the authority of *Hall-Thermotenk Natal (Pty) Ltd v Hardman* 1968 (4) SA 818 (D).

Article 34 (5) (b) provides that an award is against public policy if it breaches rules of natural justice. Numerous cases have amplified what public policy entails. In *ZESA v Maposa* 1999 (2) ZLR 452 referred to by the first respondent GUBBAY CJ (as he then was) said it is where;

“some fundamental principle of law or morality or justice is violated”

and at 466 E – H the court cautioned;

“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.”

In *Peruke Inv (Pvt) Ltd v Willoughbys Inv (Pvt) Ltd and Another* SC 11/15 the court said the public policy ground should be applied in the most glaring instances of illogicality, injustice or moral turpitude’ and also that

“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.”

The two cases are authority that the courts will not lightly interfere with an award on the grounds of public policy unless the award or its effects offends the roots of the concept of justice or morality in Zimbabwe.

In this case the applicant’s basis is that the first respondent did not offer restitution. I note that in fact when the first respondent cancelled the agreement on the 23rd of November 2017 offered to tender the amount invested into company, although the amount was not explicitly stated. In its claim before the second respondent the first respondent did not offer such restitution. In all the cases I have had recourse to on restitution there is no authority for the position that where an innocent party does not tender restitution, the claim cannot succeed. It is for the aggrieved party to counter claim restitution in the absence of such an offer.

The facts of this case remain in dispute as to whether the money paid to the company was a loan or meant to purchase the shares. The issue was not before the Court for determination. However, what the agreement shows is that the company was separate from the applicant and the first respondent. The first respondent initially held 100% of the shares in the company. The applicant was to advance an initial loan to the company of \$500 000 which would result in applicant getting 74% of the shares in the company. It is not in dispute that the money was paid and shares issued. It is the act of advancing the loan to the company that gave applicant entitlement to the shares. The further \$4 000 000 (four million dollars) was also a loan to the company. The loans were to be repaid in terms of clause 4.6. The shares were therefore issued to the applicant in terms of the agreement. The money paid was not to buy shares but a loan to the

company. *Prima facie* therefore there was nothing gained by the first respondent. The second respondent properly addressed the issue before him as to whether there was a breach. There is ample documentary evidence showing that the applicant failed to provide the \$4 000 000 for the second phase of the project in terms of the agreement. For instance on 16 August 2015 the first respondent by letter highlighted the breach and requested that the applicant remedy the breach, this was not done. Thus on 23 November 2017 the first respondent cancelled the agreement. I find nothing against the public policy of Zimbabwe. The agreement was cancelled in terms of the agreement.

Although in the applicant's affidavit the fourth challenge was in terms of Article 34 (2) (b) (ii) as read with article 34 (5) of the Act there were no further submissions to demonstrate that the award was induced by fraud or corruption. It was just a bare allegation which cannot be considered further. The application should be dismissed in its totality.

In HC 7290/18 the first respondent seeks the registration of the award issued by the second respondent.

In its opposing affidavit the first respondent raised a preliminary issue that HC 4914/18 the challenge in terms of Article 13 (3) should be heard first. The matter has been disposed of herein. It also raised issue on the authority of the LAJ Skinner to represent the applicant that has also been disposed of herein. On the merits the first respondent raised the issue that it was not heard. That issue I have addressed in this judgment and therefore cannot stand in the way of registration. That the award is against public policy, the issue has been dismissed. In essence the grounds for opposing registration were raised in HC 4914/18 and HC 9967/18 which applications I have disposed of in this judgment. There is no legal basis to disallow the registration of the award.

As a rule, costs follow the cause and courts do not easily accede to a prayer for an award of costs beyond the ordinary scale. The rule may be departed from where the unsuccessful party's conduct has been unreasonable see *Borrowdale Country Club v Murandu* 1987 (2) ZLR 77 (H).

In HC 9967/18 the first respondent requested for costs on a higher scale. No basis was laid for such a request. There is no evidence of unreasonableness or some reprehensive conduct

by the applicant. Similarly in HC 4914/18 there is no evidence of abuse of court process it was within the applicant's rights to approach the court. The applicant's conduct before the first respondent indeed left a lot to be desired but that cannot be said of its conduct before this court.

From the foregoing the following order is made.

1. The application under HC 9967/18 be and is hereby dismissed with costs.
2. The application for setting aside of the arbitral award HC 4914/18 is hereby dismissed with costs.
3. The arbitral award issued by the Honourable Mr ABC Chinake dated the 1st of August 2018 be and is hereby registered as an order of this court.
4. The cancellation of the Joint Venture Agreement between applicant and the first respondent was lawful and the said cancellation is hereby confirmed.
5. The applicant shall sign all and any documents that may be necessary to facilitate the return to the first respondent the 74% shares currently registered in its name and held in the JV Company within seven (7) days of the date hereof, falling which the deputy sheriff shall be entitled to sign such documents on its behalf;
6. The applicant shall remove its Directors from the Board of Directors of the JV Company within seven (7) days of the date hereto; falling which their appointment be and is hereby set aside with effect from the 8th day of August 2018 and the Deputy Sheriff shall be entitled to sign such documents on their behalf.
7. The first respondent shall pay the costs of and incidental to the Arbitration on the scale utilized in the High Court for contested litigation matters.
8. That respondent shall pay costs of this application.

Muza and Nyapadi, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners

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HH 33-19

HC 4914/18

REF HC 7290/18 & HC 9967/18