FIDELITY GOLD REFINERY (PVT) LTD
versus
CURECHEM OVERSEAS (PVT) LTD

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 26 March & 4 April 2025

Opposed Application

Mr *W Diara*, for the Applicant
Mr *T G Mboko,* for the Respondent

MHURI J: This is an Application for Registration of an Arbitral award in terms of article 35 of the Arbitration Act [*Chapter 7: 1 5*] as read with Rule 50 of the High Court Rules SI 202/ 2021.Applicant seeks an Order in the following terms:

> 1. The application for the registration of the arbitral award dated the 28th of May 2024 in favour of the Applicant be and is hereby granted.
> 2. Respondent be and is hereby ordered to pay to the Applicant USD 552 281.91 (Five Hundred and Fifty-Two Thousand Two Hundred and Eighty-One and Ninety-One Cents).
> 3. The amount referred to in paragraph 2 above shall be payable in United States Dollars or in the local currency at the rate applicable on the date of payment.
> 4. Respondent be and is hereby ordered to pay the Applicant's costs of the arbitration including reimbursement of the Applicant's share of the arbitrator's fees being USD2500 (Two Thousand Five Hundred Dollars). The costs of the arbitration are to be paid on the ordinary scale.
> 5. Respondent to pay costs for this Application on a legal practitioner and client scale.

At the commencement of the hearing, Respondent raised two preliminary points to the effect that the award was compromised and that the Applicant is seeking an appeal rather than registration of an arbitral award.

BACKGROUND FACTS

The Applicant and the Respondent entered into a Mining Inputs Supply Agreement dated 5 January 2020 in terms of which the Applicant, agreed to prepay to the Respondent for the procurement of an assortment of chemicals and other products which are used in the mining and processing of gold ore by small scale miners. The agreement was for one year and it

expired on the 6 January 2021. The Respondent was appointed to be the Applicant's agent to issue out the procured chemical products to small scale miners in the manner the parties had stipulated. All chemical products procured and held by Respondent remained the property of the Respondent until such chemicals were collected by the small-scale miners in terms of the voucher system that had been specifically laid out by the parties. The parties agreed to submit their dispute to arbitration. Pursuant to the agreement the Applicant paid to Respondent a sum of US$ 1 551 045.00 which money was used to procure chemicals in readiness to disburse to small scale miners that had been identified by the Applicant. Between the period of 6 January 2020 to 27 May 2020 chemicals worth US$ 954 243.79 were drawn down by small scale miners that had been identified by the Applicant as deserving of such draw down. Chemicals valued in the sum of USD 596 801.21 remained unutilised and in possession of the Respondent. After expiry of the contract on the 6 January 2021 a dispute for the chemicals that remained unutilised and in possession of the Respondent was brought before an arbitrator Advocate T.W. Nyamakura in terms of the arbitration clause. The arbitrator issued an award in favour of the Applicant ordering Respondent to pay to the Applicant US$ 552 281.91 (Five Hundred and Fifty-Two Thousand Two Hundred and Eighty-One and Ninety-One Cents).

This is an application for registration of the said award.

Respondent raised two preliminary points to the effect that:

1.The award was compromised.

2.The Applicant is seeking an appeal rather than registration of an arbitral award.

Respondent Submissions on the preliminary points as raised.

The first preliminary point that was raised by the Respondent was that the award has been compromised. Respondent submitted that after the granting of the arbitral award parties engaged with the view of settling the matter. These negotiations were in good faith and are binding on the parties. It submitted that the invitation to settle was on a without prejudice basis but the negotiations that followed were not on a without prejudice basis. It averred that two payments in the local currency have been made to the Applicant's bank account. However, it submitted that after these payments had been made the Applicant demanded payment in United States Dollars and threatened to return the payment made. The Respondent submitted that once an agreement has been entered into it constitutes a compromise and the relationship between

the parties is no longer being governed by the award. It relied on the case of *Golden Beams Development (Pvt) Ltd* v *Fredson Munyaradzi Mabhena* HH296/21, to submit that where a compromise has been made parties cannot rely on the Court Order but rather on the settlement.

The second preliminary that was raised by the Respondent was that the Applicant is seeking an appeal against the award and not registration. It was its argument that by demanding payment in US$ in one of the emails, the Applicant was seeking an appeal against the award which awarded payment in US$ or local currency equivalent. It also submitted that registration is for purposes of enforcement and that where an award is being complied with, there is no basis to seek its registration. It emphasised that the Court will deal with live disputes and not for academic purposes. It prayed that the matter be dismissed.

Applicant's Submissions on the Preliminary Points

In response to the first point in *limine*, the Applicant submitted that the entirety of the correspondence on which the Respondent seeks to rely on is privileged information and therefore is inadmissible. To substantiate its point, it relied on the case of *Enterprises Swanepoel S.A.* v *Rhine Sports Investments (Private) Limited* HH 169-18. He further submitted that the submission by the Respondent that other emails were not on a without prejudice basis does not make sense because the subject matter and names of the parties in subsequent discussions had not changed hence privilege did not cease. He also submitted that there was no compromise that was reached between the parties because the last email from the Applicant's legal practitioners was never responded to by the Respondent's legal practitioners therefore it remained an unrequited offer which does not constitute an agreement. He further submitted that this goes to show that the negotiations began but they never ended. Applicant prayed that the preliminary point be dismissed.

In response to the second point in *limine*, Applicant submitted that it won't belabour the point as it does not make sense in light of what is being sought in the Draft Order.

The Law and Analysis

The question before the Court is whether or not the Award has been compromised.

Enterprises Swanepol S.A. v *Rhine Sports Investments (Pvt) Ltd* HH 169/18, MANGOTA J held as follows:

> "I reiterate that, if a letter is written *without prejudice,* as the respondent's letter showed, the rule of thumb is that it is privileged. It cannot, therefore, be used in court as evidence."

In the case of *Kazingizi and Another* v *Equity Properties (Pvt) Ltd* HH 797- 15 the court held that:

> "As a general rule, statements that are made expressly or impliedly on a without prejudice basis in the course of *bona fide* negotiations for the settlement of a dispute will not be allowed in as evidence: *Naidoo* v *Marine & Trade Insurance Co Ltd* 1978 (3) SA 666."

The phrase without prejudice was described in the case of *Enterprises Swanepol S.A.* v *Rhine Sports Investments (Pvt) Ltd* (supra) wherein reference was made to *Tapper, Colin, Cross & Tapper on Evidence,* 10th Edition, London: Lexis – Nexis, 2004 p 497 as follows:

> "As part of an attempt to settle a dispute, the parties frequently make statements without prejudice. When this is done, the contents of the statement cannot be put in evidence without the consent of both parties…. The statements often relate to the offer of a compromise and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. Obviously, it is in the public interest that disputes should be settled and litigation reduced to a minimum so the policy of the law has been in favour of enlarging the cloak under which negotiations may be concluded without prejudice."

In *casu,* the Respondent argued that the invitation to settle dated 16 September 2024 was the only one on a without prejudice basis and that the other negotiations that followed were not privileged. I do not agree. It is common cause that the email dated 16 September 2024 that set the ball rolling inviting the Applicant to negotiate a settlement was written "on a without prejudice" basis. I find that the negotiations that followed were still on a without prejudice basis due to the fact that the Applicant's emails were in response to the respondent's email dated 16 September 2024.Also the subject matter and the parties in the subsequent discussions had not changed. The privileges therefore could not cease. The evidence that the Respondent seeks to rely upon as the basis for the allegation that the award has been compromised is privileged and therefore inadmissible. In the result, there is no evidence on which this Court can competently find that the award was compromised by the parties. The point is meritless as a result it cannot be upheld.

In response to the second point in *limine* the Applicant submitted that the point in *limine* does not make sense in light of what is being sought in terms of the Draft Order.

I will not delve into the second point in *limine* in detail as the application and Draft Order do not speak to an appeal at all. This point is meritless as well and is not upheld.

Applicant's submissions on the merits

Applicant submitted that it has fulfilled the requirements for the registration of the arbitral award in terms of Article 35 of the Model Law. It further submitted that no grounds exist in terms of Article 36 of the Model Law on which this Court may refuse the registration of the award. Finally, it submitted that the Respondent's opposition to this application is merely a dilatory tactic and constitutes a patent abuse of court process that warrants an award of admonitory costs against the Respondent. It also submitted that it is apparent that the procedure contemplated in Article 35 is largely administrative and is the mechanism by which arbitral awards are enforced in this country. Hence, he has approached this Court for registration of an Arbitral Award.

Respondent's Submissions

It is noted that the Respondent completely abandoned its ground of opposing the application that the award was against public policy. He came up with a new ground and submitted that in terms para 2 of the Draft Order Applicant is seeking payment in full, despite payments already made. It was Respondent's contention that the Application does not adhere to Article 35 of the Model Law in that there is a condition for registration for enforcement purposes. Thus, the award is not being submitted for enforcement purposes. Respondent further submitted that there is no live dispute between the parties. It was Respondent's submission that there must be finality to litigation hence the fact that Applicant has accepted some payments in enforcing the award means Applicant cannot now apply for the registration of the award. In substantiating their argument reliance was made on the case of *Christine Wangayi* v *Jestinah Mudukuti* HB 155-17.

The law

The Court's role in considering an application for registration of an arbitral award was enunciated in the case of *Matthews* v *Craster International (Private) Limited* HH 707/ 15. The Court had this to say:

> ". . .an application for the registration of an arbitral award is largely an administrative process. Whilst in such an application the court is not really being called upon to rubber stamp the decision of an arbitrator, nonetheless, it is largely giving that decision the badge of authority to enable it to be enforceable. If the court is satisfied that the award is regular on the face of it, and that it is not deficient in any of the ways contemplated by articles 34 and 36 of the Arbitration Act, then the court will register it."

1n *Vasco Olympic & 4 Ors* v *Shomet Industrial Development* HH-191-12 the Court clarified the requirements that must be met in order for it to be satisfied that the award sought to be registered is regular. In particular it opined as follows:

> "In an application such as the present one, this court is not required to look at the merits of the award. All that is required of this court is that it must be satisfied itself that the award was granted by a competent arbitrator, that the award sounds in money, that the award is still extant and has not been set aside on review or appeal and that the litigants are the parties of the subject of the arbitral award. There must also be furnished, a certificate given under the hand of arbitrator."

From the various precedents, the requirements can be distilled as follows:

a) The award must have been granted by a competent tribunal.

b) The award must sound in money.

c) The award is still extant and has not been set aside on review or appeal.

d) The litigants are the parties to the award.

e) The award must be certified as an award of the arbitrator.

An arbitral award maybe set aside if it is against public policy. The leading case on the application of public policy in Zimbabwe is the case of *Zimbabwe Electricity Supply Authority* v *Maphosa 1999 (2) ZLR 452* (S), where at 453 D-E the Court defined an award that is contrary to public policy as follows:

> "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. 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 consequences apply 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."

This case was followed in *Peruke Investments (Private) Limited* v *Willoughby's Investments (Private) Limited & Anor* SC 11/15 where the court held that courts are generally loath to invoke public policy as a ground for setting aside an award unless in the glaring instances of illogicality, injustice or moral turpitude. See also *Groupair (Pvt) Ltd* v *Cafca Ltd and Anor* HH 606/15 and *Wei Wei Properties (Ltd)* v *S & T Export and Import (Pvt) Ltd* HH 336/13.

Analysis

In relation to the first requirement, it is common cause that Advocate T.W. Nyamakura was the competent arbitrator who discharged his duties in handing the award.

The second requirement for registration of an arbitral award is that; the award must sound in money. It is also undisputed that the award sounds in money.

Regarding the third requirement, it is clear that the award remains extant and has not been set aside on review or appeal.

The fourth requirement, is that the litigants are the parties to the award. From the arbitral award it is clear that the litigants before me are the same parties to the award.

Lastly, the arbitrator authenticated the award as being his award when he appended his notarial seal thereto.

It is my considered view that Applicant has satisfied all the requirements for the registration of the arbitral award.

The next issue that remains after having considered the above requirements is whether there are any grounds upon which this Court should refuse to register the award.

Article 36 of the Model Law provides for the sole grounds upon which this court may refuse to recognize or enforce an arbitral award. It provides as follows:

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only—
>
> (a) ……
>
> (i) ……
>
> (ii) ……
>
> (iii) ……
>
> (iv) ……
>
> (v) ……
>
> (b) if the court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of *Zimbabwe*.
>
> (2) ……..

(3) For the avoidance of doubt and without limiting the generality of paragraph (1) (b) (ii) of this article, it is declared that the recognition or 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 test to be applied in determining whether an award is in conflict with the public policy of Zimbabwe was set out by the Supreme Court in *Alliance Insurance v Imperial Plastics (Private) Limited* SC30/17 which cited with approval the case of *Zesa* v *Maposa 1999 (2) ZLR* 452 (S) at 466E-G said:

> "An arbitral 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 correctness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

These remarks ought to guide the Court in determining whether the award granted is contrary to public policy. Respondent claimed that the award violates the public policy of Zimbabwe because the Arbitrator failed to appreciate its defence. It is my considered view that the award was made after the Arbitrator had made factual findings considering the evidence placed before him. Hence the Court respects these findings. An arbitral award is binding in nature and the courts are loathe to interfere with awards (see *Amalgamated Clothing and Textiles Workers Union of South Africa* v *Veld Spum (Pty) Ltd* 1994(1) SA162(A). The mere faultiness of an award is not a defense to an application for registration of an award see *MCR Vengesai & Anor* v *Zimbabwe Manpower Development Fund* HH752-16 at p 6.

From the foregoing it is apparent that Respondent failed to establish that the award is contrary to public policy, which may halt its registration. In his oral submissions, the Respondent did not address me on this ground as stated earlier, he totally abandoned it and argued on new grounds.

Disposition

In the result it is ordered that:

1. The application for the registration of the arbitral award dated the 28th of May 2024 in favour of the Applicant be and is hereby granted.

2. Respondent pays the Applicant USD 552 281.91 (Five Hundred and Fifty-Two Thousand Two Hundred and Eighty-One and Ninety-One Cents).

3. The amount referred to in paragraph 2 above shall be payable in United States Dollars or in the local currency at the rate applicable on the date of payment.

4. Respondent pays the Applicant's costs of the arbitration including reimbursement of the Applicant's share of the arbitrator's fees being USD2500 (Two Thousand Five Hundred Dollars). The costs of the arbitration are to be paid on the ordinary scale.

5. Respondent pays costs for this Application on a legal practitioner and client scale.

MHURI J…….

Coghlan, Welsh & Guest, Applicant's Legal Practitioners
Mboko T.G Legal Practitioners, Respondent's Legal Practitioners