

BUFFELS VALLEI 375 (PTY) LTD
versus
LOURENS MARTHINUS BOTHA (SNR)
and
LOURENS MARTHINUS BOTHA (JNR)
and
SITHEMBINKOSI NCUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 21 JULY 2016 AND 28 JULY 2016

Opposed Application

Ms V Chikomo for the applicant
S Siziba for the respondents

MATHONSI J: Registration of an arbitral award or its recognition for purposes of enforcement can only be refused upon the person against whom it is invoked satisfying the court of the existence of grounds of refusal set out in Article 36 of the Model Law in the Arbitration Act [Chapter 7:15]. See *Tapera and Others v Fieldspark Investments (Pvt) Ltd* HH 102/13; *Wei Wei Properties (Pvt) Ltd v S & T Export and Import (Pvt) Ltd* HH 336/13.

The grounds for refusal of recognition or enforcement of an arbitral award sets out in Article 36 are;

1. A party to an arbitration agreement was under some incapacity or the agreement was invalid 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.

By an order of this court granted by consent in HC 644/15, the dispute involving the parties was referred to arbitration as a result of which the parties agreed to appoint Promise Ncube as arbitrator. He made an arbitral award on 22 July 2015 and another one on 20 January 2016 quantifying what was to be paid to the applicant by the respondents as ZAR 13 403 620-00.

The applicant has made this application for registration of the award in terms of Article 35 of the Model Law for recognition of the arbitral award for purposes of enforcement. The application is resisted by the respondents firstly on the ground that registration has been sought prematurely considering that the arbitrator is still to arbitrate on other disputes between the parties. Registration should not be sought “in a piece-meal fashion” but should be sought when all the disputes have been resolved.

Secondly as the ancillary issues yet to be determined have a bearing on the relationship between the parties to the extent that they may result in the applicant being required to pay the respondent’s costs, the registration of the award already made should be stayed until such time that the ancillary issues have been adjudicated upon. There is really not much distinction between the two grounds for opposition. It is really one and the same thing.

The respondents also challenged the applicant’s claim for costs of registration of the award because registration of an arbitral award is a procedural step incidental to enforcement. Costs of registration should therefore not be for the account of the respondents.

In my view there is no merit in the opposition to registration except to the extent of the claim for registration costs. The basis of opposition relied upon by the respondents is not one of those set out in Article 36. It cannot be a ground for refusal to recognize an award that there are other issues still to be determined which involve the same parties. What cannot be disputed is that the award sought to be registered is complete on its own and is therefore registrable. This court will always register an award issued by an arbitrator unless the person against whom it is

invoked can satisfy any one of the grounds set out in Article 36. The respondents have not done so.

Regarding the claim for costs of registration I agree with Mr *Siziba* for the respondents that costs for registration of an arbitral award should not be borne by the respondents. I can only repeat what I stated in *Duri v Mbada Diamonds (Pvt) Ltd* HH 627/15 which I still stand by. I stated:

“Indeed quite often applicants for registration of arbitral awards seek costs of making the application with some even demanding costs on the admonitory scale. It occurs to me that the process of registration of an arbitral award is merely administrative and arises out of expediency given that arbitrators do not have the wherewithal to enforce their awards. It arises out of need in order that the award may then be executed using the mechanism available at this court. For that reason, there is no reason for the costs of an application for registration to be borne by the respondent as if it is the respondent who has caused the application to be made in the first place. If the arbitrator, or indeed the Labour Court, could issue writs for the execution of their awards or orders, there would be no need for an application for registration to be made. The application has to be made to this court because of a *lacunae* that exists in the law of this country, the legislature having omitted to provide for enforcement mechanism. I know that applicants for registration would argue that if the award is complied with there would be no need for registration. I am however of the view that it is not enough to justify an award for costs of an application occasioned by a gap left by the legislature not attributable to the respondent. For that reason, unless there is something more that is caused by the conduct of the respondent, like filing opposition when such should not be filed at all, there should be no award of costs for registration.”

In this case the respondents had to file opposition because a claim for costs was made. They cannot be penalized for that because they were entitled to contest that claim. For that reason each party has to pay its own costs.

In the result, it is ordered that:

1. The arbitral award by Arbitrator Promise Ncube is hereby registered as an order of this court for purposes of enforcement.
2. The respondents shall pay to the applicant the sum of R13 403 620-00 together with interest at the prescribed rate calculated from 20 January 2016 to date of payment.
3. Each party shall bear its own costs.

Majoko and Majoko, applicant's legal practitioners
Phulu and Ncube, respondents' legal practitioners