WIDE FREE (PVT) LTD t/a CORE SOLUTIONS

versus

MEIKLES LTD

HIGH COURT OF ZIMBABWE

MUREMBA J

HARARE, 23 February 2018 & 16 May 2018

**Opposed Application**

*S.M Hashiti,* for the applicant

*M Tshuma,* for the respondent

MUREMBA J: This is an application for registration of an arbitral award as an order of this court for purposes of enforcement in terms of Article 35 (1) of the Arbitration Act [*Chapter 7:15*]. The arbitral award was obtained following the referral of a commercial dispute between the parties for arbitration. The award orders the respondent to pay the applicant US$1 492 970.88, interest, applicant’s costs of the arbitration and the arbitrator’s fees. It was granted on 26 May 2017 by Honourable Moses H. Chinhengo. Attached to the founding affidavit as an annexure are the detailed reasons for the award given by the Honourable arbitrator. In his reasons he gives a detailed narration of what transpired throughout the arbitration proceedings from the time they commenced in November 2015 up to the time he granted the award in May 2017. His narration is more or less the same as the narration that is given by the applicant in its answering affidavit in response to the respondent’s opposing affidavit.

In its opposing papers the respondent averred that this court should not register this arbitral award in terms of Article 36 (1) (a) (ii) and v; 1 (b) (ii) as read with Article 36 (3) (b) and Article 36 (1) (v). It averred its reasons as follows.

1. *The award is not yet binding on the parties*

The respondent averred that it filed an application for the review of the matter in this court under HC 3266/17 for the setting aside of the whole arbitral award process and that matter is still pending. It was filed in April 2017 and as it is the applicant which is the respondent in that review application filed its notice of opposition out of time and is yet to regularise its defective process which it is taking long to do after being given fair warning to make right its default. The respondent suspects that the applicant is delaying in purging the default in order to ensure that it gets the award registered first. The respondent averred that if its application for review succeeds the registration of the award would have been a futile exercise as it will be set aside. In short, the respondent wants registration suspended pending determination of the review application.

1. *The respondent was not able to present its case to the arbitrator before the award was made*

The respondent averred that it was denied an opportunity to present its case before and by the arbitrator in that on 16 March 2017 during the hearing the arbitrator exhibited clear and prejudicial bias against it. An application for the recusal of the arbitrator was made but was refused with reasons to follow. It approached this court for review in terms of s 26 of the High Court Act [*Chapter 7:06*]. The arbitrator refused an application for the postponement of the hearing pending the furnishing of the reasons for dismissal of the application for recusal and the availability of its witness who was not in attendance. The arbitrator proceeded in terms of Article 25 (c) after telling the respondent’s counsel that they could excuse themselves as he was proceeding in default. That could not have been the intention of the legislature for the hearing to proceed in default. Despite a letter having been written to the arbitrator requesting for the reasons of the recusal he did not furnish same. The award was granted in default and should not be recognised for registration purposes because it can cause serious financial problems to the respondent. A decision should be made on the merits of the matter. The application for postponement of the matter was denied in an injudicious manner. The decision to proceed in terms of Article 25 (c) while the respondent’s counsel was in attendance was not proper.

1. *Recognition and enforcement of the award will be contrary to Public Policy or there was a breach of the rules of natural justice.*

The respondent averred that the recognition of this award is contrary to the public policy of Zimbabwe in the sense that when it was made, there was a blatant breach of the rules of natural justice by the arbitrator and this seriously prejudiced the respondent. The arbitrator did not conduct himself in a manner that did not show disinterest or impartiality. He had formed prejudicial conclusions about the respondent’s employee who was yet to come before him to give evidence on behalf of the respondent. This made the respondent lose all confidence in the arbitrator. An application for the recusal of the arbitrator was made in terms of Article 12 (2) as read with Article 13 (2) of the Arbitration Act and it was dismissed with reasons to be availed later. The arbitrator then ordered the hearing to proceed with the full knowledge that the respondent’s witness was not available. An application for a postponement pending the supply of reasons for dismissing the application for recusal and the availing of the witness was again dismissed. The hearing proceeded in terms of Article 25 (c) of the Act despite the respondent’s counsel being present, before he excused himself. The respondent was denied the opportunity to rebut the evidence relied upon to make the award. The arbitrator was thus biased against it and denied it the opportunity to be heard. The *audi alteram partem* rule, that is, the ‘hear both sides’ rule was not observed and the *audiatur el altera pars* principle which means‘no man should be condemned unheard’ was not observed. The award should therefore not be recognised.

The respondent averred that, but for the default, the award would not have been

granted. The respondent went on to point out where the arbitrator arrived at wrong findings. It said that had it been given a full opportunity all those issues would have come out clearly. It averred that these issues could not be ventilated because the arbitrator decided to proceed in terms of Article 25 (c). The breach of the rules of natural justice resulted in the granting of the award following wrong findings which were made by the arbitrator in default of the respondent. Should this court recognise and enforce the award, the respondent will suffer irreparable harm. It has been asked to pay $1 492 970.88 to the applicant, which is a huge amount. The respondent can be pushed out of existence thereby bringing to a halt the lives of millions of innocent Zimbabweans who are earning a living through its existence. The respondent has already paid all that it was contractually supposed to pay had the applicant delivered in terms of the contract of which it did not, so it was overpaid.

The respondent further averred that recognition and enforcement of this award will be contrary to public policy considering the way it was procured. This is a matter which cannot be sufficiently dealt with by the arbitration process, but by this court (High Court). The issues should be dealt with holistically in a public setting. The respondent further averred that it was never happy with the arbitrator from the beginning i.e. the way he was appointed and how he handled the matter. Justice must not only be done, it must be seen to be done. The applicant is seeking to reap where it did not sow. The Government had without the applicant paid the respondent as per the RBZ Debt Assumption Bill. Public Policy does not allow people to get undeserved credit. The respondent averred that a recognition and enforcement of this award will perpetuate the breach of the rules of natural justice and it will be a denial of justice to it. Its constitutional right to equal protection of the law and its rights to property would be greatly impaired.

In its answering affidavit the applicant made the following averments and gave the background facts of this matter as follows. On 27 December 2013 the parties entered into an agreement with the respondent mandating the applicant to facilitate the repayment of a debt due to it by the Reserve Bank of Zimbabwe. It was a term of the agreement that any dispute arising between the parties in connection with the agreement would be resolved through arbitration. After a successful completion of the mandate by the applicant, a dispute arose regarding how applicant was to be remunerated whether in treasury bills or in cash. For close to a year the dispute could not be resolved as the parties adopted diametrically opposed views. Consequently, the applicant approached the Commercial Arbitration Centre for the appointment of an arbitrator. Resultantly on 11 November 2015, the Honourable Mr Moses Hungwe Chinhengo was appointed as arbitrator by the Commercial Arbitration Centre. Subsequently, a pre-arbitration meeting was held on 19 November 2015. Time lines within which to file pleadings were set and agreed upon by the parties.

On 24 November 2015 the applicant filed its statement of claim with the arbitrator and served a copy on the respondent. The claim was for a payment of US$2 077 436.00 being the principal commission together with interest arising from successfully carrying out its mandate and recovering applicant’s long overdue debt from the Reserve Bank of Zimbabwe of

US$90 861 092.33. In response the respondent filed a preliminary point taking issue with the procedural appointment of the arbitrator, arguing that the agreement between the parties stipulates that the Commercial Arbitration Centre shall appoint an arbitrator where parties are unable to appoint one, that in the circumstances the parties had never attempted to appoint a mutually preferred arbitrator and were unable to reach an agreement. A hearing was conducted and on 15 December 2015, the arbitrator dismissed the preliminary point. Despite this, the respondent sat on its laurel and did not file its opposition to the claim despite knowing that the matter was continuing. On 27 January 2016, the applicant beseeched the arbitrator to finalise proceedings. On the other hand, the respondent applied for stay of proceedings on the basis that it had filed a High Court application for review in terms of Article 13 of Arbitration Act [*Chapter 7:15*]. It was argued that although the application for review had been filed, it did not meet the grounds stated in Article 12 which is a precursor to an Article 13 application. The respondent conceded and withdrew the incompetent High Court application. On that same day the arbitrator dismissed the respondent’s application for stay of proceedings and ordered the respondent to file its opposition to the merits of the claim by 9 February 2016. The matter was supposed to be heard on 17 February 2016. Thereafter the respondent filed another High Court application in HC 1032/16 arguing that the appointment of the arbitrator was *ultra vires* the provisions of the arbitration clause in the agreement and that the arbitrator’s ruling dismissing the application that he recuses himself from hearing the matter was contrary to the public policy of Zimbabwe. At about the same time, the respondent filed an urgent chamber application in HC 1107/16 in this court for stay of arbitration proceedings. Both applications failed. As these matters were being determined the respondent expressed its intention to resolve the matter amicably and the parties mutually agreed to suspend arbitration proceedings in order to come up with a settlement. However, the respondent kept on bidding for time until the applicant realised that it was being taken for a ride. The respondent found excuses to stall the matter until March 2017 by giving endless excuses which ranged from unavailability of its attorney to unavailability of its witnesses. When the matter was finally dealt with on 16 March 2017 it was after the respondent had requested for that date. However, on 14 March 2017 the respondent had another excuse why the matter could not proceed on 16 March 2017 namely, that its witnesses would be in South Africa. It was proposed to the respondent that the matter be dealt with on the papers but that proposal was turned down.

On 16 March 2017 the respondent’s counsel finalised cross examination of applicant’s witness at about mid-day and applicant closed its case. The matter was stood down to 1400 hours in order to allow respondent to lead its evidence after its counsel had failed to contact representatives of his clients through the phone. At 1400 hours the respondent’s counsel came back armed with correspondence which showed that the respondent’s witness Mr Tabani Mpofu had been invited to a meeting on that day at the Attorney General’s Office. The letter was used as the basis for the unavailability of the respondent’s witness. This was now a different reason from the one proffered previously that the witness would be in South Africa on that day. It was argued on behalf of the applicant that the respondent was merely being dilatory. However, it was eventually agreed that the matter be postponed. Again the parties could not agree on a mutually convenient date until the applicant insisted that in the absence of good cause shown, the matter be rolled over to the following day, 17 March 2017. The arbitrator ruled that in the absence of good cause shown, the matter would proceed on 17 March 2017 and that should good cause be shown on 17 March, the matter would be postponed to 3 April 2017. On 17 March 2017, no good cause was shown but nonetheless the respondent was further indulged and the matter was postponed to 3 April 2017. Realising that the day of reckoning was imminent, the respondent wrote a letter to the Commercial Arbitration Centre claiming that the arbitrator had already formulated on opinion over its witness Mr Tabani Mpofu who was yet to appear before the tribunal. Apparently it is Mr Tabani Mpofu who wrote that letter. The letter was followed up by an application for recusal of the arbitrator. The application was dismissed with the respondent being afforded a chance to prosecute its defence, but again the respondent chose not to avail its witness the same Mr Tabani Mpofu. Naturally the law took its course and the matter proceeded in terms of Article 25 of the Arbitration Act. The arbitrator then made a decision on the basis of the pleadings filed by both parties and the evidence led by applicant’s witness which evidence or testimony was subjected to cross examination by respondent’s counsel.

Thereafter the respondent filed an application under HC 3266/17 to review the decision of the arbitrator dismissing the application for recusal. Same was opposed, but no answering affidavit was filed. Consequently, the applicant moved for the dismissal of that application for want of prosecution under HC 5711/17. The applicant attached a court order which regularized its opposing papers in HC 3266/17. It further averred that the respondent’s allegation that the award is contrary to the Public Policy of Zimbabwe cannot be sustained in the circumstances. The arbitration was carried out in terms of the law and the respondent’s tricks to stall proceedings and throw spanners in the whole process are a huge exercise in futility. The applicant further averred that no proper grounds have been put across to justify claims that the arbitral award is not binding on the parties, nor that it is contrary to the Public Policy of this country. An order for the registration of the award can be properly granted as prayed for.

*The Law and its application*

Registration of an arbitral award of this nature is made in terms of Article 35 of the Arbitration Act [*Chapter 7:15*] which provides that one must make an application in writing to the High Court for its registration. Article 36 of the said Act lays down a host of grounds upon which this court may refuse to grant an order for the registration of an arbitral award. The Article provides as follows.

“Article 36

*Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may

be refused only—

(*a*) at the request of the party against whom it is invoked, if that party furnishes to the court where

recognition or enforcement is sought proof that—

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said

agreement is not valid under the law to which the parties have subjected it or, failing any

indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of

an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the

submission to arbitration, or it contains decisions on matters beyond the scope of the submission

to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated

from those not so submitted, that part of the award which contains decisions on matters

submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the

agreement of the parties or, failing such agreement, was not in accordance with the law of the

country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a

court of the country in which, or under the law of which, that award was made; or

(*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) If an application for setting aside or suspension of an award has been made to a court referred to in

paragraph (1) (*a*) (v) of this article, the court where recognition or enforcement is sought may, if it considers it

proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of

the award, order the other party to provide appropriate security.

(*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*.

Under Article 36 the court ceased with an application for registration of the award does not exercise an appeal power or review power and decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. See *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (SC). In this same case at p 466 it was also held that 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 case the court would not be justified in setting the award aside. It was further held that,

“Natural justice embraces the requirement that there must be fairness in the procedure.” Therefore, both parties must be treated equally. Each must be given a full opportunity to present his case. (this is a mandatory requirement under Article 18) and be afforded an opportunity of answering the case against him by meeting his opponent’s evidence and contentions. See *FSI Holdings Ltd* v *Rio Tinto Zimbabwe Ltd & Anor* 1997 (1) ZLR 31 (S). It is also a rule of natural justice that the arbitrator must not be a judge in his own case; nor must he act with bias against a party. He should scrupulously disclose any interest he has in the dispute or might reasonably be thought to have. See *Leopard Rock Hotel Co (Pvt) Ltd* v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 270 E – G; and generally, Christie Business Law in Zimbabwe at 474; Butler and Finsen Arbitration in South Africa at 165".

In terms of Article 35 (1) of the Arbitration Act an arbitral award becomes binding upon being granted and it becomes enforceable upon being registered by the High Court. The provision reads;

“An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to the provisions of this article and of article 36.”

In *Dudka* v *Cheni Investments (Pvt) Ltd & Ors* 2011 (1) ZLR 1 (H) in the interpretation of Article 35 it was held that an award takes effect upon its grant. Its execution has no effect on whether it is binding or not. Registration only allows for execution. It therefore follows in the circumstances of this case that the award became binding on 26 May 2017, which is the day it was granted by Honourable Chinhengo. In the absence of an order which set it aside or suspended it, it remains binding. The mere filing of an application for review does not affect the binding nature of the award and does not detract from its registration. As was correctly submitted by Mr *Hashiti* the filing of an application for review is not a bar to its registration*.* It does not matter that the review application might succeed. This is why Article 36 (2) says if an application for setting aside or suspension of an award has been made to a court, the court where recognition or enforcement is sought may, if it considers proper, adjourn its decision. This means that the court has discretion on whether or not to register the award taking into account various factors in the circumstances of the case.

The issue that recognition and enforcement of the award will be contrary to public policy in that there was a breach of the rules of natural justice goes hand in hand with the issue that the respondent was not able to present its case to the arbitrator before the award was made. I will thus deal with the issues together. It is common cause that the arbitrator dealt with this matter in terms of Article 25 (c) which says;

“Unless otherwise agreed by the parties, if, without showing sufficient cause any party fails to appear at a hearing or to produce documents, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.”

The provision deals with a situation where the other party defaults or fails to produce documents without sufficient cause. The tribunal may continue with the proceedings and make an award on the basis of the evidence presented to it. In *casu* it is not disputed that on the day the applicant’s only witness Mr Tabani Mpofu was cross examined and the applicant closed its case, the respondent’s one and only witness was not in attendance. An explanation for his non-attendance was proffered by the respondent’s counsel. Both the tribunal and the applicant were not happy with this turn of events considering that the hearing had been postponed to this date at the request of the respondent itself. The arbitrator raised a query about the explanation that had been given for the witness’ absence. Be that as it may, the hearing was postponed to the following day for continuation. On the next day, the same witness was said to have gone to South Africa on respondent’s business. Over and above that the same witness had written a letter to the Commercial Arbitration Centre chronicling the events that had happened on the previous day. The witness was alleging bias on the party of the arbitrator in that he (the arbitrator) had tried to secure the attendance of the witness at the hearing. The witness, Mr Tabani Mpofu indicated that as a result both the respondent and himself had lost confidence in the fairness and impartiality of the arbitration process. As such they were seeking the recusal of the arbitrator. They wanted the Commercial Arbitration Centre to appoint another or a different arbitrator to the process. In the same letter Mr Tabani Mpofu stated that should Mr Chinhengo insist on proceeding with the matter, the respondent would apply for his recusal. He further said that the respondent’s counsel was now under instructions not to participate in any process chaired by the current arbitrator.

It is common cause that the respondent went on to make the application for the recusal of the arbitrator in the matter. When the arbitrator dismissed it with reasons to follow and ordered that the hearing should continue with the respondent leading its evidence, the respondent’s counsel indicated that the respondent wanted to be furnished with the reasons first before the hearing could proceed. Honourable Chinhengo in his award says that he insisted that the hearing should proceed and the respondent’s counsel requested for time to contact or secure his witness. When he returned he is said to have said;

“I communicated with Mpofu. His indication is that he wants reasons before he testifies. He is not coming.”

The arbitrator ruled that the matter would continue. At the request of the applicant’s counsel that is when the arbitrator ruled that the matter was going to be dealt with in terms of Article 25 (c) in default of the respondent. There is a dispute as to whether thereafter the respondent’s counsel excused himself or whether he was excused by the arbitrator. That to me, is neither here nor there because the bottom line is that the hearing was continuing on that day and the respondent’s witness who was the key and only witness was not in attendance. Even if the respondent’s counsel had remained in attendance that was not going to change the complexion the proceedings had taken. No postponement of the matter had been sought or granted. The applicant corroborated what the arbitrator said in his award that the respondent chose not to avail its witness when it was called to do so. The respondent stated that its counsel made an application for a postponement of the matter pending the furnishing of the reasons of dismissal of the application for recusal and for its witness to be made available. My analysis of the matter leads me to the conclusion that the respondent’s counsel never made an application for a postponement of the matter in order to secure the attendance of the respondent’s witness. I say this because the arbitrator in his award quotes *verbatim* what Mr Mpofu is said to have said, that he was not coming for the hearing. The respondent did not refute that in its opposing affidavit. Even the applicant said that the respondent’s witness chose not to come. I do not believe that both the applicant and the arbitrator lied against the Mr Tabani Mpofu. In any case the letter that Mr Mpofu wrote to the Commercial Arbitration Centre seeking the recusal of Honourable Chinhengo and the appointment of a different arbitrator says it all. It categorically states that should the arbitrator insist on proceeding with the matter, the respondent’s counsel was under instructions not to participate in any process chaired by him. Mr Mpofu had made it clear that the respondent was no longer going to participate in the proceedings. So it does not make sense for the respondent to say a postponement was then sought in order to secure the attendance of the same Mr Tabani Mpofu who had made it clear that there was not going to be any more participation in the matter by the respondent. The letter in question is quoted in full in the award which forms part of the applicant’s application. The respondent therefore chose *mero motu* not to participate in the hearing.

The history of the matter as given by both the applicant in its answering affidavit and by the arbitrator in his award which forms part of the applicant’s application shows that the respondent was very difficult right from the start of the hearing in November 2015 up to April 2017 when it then chose not to participate any further in the arbitral proceedings. It made two applications for the recusal of the arbitrator and a number of applications for review before this court. Over and above that it made a number of applications for the postponement of the hearing and on all those occasions it was being indulged. What it is also pertinent, which the respondent has not denied, is that right from the time the arbitral proceedings commenced in November 2015 up to April 2017, its representative and key witness who happens to be its company secretary and deponent to its opposing affidavit Mr Tabani Mpofu never attended a single hearing, not even when the applicant’s witness was giving evidence. As the hearing was ongoing he would be busy attending to other business of the respondent. He would not have the decency and courtesy to excuse himself yet the hearing dates in question would have been granted at the behest of the respondent. The conduct of the respondent as represented by Mr Tabani Mpofu shows a complete disrespect and contempt of the arbitrator. If Mr Mpofu had any respect for the arbitrator he would have been in attendance ready to testify on the day the ruling on the application for recusal was being made just in case the ruling did not go the respondent’s way. No explanation is given by the respondent as to why Mr Tabani Mpofu was not in attendance on that day. Mr Mpofu himself being the deponent to the respondent’s opposing affidavit does not even explain himself. It is clear that he was not in attendance because he had already made it clear in his letter to the Commercial Arbitration Centre that after making an application for the recusal of the arbitrator, the respondent’s counsel was under instruction not to participate in any further proceedings chaired by the Honourable Chinhengo. It is therefore not surprising that he was not there. This being the case the respondent cannot cry foul now. It cannot allege that it was denied the opportunity to present its case before and by the arbitrator. The arbitrator cannot be faulted for having proceeded in terms of Article 25 (c) in default of the respondent. The respondent’s witness failed to appear at the hearing to give evidence without sufficient cause. In that regard the tribunal was right in proceeding to determine and make the award on the evidence that was before it. The respondent by the conduct of its representative and witness waived its right to challenge evidence given by the applicant. It chose not to give its defence in the matter to its own prejudice by playing difficult. A party who deliberately absents himself from a hearing or walks out without sufficient cause cannot at a later stage allege that he was denied an opportunity to present his case. See *Moyo* v *Rural Electrification Agency* SC 4-14.

In the circumstances of this matter it cannot be said that the rules of natural justice were breached. The *audi alteram partem* principle entitles both parties in the matter to be heard, but if a party is given or granted that opportunity and it willfully refuses to participate like what happened in the present matter, there is no breach of the principle. The tribunal was correct in following the provisions of Article 25 (c) because it had no other choice. A party cannot willfully absents itself from a hearing and then cry foul that the rules of natural justice were not followed. Such an attitude exhibits a gross misconception of the rules of natural justice. That the arbitrator insisted on the attendance of the respondent’s witness on the day the applicant closed its case is not evidence of bias, interest and lack of impartiality in the matter. Matters are supposed to be brought to finality expeditiously. This is why Article 25 (c) provides that parties cannot absent themselves from appearing at a hearing without sufficient cause. It is meant to curb situations where parties willfully and willy-nilly choose to absent themselves. If an application for recusal of a presiding officer in a matter is dismissed, it does not entitle the aggrieved party to refuse to participate in the matter. It should still participate and at the same time make use of the legal remedies available to it to challenge the decision of the presiding officer.

*In casu* the respondent by refusing to participate any further in the arbitration proceedings it denied itself the opportunity to answer the case against it. If its representative and sole witness had attended the hearing and given evidence, all the issues it is trying to raise now in this application would have been properly ventilated. If the arbitrator made wrong findings of law and facts because the respondent did not give its side of the story, then it has no one to blame but itself. In any case an award is not contrary to public policy merely because the arbitrator made wrong conclusions in fact or in law. See *ZESA* v *Maposa* *supra*.

That the respondent will suffer irreparable harm by the huge amount that was granted against it is immaterial. The award of a huge amount in the present matter is not contrary to public policy. The respondent’s counsel relied on the case of *Tel-One (Pvt) Ltd* v *Communications and Allied Services Union of Zimbabwe* HH 74-2007 for the argument that a huge award which clearly pushes the respondent into liquidation is contrary to public policy. The case is distinguishable from the present one in that in the Tel-One case the dispute involved the employer and its employees. They failed to agree on salaries and wages negotiations. When the arbitrator then determined the matter upon the parties reaching a deadlock, he did not invite the parties to set out the issues for determination. He determined the matter as he perceived it and awarded exorbitant salary and wage increments which the employer was not able to sustain. The salaries and wages bill was going to have the effect of crippling all the employer’s operations and drive it into insolvency. It threatened the very existence of the employer. The financial position of the company could not sustain the huge salaries and wages bill. The employer applied to this court for the setting aside of the award. In setting it aside this court held that the substantive effect of the award was to cripple the employer and drive it into insolvency as this was beyond its resources. It held that on those grounds the award was contrary to public policy.

The facts *in casu* are however nowhere near the facts in the Tel-One case. In the present matter the applicant recovered money owed to the respondent by the Reserve Bank of Zimbabwe pursuant to a contract the parties had entered into voluntarily. The amount was or is in the region of US$90 million and out of that amount the respondent was ordered to pay close to US$1.5 million for services rendered by the applicant in recovering the money in question in terms of an agreement the parties entered into. Taking away US$1.5 million from US$90 million cannot drive the respondent into insolvency. Moreover, it voluntarily agreed to pay that amount in a contract it entered into. The doctrine of sanctity of contract provides that once a contract is entered into freely and voluntarily, it becomes sacrosanct and courts should enforce it. A person cannot enter into a contract freely, obtain a benefit from it and then be allowed to repudiate from the obligations he has undertaken. In *casu* the respondent entered into this contract with its eyes wide open, it cannot now allege that paying US$1.5 million to the applicant will drive it into liquidation when the applicant collected about US$90 million on its behalf. It cannot therefore in the circumstances be argued that the award is contrary to public policy. In the Tel-One case it was a salaries and wages increase that was granted by the arbitrator without the consent of the employer. The increase was not sustainable and it was way beyond the financial resources of the employer. The two cases are not comparable.

In conclusion, refusing to recognize the award in the present case will be allowing the respondent to take advantage of the situation it deliberately engineered. It deliberately chose not to proceed with the matter despite being given an opportunity to present its case. There was no breach of the rules of natural justice and as such the award is not contrary to public policy. The award is binding on the parties.

In the result, I will grant the application to register the arbitral award. It be and is hereby ordered that:

1. The arbitral award made in favour of the applicant by the Honourable Arbitrator Mr. Moses Hungwe Chinhengo on 26 May 2017 is registered as an order of this court.
2. The respondent shall pay to the claimant the sum of US$1 492 970.88 together with interest at the rate of 5% per annum from 23 November 2015 to the date of full payment.
3. The respondent shall pay one half of the claimant’s costs of the arbitration.
4. The respondent shall pay the arbitrator’s fees, but the liability of the parties to the arbitrator for such fees shall be joint and several, the one paying, the other to be absolved.
5. The respondent shall pay the costs of this application.

*Mambosasa*, applicant’s legal practitioners

*Chinamasa, Mudimu, Maguranyanga*, respondent’s legal practitioners