SAN HE MINING ZIMBABWE [PVT] LTD
versus
ZIMASCO [PVT] LTD
and
MOSES H CHINHENGO N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 June 2023

Date of judgment: 19 January 2024

Opposed application

T. Magwaliba, with him, *M. Mbuyisa*, for the applicant
M. Phiri, with him, *B Mahuni*, for the first respondent
No appearance for the second respondent

MAFUSIRE J

Precis

[1] The applicant, San He Mining Zimbabwe [Pvt] Ltd ["***San He***"], has brought a combined application in respect of an arbitral award, on 28 July 2022 by the second respondent, the arbitrator, retired judge, Mr Justice Chinhengo. On the one hand it seeks the setting aside of that portion of the award adverse to it. On the other hand, it seeks the registration of that portion of the award beneficial to it, but as amended. The combined application is said to have been brought in terms of the United Nations Commission on International Trade Law [UNCITRAL] Model Law, an annexure to our Arbitration Act [*Chapter 7:15*] ["***the Model Law***"]. Costs of suit are being sought against the first respondent, ZIMASCO [Pvt] Ltd ["***Zimasco***"], on the legal practitioner and client scale. Zimasco opposes the application. It also seeks costs at the same scale against San He.

Background

[2] Both San He and Zimasco are private companies registered in Zimbabwe. The arbitration before Mr Justice Chinhengo was over a dispute emanating from some chrome mining and processing agreement between the parties in April 2017 ["***the agreement***"]. The agreement, in very simple terms, was that San He would mine chrome ore on claims owned

by Zimasco. San He would process and deliver the chrome concentrate to Zimasco. The agreement set out in quite some detail, among other things, the nature and scope of the work, the duration of the contract, the expected average yield, the manner the proceeds would be shared between the parties, the dispute resolution mechanism, and so on.

[3] The arrangement between the parties terminated on 31 December 2019. None of the parties raised a dispute during its subsistence. The dispute that was eventually referred to arbitration manifested well after termination. It all started with San He, on 21 September 2021, demanding payment by Zimasco for some premia or premiums on certain ore concentrate that had been produced in some several months during the subsistence of the agreement which, although due to San He and payable by Zimasco at the time, had been neither claimed by San He nor, concomitantly, paid by Zimasco.

[4] Very briefly, and for the moment excluding too much detail from the narration, the basis of San He's claim was that in terms of a clause in the contract, it was due a premium for producing and delivering a high-grade chrome ore concentrate the quality of which would have exceeded the contractual average base rate. It is said that the premium had never been claimed. The total amount of the claim was US$112 622-10.

[5] In response, Zimasco manifestly acknowledged San He's right to claim but raised the point that the actual quantum would have to be subject to verification. Zimasco also said that whatever was due by it would have to be payable in the local currency on a ratio of 1:1 of the United States dollar [USD] to the Zimbabwean RTGS dollar [ZWL$], allegedly in line with statutory instrument [SI] 33 of 2019[1]. Zimasco went on to raise a counter-claim of its own in a much bigger amount, well in excess of USD10 million, payable in that currency or the equivalent of it in the local currency. For the moment, excessive detail will be spared.

[6] Zimasco's counter-claim of over USD10 million aforesaid was in three parts. Citing other clauses in the contract, it claimed that during the subsistence of the agreement, San He had failed to meet production targets in some months and that these shortfalls had never been compensated in the subsequent months as contemplated by the agreement. Zimasco further

[1] Presidential Powers [Temporary Measures] [Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars]

claimed that certain yields of chrome ore during the subsistence of the agreement had been of inferior quality in that the average weighted chrome to iron content [Cr/Fe] had been below the specified minimum, with the result that Zimasco had been penalised on the chrome market. The total of these two claims was said to be USD2 963 472. Lastly, Zimasco raised the point that in accordance with the agreement, San He had been obliged to rehabilitate each mining location before moving onto the next, that San He had never done so and that the cost thereof would be USD7 275 416.

[7] San He denied any liability. The matter was referred to arbitration in terms of the arbitration clause in the agreement. Zimasco was the claimant. San He was the respondent and counter-claimant. Both parties raised the special defence of prescription against each other's claims.

[8] At arbitration, Zimasco's claims were adjusted downwards. Following some concessions by either side on various aspects of their respective claims, particularly Zimasco, both parties wreaked success in varying degrees. The special defence of prescription was dismissed. The arbitrator, in his wisdom, apportioned the costs of arbitration between the parties in proportion to their respective degrees of success.

[9] In a lengthy judgment in which a detailed analysis of the facts, the agreement, the evidence, the parties' arguments, the legal position in some areas of the law, and so on, was made, the operative part of the award, paraphrased, was as follows:

- ✓ On Zimasco's first claim on shortfalls on the monthly targets of chrome ore, San He would pay USD1 632 005-13, or its equivalent in Zimbabwean dollars at the rate of exchange prevailing on the date of payment;
- ✓ On its second claim relating to shortfalls on the quality of the chrome, Zimasco would calculate the amount due to it at a penalty rate of USD1-00 [instead of USD1-50 as had been claimed by Zimasco] per tonne per 0.01 drop in the Cr/Fe ratio from a ratio of 2.00 on the tonnage of the chrome concentrate, and San He would pay the resultant amount in United States dollars, or the equivalent of it in Zimbabwean dollars at the rate of exchange as aforesaid;
- ✓ On Zimasco's claim for the rehabilitation of the mined areas, San He would reclaim those at its own cost within 3 months of the award, to the satisfaction of the Environmental Management Agency, the Ministry of Mines and Mining Development, the local authority concerned, the Zimbabwe National Water Authority and Zimasco, failing which Zimasco would reclaim the mined areas itself, or through

its agent, and pass on the costs thereof to San He which, in turn, would have to pay within 30 days of the presentation of the bill.

- ✓ On San He's counter-claim for unpaid premiums, Zimasco would pay USD112 622-10 or its equivalent in Zimbabwean dollars at the rate of exchange prevailing at the time of payment.
- ✓ All amounts payable would attract interest at the prescribed rate from the date of the award to the date of payment in full.
- ✓ On the costs of suit, San He would pay three-quarters of Zimasco's legal costs on the legal practitioner and client scale, and three-quarters of the arbitrator's fees.

Basis of application

[10] San He's application before this court for the setting aside of that portion of the award adverse to it is predicated on the argument that the arbitrator rendered decisions on matters beyond the scope of the submission to arbitration and that the award constitutes such a palpable inequity that is so far reaching and outrageous in its defiance of logic or moral standards as would hurt intolerably the conception of justice in Zimbabwe in the mind of any sensible person and is therefore contrary to the public policy of Zimbabwe.

[11] San He's argument, paraphrased, is that the arbitral award went beyond the scope of the submission to arbitration because the order or directive for it to pay Zimasco a penalty of USD1-00 per tonne per 0.01 drop in the Cr/Fe ratio from a ratio of 2.00 on the tonnage of the chrome concentrate was not what had been submitted for arbitration. It is argued that in terms of the agreement there had been two types of penalties in the event of a default by San He. The one type of penalty had been in terms of cl 8.3 of the agreement, and the other in terms of cl 8.4. San He asserts that Zimasco's claim for penalties as submitted to the arbitrator had been in terms of cl 8.4 and yet the arbitrator had gone on to make an award in terms of cl 8.3, which was irrelevant.

[12] As far as I have deciphered it, San He's further argument that the arbitral award is contrary to the public policy of Zimbabwe is based on six factors, namely:

- ✓ That the arbitrator failed to see that there was no compensation due to Zimasco in respect of alleged shortfalls on the production targets because whilst in some months there could have been some such shortfalls, these had been compensated by over production in the other months.

- ✓ That at any rate, the agreement did not contemplate the payment of money for any shortfall on production targets, because at all instances compensation would be in the form of delivery of product in the subsequent months.
- ✓ That San He's capacity to meet the production targets had been dependant upon several variables including the quality of the feed on the claims, and that this had at all times been Zimasco's responsibility, so that where the feed was poor and San He failed to meet targets, it could not carry the blame.
- ✓ That the defence of prescription should have succeeded because Zimasco's cause of action would arise each time there was a shortfall on the production targets if they remained uncompensated in the subsequent months and that given that more than three years had elapsed before Zimasco commenced arbitration proceedings, the claims had become prescribed by virtue of the provisions of the Prescription Act [*Chapter 8:11*].
- ✓ That it was not the mandate for the arbitrator to decide whether or not San He should rehabilitate the mined areas, less so, to order it to pay an unspecified sum of money in the event of a default.
- ✓ That the decision to apportion the costs of the arbitration on the basis of the degrees of success of the respective parties was outside the scope of the arbitrator's mandate in that the issue submitted for arbitration in this regard was that the losing party would pay the winning party's costs on an attorney-client scale, that the parties had not given the arbitrator the mandate to determine what would happen in the event that any of them had not been successful, that for the arbitrator to order San He to pay three quarters of Zimasco's costs in circumstances in which, in fact, it was San He that had been successful in its counter-claim in its entirety was outrageous.

[13] In regards to the right to amend that portion of the arbitral award entitling it to receive the USD amount, San He impugns the words, "*or its equivalent in Zimbabwe dollars calculated using the official bank rate of exchange on the date of payment*" on the basis that Zimasco having conceded San He's counter-claim in USD, there was no basis for the arbitrator to direct an alternative mode of payment in the local currency.

Basis of opposition

[14] Zimasco has opposed San He's application. It basically supports the award in its entirety. It denies any of the alleged infractions by the arbitrator. It condemns San He for allegedly violating all the tenets of arbitration by ignoring the position that an arbitral award is final and binding on the parties. It argues that the present application is no more than an appeal or review in disguise.

Point *in limine*

[15] Originally, this application was launched in the General Division of this court on 30 August 2022. That was well after the creation of the Commercial Division in this country and its coming into operation on 6 May 2022. Zimasco took the objection that the application had been filed in the wrong forum. It sought its dismissal partly on that basis. That objection must have succeeded in the General Division because by an order of that Division on 27 January 2023, *per* DEME J, the matter was referred to the Commercial Division. The issue whether this approach was correct or proper shall not be considered because it is not before me.

Issue for determination

[16] In broad terms, the issue for determination, distilled, is whether or not San He has made out such a case as would warrant the intervention of this court to set aside Justice Chinhengo's arbitral award on 28 July 2022 on the basis that he made decisions on matters beyond the scope of his mandate and or that that the award constitutes such a palpable inequity that is so far reaching and outrageous in its defiance of logic or moral standards as would hurt intolerably the conception of justice in Zimbabwe in the mind of a sensible person and is therefore contrary to the public policy of Zimbabwe.

[17] In summary, San He avers that its application for the setting aside is made in terms of Article 34(2)(a)(iii) and 34(2)(b)(ii) of the Model Law. The cited provisions are those that empower this court to set aside an arbitral award on proof that the award, among other things, contains decisions on matters beyond the scope of the submission to arbitration [*Art* 34(2)(a)(iii)], or that the award is in conflict with the public policy of Zimbabwe [*Art* 34(2)(b)(ii)]. San He further asserts that its application for registration is predicated on Article 35(1) of the Model Law. This provision, *inter alia*, deals with the enforcement of an arbitral award upon application to this court.

Principles governing applications for registration or setting aside of arbitral awards

[18] The legal principles to apply in an application for the registration or setting aside of an arbitral award in terms of the Arbitration Act are not virgin territory. As such, there is little scope for originality. Nonetheless, it is still necessary to set them out as a legal compass to guide the determination process. In this regard, the opening enquiry is inevitably the

circumstances in which this court may vacate or register an arbitral award in terms of the Arbitration Act.

[19] Arbitration is a voluntary and private dispute resolution mechanism chosen by the parties. It is an alternative process to the determination of disputes through the State courts. The parties formulate the nature and extent of their differences. They chose their own judge. They lay down the rules of procedure. They agree on the terms of reference for the judge. They pay the judge. Everything is governed largely by the private bilateral agreement. Public law, in the form of the Arbitration Act, only comes in to, among other things, regulate what may be arbitrated upon [s 4], restrict the intervention of the State courts, and stress the finality and binding nature of arbitral awards [*Art* 5 and *Art* 35]. In *Zimbabwe Educational, Scientific, Social and Cultural Workers' Union v Welfare Educational Institutions' Employers' Association* 2013 (1) ZLR 187 (S), the Supreme Court, per MALABA DCJ, as he then was, said:

> "It is trite that where parties make submissions to arbitration on the terms that they choose their own arbitrator[s], formulate their own terms of reference to bind the arbitrator and agree that the award will be final and binding on them, the court of law will proceed on the basis that the parties have chosen their own procedure and that there should not be any interference with the results. See *ZESA v Maposa* 1999 (2) ZLR 452 (S). Even in cases of misconduct of proceedings by the arbitrator, the court would be reluctant to interfere, save in certain limited instances in which an award is against public policy. The standard is high."

[20] Stressing the private and consensual nature of the arbitration process which the courts should respect except in those exceptional circumstances contemplated by the Model Law, MALABA DCJ, in *Alliance Insurance v Imperial Plastics [Pvt] Ltd & Anor* SC 30-17, said, at p 5:

> "The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are followed. The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34(2)."

[21] In the same vein as the Supreme Court statement above, but rather more tersely, MATHONSI J, as he then was, in *(1)Harare Sports Club v Zimbabwe Cricket (2) Zimbabwe Cricket v Harare Sports Club & Anor* 2019 (2) ZLR 421 (H) said, at p 428E – F:

> "After all, it is the parties who voluntarily submit to arbitration as an instrument for the speedy and cost effective means of resolving their dispute. The courts are therefore more

> inclined to deprecate conduct of a party intent on disrespecting the agreement by undermining the process of arbitration agreed upon by the parties. Fanciful defences against registration of arbitral awards and frivolous applications seeking to set aside an award by inviting the court to plough through the same dispute which has been resolved by an arbitrator in the forlorn hope of obtaining a different outcome will not be entertained."

[22] No appeal lies against the decision of the arbitrator. The rationale for this was aptly summarised in the 19th century English case of *Holmes Oil Co v Pumpherston Oil Co* (1891) 28 SLR 940; [1891] UKHL 940, quoted with approval in *Harare Sports Club* above, at 429B - C. In that case the court, *per* LORD HALSBURY LC, said:

> "Now, one of the advantages that people are supposed to get by reference to arbitration is the finality of the proceedings when the arbitrator has once stated his determination. They sacrifice something for that advantage – they sacrifice the power to appeal. If, in their judgment, the particular judge whom they have selected as gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the courts of law possess, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law therefore, that when they have agreed to refer their difficulties to arbitration, as they have here, you cannot set aside the award simply because you think it is wrong."

[23] *Art* 34 and *Art* 36 of the Model Law are interpreted restrictively. The *locus classicus* on the meaning of an arbitral award being in conflict with the public policy of Zimbabwe and the approach of the courts is *ZESA v Maposa* above. A judgment on a matter like this cannot be complete without reference to the *Maposa* case. The appellate court, *per* GUBBAY CJ, laid down the test as follows, at 465D:

> "… [T]he approach to be adopted is to construe the pubic policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated."

[24] The test above was more elaborately laid out at p 466E – G of the judgment 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 law. In such a situation the court will not be justified in setting the award aside.
>
> Under article 34 or 36, the court does not exercise an appeal 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 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 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 applies 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 above."

[25] Put in another way, to say an award is contrary to the public policy of Zimbabwe, it must 'shock the conscience' or 'is clearly injurious to the public good or [is] wholly offensive to the ordinary reasonable and fully informed member of the public' as stated by the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia [Persero] v Dexia Bank SA* [2007] 1 SLR(R) 597, at para 59, cited with approval in *Chartpril Enterprises [Pvt] Ltd & Ors v Elnour United Engineering Group [Pvt] Ltd & Anor* HH 602-21. Only in the most glaring instances of illogicality, injustice or moral turpitude will the court invoke the power to set aside an arbitral award: *Peruke Investments [Pvt] Ltd v Willoughby's Investments [Pvt] Ltd & Anor* 2015 (1) ZLR 491 (S), at 499H – 500A.

Applying the law to the facts

[26] Having laid out the basic principles applicable to applications for the registration or setting aside of arbitral awards, what remains is to apply the law to the nuts and bolts of this case. Each of the applicant's grounds of objection to the arbitrator's award will now be interrogated one by one.

Prescription

[27] San He's argument on prescription, distilled, is that the decision of the arbitrator on this aspect constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or moral standards because Zimasco's cause of action would arise during the currency of the agreement each time there were shortfalls in the production targets or quality. It is argued that the arbitrator's decision defies logic especially because the agreement itself had no provision for a monetary compensation but only compensation via the product, yet in spite of this the arbitrator went on to invoke cl 24.3 of the agreement to calculate a monetary penalty when that provision only dealt with a non-monetary penalty.

[28] Clause 24.3 of the agreement read as follows:

> "In the event that the CONTRACTOR has failed to meet the month's production of 6,000t, the COMPANY shall be entitled to 3,300t of product produced being 55% of the contractual quantity. If the monthly production is less than 3,300t, the full quantity produced shall be for

> the COMPANY and the balance to 3,300t due for that month shall be produced by the CONTRACTOR in the subsequent months as agreed by the parties."

[29] Both parties had raised the special plea of prescription in their papers. However, Zimasco having conceded San He's counter-claim at arbitration, the arbitrator considered prescription only in relation to Zimasco's claim and San He's defence. Guided by case law on the meaning of 'cause of action', the arbitrator decided that the compensation sub-clause in the agreement envisaged that the shortfall on the tonnage of ore would be compensated for in the subsequent months without limit as to the number of months within which to do so. This could be done in any month before the agreement had come to an end. As such, the cause of action would become complete only at the end of the contract. Therefore, the matter having been referred to arbitration before the 3 years had lapsed, prescription did not apply.

[30] San He says such reasoning is a palpable inequity, that it defies logic and any moral standards and that a sensible person will consider that the conception of justice in Zimbabwe will be hurt intolerably if the decision is allowed to stand. I disagree. It is actually absurd to make such a suggestion. The arbitrator's decision on the point is quite solid and sound. But at any rate, even if he was wrong, which I consider he was not, there is no connection between the test in *Maposa's* case above that San He relies upon and its own situation herein. It certainly can live with this decision. The absurdity of its approach is demonstrated by the fact that it was itself quite prepared to accept that its counter-claim, which arose at the same time as Zimasco's claims, and which was predicated on the same agreement, was not prescribed. There can be no merit in such a challenge.

Award of USD1 632 005-13 for shortfalls on production targets

[31] San He argues that the reason why this award is such a palpable inequity and so far reaching as to be outrageous in its defiance of logic or moral standards and hurting intolerably the conception of justice in Zimbabwe is because firstly, San He never failed to meet the production targets, or that if indeed it did so in some months, it was because of the poor feed on Zimasco's claims or that it would compensate any such shortfalls by over production in subsequent months. It is further argued that in any event the form of compensation contemplated by the agreement between the parties did not envisage the payment of money, but rather the supply of product.

[32] Whether San He met or did not meet the production targets in some months during the subsistence of the agreement is a question of fact. However, there were some pre-arbitration concessions by the parties on some aspects of their respective claims. One such concession upon which there was an agreement was the quantum of the cumulative tonnage of the shortfalls. Thus, the parties did agree that indeed there had been shortfalls in some months. Those months were actually specified. All that was then left to the arbitrator to do was to decide the rate of the penalty to apply between the USD1-50 per tonne urged by Zimasco, and the USD1-00 set out in the agreement. It is unprocedural for San He to spring the argument in this court that there had been no shortfall on the production targets.

[33] As to whether the arbitrator could order the payment of money instead of the delivery of chrome to compensate the shortfall, plainly he could. Clause 10 of the statement of agreed facts set out some of the issues for determination. They included the issue whether or not Zimasco was entitled to the specified sum of money for the non-conforming tonnage in the months in question. Furthermore, the arbitrator decided that, at any rate, specific performance was no longer possible given that the agreement had terminated and that San He was no longer on location. He directed the payment of money in lieu of the product, something which was specifically within his mandate for determination. Nothing that he did can legitimately shock the conscience of any sensible person.

Award of a penalty at the rate of USD1-00 per tonne per 0.1 drop in Cr/Fe ratio

[34] The applicant argues that the arbitrator's approach to calculate the amount due by San He on the basis of a penalty of USD1-00 per tonne per 0.1 drop in the Cr/Fe ratio from a ratio of 2.00 was beyond the scope of the parties' submission to arbitration. It argues that the parties having filed an agreed statement of facts and having set out the issues for determination, it was incumbent upon the arbitrator to confine himself to the four corners of that document.

[35] The first observation I make is that the agreed issues for determination in the parties' statement of agreed facts were in reality open-ended. Whilst in paras 9 and 10 the parties set out some specific issues for determination, in the preceding paragraphs, they had also formulated what they considered to be the nature of their dispute. In para 6 in particular, they agreed that they would lead oral evidence from witnesses to deal with the interpretation of the

formula used to calculate the premiums and the penalties due in light of the claims and counter-claims. But most significantly, in para 7, the parties expressly agreed that in addition, the other issues for determination would be dealt with on the documentary evidence presented by the parties, together with oral arguments to be made by counsel at the hearing [*emphasis added*].

[36] Therefore, the argument that the formula used by the arbitrator on penalties fell outside the scope of the submission to arbitration is manifestly incorrect. In fact, this argument needs to be interrogated further. San He's position is that the arbitrator calculated the penalty in terms of cl 8.3 of the agreement, which, allegedly, was irrelevant.

[37] Clause 8 of the agreement provided for premiums and penalties. In my understanding, premiums were some kind of reward for high grade ore, and penalties some kind of sanction for low grade ore. The chemical formula for the chromium oxide is Cr_2O_3.

[38] According to cl 8.1, such premiums or such penalties would be applicable for product with a chrome to iron ratio of not less than 2.00. This would be based on the chromium oxide [Cr_2O_3] quality of the delivered concentrates. Specifically, it was cl 8.2 that provided for premiums. According to this sub-clause, if the percentage Cr_2O_3 ratio exceeded the contractual base grade quality by more than 1%, up to a maximum quality of 50%, San He would be due a premium. The converse position was set out in cl 8.3. It provided for penalties on decreased qualities of ore. San He would be penalised at USD1-00 per tonne for each percentage decrease in the percentage Cr_2O_3 if it was below the contractual base grade by more than 1%.

[39] Clause 8.4, according to my reading and understanding of it, can be said to have carried some kind of indirect penalty or sanction. In my paraphrase, Zimasco was entitled to reject chrome ore concentrates with a Cr_2O_3 of less than 46%, or a Cr/Fe of less than 2.00, or both. In that event San He would be required to reprocess the rejected concentrate at its own cost. However, the sub-clause gave Zimasco the discretion to accept such sub-grade concentrate [my coinage] on condition that Zimasco's share of the product, as per the agreement, would be adjusted upwards to compensate for the loss in value of the product on the international market.

[40] Verbatim, cl 8.4 read as follows:

> "Concentrates with a Cr_2O_3 less than 46% OR Cr/Fe less than 2.00 OR both shall not be accepted by the COMPANY and the CONTRACTOR shall be required to reprocess it at its own cost. The COMPANY may exercise its discretion to accept such material from the CONTRACTOR provided the share of product to the COMPANY as per clause 24 is adjusted upwards to compensate for loss in value due to quality based discounts given by the market for the product."

[41] Basically, the parties' share of the product in terms of cl 24, which was cited in cl 8.4, was 55% for Zimasco and 45% for San He, subject to San He meeting certain production targets in terms of quantity. The arbitrator based the penalty against San He on cl 8.3 of the agreement. San He argues that this was wrong because the claim submitted by Zimasco was predicated on the cl 8.4 type of penalty, and that as such, the arbitrator rendered a decision on matters beyond the scope of the submission to arbitration.

[42] San He's argument on this point is fallacious. It ignores the fact that Zimasco's claims before the arbitrator in regards to shortfalls were in two parts. The one was in regards to shortfalls on the base production tonnage of 6 000 tonnes of chrome ore concentrate per month in terms of cl 24 of the agreement. The other was in regards to the cl 8.3 type of penalty of USD1-00 per tonne for each percentage Cr_2O_3 decrease. San He met both claims headlong, firstly raising the special defence of prescription, and then on the merits.

[43] Plainly, the arbitrator did not, on this point, render a decision on matters beyond the scope of the submission to arbitration. It is not necessary for this court to plough through the same detailed arguments of the parties as at the arbitration, or to place the arbitral award under some kind of microscope to determine whether the arbitrator got this or that point right or wrong. The law permits him to get it wrong, of course to a degree. The parties are required to accept the decision and move on. They submit to arbitration for better or for worse. As MATHONSI J put it in *Harare Sports Club* above, frivolous applications seeking to set aside an award by inviting the court to plough through the same dispute which has been resolved by an arbitrator in the forlorn hope of obtaining a different outcome are not to be entertained.

Award on reclamation of the mined areas

[44] San He's challenge on the award relating to the rehabilitation of the mined areas is that what was submitted to arbitration was Zimasco's claim for a monetary compensation in a

specified amount, USD7 717 565-33, yet the arbitrator directed San He to carry out the rehabilitation within 3 months of the award failing which pay a bill as would be presented by Zimasco on the costs of such rehabilitation.

[45] However, as previously observed, the issues for determination were much wider. They would be dealt with on the documentary evidence together with the oral arguments by counsel. The arbitral award herein shows that the arbitrator's decision on this aspect was influenced partly by San He's own offer to rehabilitate the mined areas. San He claimed it had the capacity to do so. So, the decision was manifestly to accommodate that position. The arbitrator could legitimately make such a decision. It fell within the scope of his mandate. An award, like an order of court, must be effectual. If San He defaulted on the reclamations, then Zimasco could go ahead and do it itself or through an agent and pass on the costs. A monetary compensation for this particular type of claim was squarely within the arbitrator's mandate because that is what Zimasco had claimed in the first place.

Apportionment and award on costs

[46] San He's challenge on this aspect of the award is that all that the parties had agreed on as an issue for arbitration was that the loser would pay the winner's costs of arbitration and the arbitrator's fees on an attorney and client scale and that they had never agreed on what would happen in the event of a party achieving less than complete success.

[47] One general rule on costs in the adjudication of cases through the State courts is that the award of costs is wholly a matter in the discretion of the judicial officer: see *Graham* v *Odendaal* 1971 (2) SA 611(AD); *Kruger Brothers & Wassermen* v *Ruskin* 1918 AD 63 and *Rautenbach* v *Symington* 1995 (4) SA 583 (O). In *Farpin Investments [Pvt] Ltd v Net One Cellular [Pvt] Ltd* HH 28-16 I considered that in the absence of any specific agreement to the contrary, or any factors militating against it, this general rule could be extended to an arbitration process. The position seems quite consonant with *Art* 31(5)(a) of the Arbitration Act. The provision states that unless otherwise agreed by the parties, the costs and expenses of an arbitration, including the legal and other expense of the parties, the fees and expense of the arbitral tribunal and other expense related to the arbitration, shall be as fixed and allocated by the tribunal in its award.

[48] Thus, by operation of the law, the arbitrator had the power to apportion the costs in the manner he did. At any rate, it is really scratching the bottom of the barrel to suggest that the costs could not be apportioned in the manner the arbitrator did given the degree and quantum of success by each of the parties. It is a far cry to argue that such a decision by the arbitrator was a palpable inequity that was so far reaching and outrageous in its defiance of logic or moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt. To the contrary, the decision was quite sensible and logical. San He seems to forget the stringent test that has to be passed before an arbitral award can be set aside.

Counter-claim should not be payable in the local currency as an alternative

[49] San He's challenge on this aspect of the award is that unlike Zimasco's claim which had an alternative prayer for payment in the local currency, its own counter-claim was stated in USD only. It admits that Zimasco did challenge the stance that the counter-claim should only be paid in foreign currency without the alternative option. However, San He dismisses such challenge by Zimasco as having been made half-heartedly. This argument is persisted with notwithstanding that Zimasco had raised the objection right from the onset in its statement of defence and had persisted with it right through the arbitration proceedings and in the present application.

[50] San He's argument is misplaced. Now the court is being invited to scrutinize the quality of Zimasco objection to determine whether it was half-hearted or serious. This is absurd. By operation of the law in terms of SI 33 of 2019 aforesaid, which eventually became s 44C of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and s 22 of the Finance (No. 2) Act No. 7 of 2019, unless San He could prove that the debt due to it in terms of the agreement was one of the exceptions to the conversion on the one to one ratio between the USD and the ZWL$, the arbitrator cannot be faulted for adding the alternative for Zimasco to pay in the local currency. The amount was a domestic debt and not a foreign obligation.

Disposition

[51] None of the grounds submitted by San He for the setting aside of the arbitral award by Mr Justice Chinhengo on 28 July 2022 and for amending that portion of the award favourable to it had any merit. The application is manifestly ill-conceived. In seeking dismissal of the application, Zimasco prays for costs on an attorney and client scale. It is justified because, among other things, if San He had paused to consider the stringent test that has to be passed before a court can overturn an arbitral award, it should never have brought this application.

[50] In the result, the application is hereby dismissed with costs on an attorney and client scale.

19 January 2024

Mtetwa & Nyamirai, applicant's legal practitioners
Muvingi & Mugadza, first respondent's legal practitioners