A. NATIONAL SOCIAL SECURITY AUTHORITY
and
HOUSING CORPORATION ZIMBABWE (PRIVATE) LIMITED
and
PETER CORNEGIE LLOYD N.O

B. HOUSING CORPORATION ZIMBABWE (PRIVATE) LIMITED
and
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 June 2023

Consolidated Opposed Court Application for Setting Aside of Arbitral Award and for Registration of the Award

Advocate *K Kachambwa*, for the applicant
Advocate *D Tivadar*, for the respondents

CHITAPI J:

PARTIES

[1] The parties to this application are as named in the heading to this judgment. They are both bodies corporate which have power to sue and be sued. National Social Security Authority (hereinafter referred to as "NSSA") is the applicant in case number HC 2938/19 which from the heading is named case "A" being a convenience reference not intended to give it any prominence. Housing Corporation of Zimbabwe (Pvt) Ltd (hereinafter referred to as "CZ") is the first respondent in the same case number HC 2938/19. Peter Cornegie Lloyd N.O (hereinafter referred to as the Arbitrator) is the second respondent.

[2] Save for the Arbitrator, NSSA and HCZ are parties in case number HC 2554/19 as respondent and applicant respectively. Case number HC 2554/19 was filed on 27 Marcy 2019. Case number HC 2938/19 was filed on 3 April 2019.

NATURE OF THE APPLICATIONS

[3] In case number HC 2938/19, NSSA petitioned the court claiming relief which is couched in the draft order as follows:

> "IT IS ORDERED THAT:
>
> 1. The final award granted on the 25th March, 2019 by the Honourable Arbitrator Peter Carnegie Lloyd in favour of the 1st respondent is hereby set aside and is of no force and effect.
> 2. The matter shall be referred to a different Arbitrator appointed in terms of the arbitration agreement appointed in terms of the arbitration agreement who shall determine equitable terms of the termination of the agreement between the parties.
> 3. The 1st respondent shall bear the costs of this application if opposed."

[4] In case number HC 2554/19, HCZ petitioned the court claiming relief which is couched in its draft order as follows:

> "**IT IS ORDERED THAT:**
>
> 1. The Arbitral Award made in favour of the applicant by the Honourable Arbitrator Mr Peter C. Lloyd on 25 March 2019 is registered as an order of this Court.
> 2. The respondent shall pay to the applicant the sum of $30 0000 000.00 together with interest thereon at the prescribed rate of 5% per annum from 22 February 2019 to the dated of full payment."

[5] In relation to case number HC 2554/19, the Honourable Arbitrator as is common cause between the parties corrected the first award dated 25 March 2019 by a corrected award dated 8 July 2020, the extent of the correction was to substitute the amount of $30 000 000.00 awarded to HCZ as recorded in both the partial and final awards with the sum of $22 million. In consequence, if this application succeeds, the figure of $30 000 000.00 appearing in paragraph 2 of the draft order shall be substituted with a figure of $22 000 000.00.

[6] It is therefore apparent that there was an arbitral award concerning NSSA and HCZ which was rendered by the Arbitrator ono 25 March 2019 as a final award. The same was corrected by the Arbitrator in part on 8 July 2020 as I have detailed. HCZ seeks that the award should be registered as an order of the court. In other words, HCZ seeks that the court should as provided in Article 36 of the Model Law as domesticated in the Arbitration act, [*Chapter 7:15*], recognize the arbitral award as binding and enforceable at the instance of the

party in whose favour it was made. *In casu*, HCZ does not seek enforcement but the recognition of the arbitral award as binding, thus it becomes an order of the court for enforcement purposes.

[7] NSSA on the other hand does not only oppose the application for recognition but has in what may for convenience be described as a counter application applied in case number HC 2835/19 for an order that the arbitral award should be set aside as provided for in Article 34 of the Model Law on grounds which I will set out in due course.

CONSOLIDATION

[8] Case numbers HC 2554/19 and HC 2938/19 essentially involve two sides of the same coin. They arise from and rely on the same facts and law arising from the same arbitral award albeit the relief sought in the cases are different but again related. In the light of the fact that the cases arose from the same arbitral award, the two applications were upon a chamber application for consolidation made by HCZ in case number HC 5556/19, consolidated by order of FOROMA J dated 15 July 2019 whose content was:

> "IT IS ORDERED THAT:
>
> 1. The actions filed under case nos. HC 2554/19 and 2938/19 are hereby consolidated and shall proceed as one action.
> 2. The applicant is ordered to file heads of argument in the consolidated action within 5 days of the date of this order being granted."

As the reference to an action connotes litigation commenced by issue of summons, the word must be construed as a reference to the application. This must be so because case numbers HC 2554/19 and HC 2938/19 were and remain applications. The parties have always treated them as such.

[9] The order of consolidation being largely a tool of convenience to the parties and the court allows for the court to render a single judgment to dispose of the consolidated cases. Order 13 r 92 of the repealed High Court Rules, 1971 then in force when FOROMA J granted the order of consolidation provided in relevant part as follows:

> "**92. Consolidation of Actions**
>
> Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties make an order consolidating such actions, whereupon –
> (a) the said actions shall proceed as one action
> (b) the court may make an order which it considers proper with regard to the further procedure, and may give one judgment disposing of all matters in dispute on the said actions.

> Provided that with the consent of the parties to the action a judge may make an order consolidating the actions and any order which he considers proper with regard to the further procedure."

The rule has been carried over and incorporated in the current High Court Rules, S I 202/21 as r 34. The consolidation of the applications does not make the consolidated cases a single one in the sense of altering the nature of the individual claims made in the consolidated cases. It simply means that the consolidated cases are dealt with in one hearing. Whilst a single judgment may be delivered and is invariably delivered, it must dispose of the individual cases by answering each of the claims which arise from the cases. This judgment will therefore dispose of the two consolidated application by addressing singularly the prayer sought in each of the applications.

HISTORY OF LITIGATION

[10] The two consolidated applications were set down for determination before the court for the second time. The parties argued the consolidated applications before MUSITHU J who delivered a judgment ref. HH 481/20 on 22 July 2020. In the said judgment, the learned Judge dismissed case number HC 2938/19 and granted the relief sought in case number HC 2554/19.

[11] NSSA was not satisfied with the judgment of MUSITHU J. It noted an appeal against the whole judgment aforesaid. The appeal was noted under case number SC 338/20. The appeal was heard on 13 September 2020. In the hearing, in the Supreme Court, counsel for the appellant (NSSA) applied for and was granted leave to amend the grounds of appeal. The amendment consisted in the addition of a ground of appeal that raised a point of procedural law. The ground of appeal attacked the validity of the proceedings before MUSITHU J on the basis that HCZ in its application for registration of the arbitral, did not attach to the application, an authenticated copy of the arbitral award whose registration was granted. The Supreme Court in the judgment SC 20/2022 determined that a failure to comply with the provisions of Article 35(2) of the Arbitration Act was fatal to the application for registration of the Arbitral award.

[12] The Supreme Court in the judgment further determined that there was nothing in the judgment of MUSITHU J to show that the learned Judge had made a determination on the application number HC 2938/19 which concerned the prayer by NSSA for the setting aside of the arbitral award. The Supreme Court noted that the failure by a court to make a determination on an issue ventilated before the court constituted a gross irregularity which vitiates the court's

decision with the result that the decision is set aside on appeal. The Supreme Court deposed of the appeal by setting aside the judgment and made an order as follows:

> "Accordingly, it is ordered as follows:
>
> 1. The appeal be and is hereby allowed with costs.
> 2. The judgment of the court *a quo* be and is hereby set aside.
> 3. The matter is remitted to the court *a quo* for hearing *de novo* before a different judge."

The above summary explains how the consolidated applications are being heard for the second time albeit as a fresh hearing.

[13] Although the Supreme Court did not and would not be expected to direct how the *de novo* hearing ought to be managed, the judgment nonetheless is instructive in that it acts as a reminder of procedural pitfalls to be avoided in order that the current proceedings are not afflicted by the omissions which led to the setting aside of the judgment of my brother MUSITHU J, namely the need to strictly comply with Article 35(2) of the Model Law and also the need for the court to determine and pronounce itself on every issue on which the parties seek a determination.

[14] I should record that in so far as the proceedings *de novo* are concerned there has been compliance with Article 35(2) of the Model Law. The full Article 35 provides as follows:

> "ARTICLE 35
> *Recognition and enforcement*
>
> (1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the *High Court*, shall be enforced subject to provisions of this article and of article 36.
>
> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in *the English language*, the party shall supply a duly certified translation into *the English language*."

HCZ attached to its application HC 2554/19, the duly authenticated and certified award. The issue of the validity of the arbitral award was agreed as common cause. Both applications, that is HC 2554/19 and HC 2938/19 arise from the same arbitral award whose authenticity is a non-issue.

[15} I will note in passing that the application by NSSA in case number HC 2938/19 for the setting aside was made under the provisions of Article 36, in particular subsection (1) (b)(ii) as

read with subsection (3) of the same Article. For the avoidance of doubt, the full Article 36 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*."

[16] When contrasting Articles 35 and 36, it will be seen that Article 36 does not unlike Article 35 provide for procedural issues on what documents should compromise an application for setting aside the arbitral award. In that regard, it appears to me to be a matter of common sense that in an application for setting aside the arbitral award under Article 36, although the Article does not unlike Article 35 speak to the requirement that an authenticated original award or copy thereof be attached to the, a party seeking the setting aside of the arbitral award should also take the queue from Article 35 and attach the authenticated original or certified copy thereof so that the issue of authenticity of the award is resolved.

[17] It also appears to me that because the arbitral award is a *quasi-judicial* instrument which has the force of law, a party seeking its setting aside as much as one who seeks its registration should provide the court with an authenticated original or certified copy. The authentication is necessary as it represents a certification by the Arbitrator that it is his or her award. If one compares the situation with court judgments, these are certified by the Registrars or Clerks of Court who are the custodians thereof. Since the arbitral award is not lodged anywhere from where the custodian can certify it, the maker of the award presented before the court who is the Arbitrator should in logicality be authenticated by the Arbitrator who keeps his or her own records.

There will of course be the argument that the normal rules of evidence should then apply in an application under Article 36 because it does not provide for authentication of an award. I however hold the view that because the application under Article 36 is really the other side of the application under r 35, a failure to attach the authenticated award, may well lead the court to either strike the matter off the roll because to my mind what is key is the award itself and it should be an authentic one.

[18] The discourse on Articles 35 and 36 aside, the issue of authentication of the award for purposes of application HC 2938/19 for the setting aside of the arbitral award does not arise because the same authenticated award is common to both applications.

In terms of the structure of the judgment, it deals firstly with case number HC 2938/19 because if NSSA succeeds in getting the relief of the setting aside of the arbitral award, case number HC 2554/19 wherein registration of the same award is sought falls by the wayside. If on the other hand application HC 2938/19 is dismissed, the court must then proceed to determine whether the applicant therein HCZ has established a case for registration of the award.

LAW ON SETTING ASIDE OF AN ARBITRAL AWARD UNDER ARTICLE 34

[19] The subject matter of the setting aside of an arbitral as noted is governed by Article 34 of the Model Law which reads as follows:

> "ARTICLE 34
> *Application for setting aside as exclusive recourse against arbitral award*
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the *High Court* only if—
(*a*) the party making the application furnishes 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 on that question, under the law of *Zimbabwe*; or
(ii) the party making the application 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 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
[Subparagraph amended by Act 14/2002]
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law; or
[Subparagraph amended by Act 14/2002]
(*b*) the *High 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 award is in conflict with the public policy of *Zimbabwe*.
(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
(4) The *High Court*, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.
(*5*) *For the avoidance of doubt, and without limiting the generality of paragraph* (*2*) (*b*) (*ii*) *of this article, it is declared that an award is in conflict with 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.*".

[20] Article 34 provides for various grounds on which if established by the person seeking the setting aside of an arbitral award, this Court may and not shall set aside the award. The onus is on the party seeking the setting aside of the arbitration award to allege and prove any of the grounds set out in Article 34(2). It will be noted that the grounds for setting aside of the arbitral largely mirror the grounds set out in Article 36 upon which the court may refuse to recognize it as binding or to enforce an arbitral award. This is why as I have stated the applications made under Articles 34 and 36 are to all intents and purposes two sides of one coin. The main difference is the relief sought.

[21] In para(s) 2.2 and 3.3 of the founding affidavit in case number HC 2938/19 for setting aside the arbitral award the deponent stated as follows:

> "2.2 The application is made in terms of Article 34(2)(iv)(b)(ii) of the Model Law as set out in the Arbitration Act [*Chapter 7:15*] on the basis that the award handed down by the second respondent is in conflict with the public policy of Zimbabwe.
>
> 2.3 I shall demonstrate hereunder, the arbitral award can only be described as shocking, palpably iniquitous and manifestly injurious to the public policy of the land."

The grounds of challenge are wrongly cited as Article 34(2)(iv)(b)(ii). The grounds become conflicted if so expressed. The correct citation should be Article 34(2)(a)(ii) and Article 34(2)(b)(ii) are distinct and ought to be separately quoted. NSSA therefore relied on the two separate grounds set out in Article 34(2)(iv) and Article 34(2)(b)(ii). For the avoidance of doubt, I restate the grounds. Article 34(2)(a)(iv) reads that:

> "(2) An arbitral award may be set aside by the High Court only if-
>
> (a) The party making the application furnishes proof that:
> (i) ..……
> (ii) ……..
> (iii) ……..
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law; or
> (b) the High 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 award is in conflict with the public policy of Zimbabwe."

[22] Subsection (5) of s 34 significantly provides for circumstances which when established on a balance of probabilities by the applicant who seeks the setting aside an arbitral award will result as a matter of law in a finding that the award conflicts with the public policy of Zimbabwe. The subsection reads as follows:

> "(5) For the avoidance of doubt, and without limiting the generality of para (2)(b)(ii) of this article it is declared that an award is in conflict with 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."

[23] There is a plethora of case law on the subject of the setting aside of arbitral awards on the ground that the award conflicts with the public policy of Zimbabwe. In the judgment in

Peruke Investments (Private) Limited v *Willoughby's Investments (Private) Limited & Anor* SC 11/2015, the Supreme Court per PATEL JA (as then he was) stated as follows on p 11 on the cyclostyled judgment:

> "WHETHER AWARD CONFLICTS WITH PUBLIC POLICY
>
> In terms of Article 34(2)(b)(ii) of the Model Law, an arbitral award is challengeable and may be set aside on the ground that it is in conflict with the public policy of Zimbabwe. As a rule, the courts are generally loath to invoke this ground except in the most glaring instances of illogicality, injustice or moral turpitude. In the words of GUBBAY CJ (as he then was) in the *locus classicus* on the subject, *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZRL 452(S) at 465 D-E;
>
> > "In my opinion the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognize 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."

This cautionary approach is further underscored by the learned Chief Justice in elucidating the proper test to be applied at 466 E-H:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.
>
> Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognize and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitute a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible 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 consequence 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."

The court must therefore determine whether or not the applicant has proved on a balance of probabilities, taking into account the approach enunciated by the Supreme Court as quoted above that the award being impugned is contrary to the public policy of Zimbabwe and in consequence be set aside.

BACKGROUND FACTS

[24] On 14 July 2017 at Harare NSSA and HCZ executed a written agreement described as a "Housing Offtake Agreement" in which HCZ was called the Developer. The prelude to the

agreement to the extent material to this judgment provided as follows in the introduction on p 2 of the agreement:

> "A ….
>
> B ….
>
> C. The Developer intends to acquire three separate pieces of land as more fully set out in schedule for the purpose of constructing a total of 8000(eight thousand) housing units; subject to final Town Planning approval and NSSA intends to become the sole off taker of all the housing units developed by the Developer under the prefect through the right of first refusal granted to it by the Developer as mere fully set out in this Agreement.
>
> D. The housing units referred to in para C above shall be constructed by the Developer in phases on land approved by NSSA with the first phase being for 2000 (two thousand) housing units, subject to final Town Planning approval; over a period of thirty (30) months. Subsequent phases shall be governed by the terms and conditions of this agreement subject to any variations agreed to by the parties……."

[25] The second respondent set out the background in the partial award. I deal with highlights of the same. The agreement between the parties in material particulars envisaged the construction of 8 000 housing units at an agreed cost per unit and the houses were to be delivered in batches of 250 over an agreed period of time. The applicant was required to pay a deposit of US$16 million dollars as an offtake deposit within seven (7) days of the effective date, such date being the date on which the last of the conditions precedent would have been fulfilled. The off take deposit was paid to the first respondent. There were other conditions which had to be fulfilled. The applicant and first respondent appear to have had a fall out in or about the beginning of 2018 and their fall out culminated in the first respondent cancelling the agreement between them by letter dated 29 May 2018. The first respondent asserted that the applicant had repudiated the agreement or materially breached it and failed to remedy its material breaches despite notice given by the first respondent. It will be convenient not to go through the individual terms of the agreement as the terms are not disputed. What is disputed is their alleged violation. The material provisions to the extent that they impact on the grounds alleged for setting aside the award will be considered in dealing with those grounds.

[26] It is common cause that the parties referred their dispute for arbitration held before the second respondent. The first respondent was the claimant, the applicant, the respondent. The first respondent in the arbitration proceedings claimed that the applicant had committed certain material breaches of the agreement which amounted to a repudiation of the agreement. In

consequence of the violations of the provisions of the agreement the first respondent became entitled to cancel the agreement and claim damages which it did. The first respondent claimed damages of US $2 316 000.00 and $56 542 364.00, interest a *tempero-morae* and costs of arbitration.

[27] The applicant denied having breached the agreement nor repudiated it. It denied that the first respondent was entitled to lawfully terminate the agreement as it purported to do. The applicant averred that it was itself entitled to cancel the agreement on account of alleged breaches of the agreement perpetrated by the first respondent. In consequence, the applicant filed a counter-claim in which it claimed cancellation of the agreement, refund of the off take deposit of US$16 million which it had paid to the first respondent and damages of US$5 000.00 per day from 4 February 2018 to the date of payment of the US$16 million and costs. The first respondent denied the counter claim and prayed for its dismissal. It is common cause that the first respondent succeeded in its claim and was awarded damages in the sum as revised and the counter-claim of the applicant failed. The arbitral award comprised twenty-five printed pages of the partial award whose authenticity is agreed by the parties.

[28] The applicant in the founding affidavit deposed to by its Group Legal Advisor and Board Secretarial Services Executive Cynthia Tendai Mugwira deposed inter-alia as follows in summary:

> "(i) That the applicant and first respondent entered into a be spoke housing off take Agreement on 14 July, 2017 in terms of which the applicant would purchase 8 000 housing units to be constructed by the first respondent.
> (ii) That the agreement was an offtake agreement which meant that the applicant's obligation to purchase the housing units would arise after construction and delivery of the houses. The deponent summarized the position as one of no house - no payment.
>
> (iii) That the applicant was not directly involved in the construction or funding of the construction of the houses, thus the first respondent assumed full risk of construction with its entitlement being payment for each constricted unit.
>
> (iv) That upon conditions precedent being met the first respondent the off take deposit of RTGS $16 million was paid to the first respondent on 4 August 2017. The deponent averred that the first respondent was supposed to commence construction of the housing units.
>
> (v) That whilst the applicant was of the view that the commencement date of the agreement was the date of payment of the deposit of US $ 16 million aforesaid the first respondent took the position that the agreement never commenced because clause 8:2 of the agreement was not fulfilled by the applicant. Clause 8:2 provided for pre- construction obligations of the applicant which had first to be satisfied after which parties would meet and sign off an agreed date as the date of fulfilment of pre- construction obligations.

(vi) That no housing units were constructed, completed and delivered from August to May 2018 contrary to the agreement despite payment of RTGS $ 16 million which was equivalent to the purchase price of 421 completed housing units.

(vii) That the applicant counter-claimed for the refund of the RTG$16 million and delay damages in delivery of the housing units calculated at RTGS $ 500 per day unit delivery.

(vii) That the second respondent "anomously" found for the first respondent and awarded the first respondent damages for breach of contract as per the partial and awards.

[29] The applicant averred in para(s) 4, 6 of the founding affidavit that the award was so outrageous in its defiance of logic that it amounted to a serious violation of the public policy of Zimbabwe. The award "simply induces a sense of shock to any reasonable Zimbabwean", so the applicant asserted.

In amplification of the public policy violation argument the applicant made lengthy depositions in para(s) 5.1 – 5.20. They can be summarized as:

(i) that by awarding damages for loss of profit and dismissing the counter claim for refund of the RTGS$16 million, the second respondent awarded a sum of RTGS$46 million to the first respondent "in return for nothing".

(ii) that the second respondent in awarding RTGS$30 million for loss of profit missed the point that the profit could only have been realized had the 8 000 housing units been actually constructed and delivered to the applicant.

(iii) that because the nature of the agreement in issue was an offtake agreement, it indemnified the applicant against the risk associated with construction agreements as entrenched in clauses 19.1; 21.1; 22.1 and 24.1.

[30] For expediency, I relate to the clauses referred to. Clause 19.1 is an indemnity clause wherein the applicant is indemnified by the first respondent for any claims by third persons arising from or in the course of carrying out the housing project. Clause 21.1 provided that risk and profit in the completed housing units would pass to the applicant upon payment of the purchase price by the applicant whereafter the applicant would be entitled to the benefits accruing from the housing units. Clause 22.1provided that upon termination of the agreement for breach, the injured party could claim damages permitted at law other than "consequential damages or indirect loss." Clause 24.1 provided that the agreement did not constitute a partnership between the applicant and the first respondent. As such all transactions connected with the project had to be done and/or concluded in the first respondent's name only.

[31] The applicant averred that despite the protections afforded to it by the clauses referred to, the second respondent nonetheless ordered the applicant to pay RTGS$30 million despite

that no single house answering to the specifications in the agreement was built or delivered despite the obligation to deliver 8 000 units.

[32] The applicant further averred that the award was absurd for awarding profit when no house had been built and attributed the absurdity to the fact that the second respondent had confused himself by construing the offtake agreement as an ordinary construction contract. It was the applicant's further averments that loss of profit could only have arisen had the first respondent built the houses and the applicant failed to pay for them or the first respondent on selling the housing units to another party realized an amount less than the agreement price. The difference on the prices would be the extent of damages suffered, so averred the applicant.

[33] The applicant also averred that the second respondent was oblivious to the question of mitigation of damages which was a fundamental principle of law. It was averred that the first respondent had a duty to mitigate its damages and that the failure by the second respondent to appreciate the issue of damages mitigation arose from the second respondent's refusal to give parties the opportunity to dealienate issues for determination.

[34] The applicant averred that the amount of damages awarded was unjustified and questionable. Applicant averred that the damages were so excessive that the first respondent was equally shocked and abandoned its claim for costs on the argument that the damages awarded sufficiently addressed its claim. It was submitted that the first respondent was too embarrassed to ask for costs hence showing the unreasonableness of the award.

[35] The applicant averred that the second respondent awarded RTGS$46 million to the first respondent merely because a few of their e-mails were not answered by the applicant resulting in frustration on the part of the first respondent. It averred that delays were a result of bureaucracy associated with public institutions like the applicant. The applicant averred that the award was "shockingly iniquitous" and that the second respondent's reasoning and conclusions went beyond mere faultiness but constituted a palpable inequity that defied logic and the morality of Zimbabwe. The applicant also averred that the funds of the applicant are public funds which must be invested as they constituted old age persons pensions. It was argued that to order payment of RTGS$46 million of public funds for no delivery outrageously violated public policy and amounted to "the biggest heist in history" considering that the first respondent's directors fled the country after being suspected of obtaining the contract in issue illicitly. The applicant further averred that an award tainted with male fiancé and which has the effect of dissipating public funds must be set aside since many Zimbabweans stood "in

peril" to the sum of RTGS$46 million for no value. It was averred that there could not be any clearer case of unjust enrichment under the guise of contractual damages.

[36] The applicant raised additional grounds to justify why the award should be set aside. It was averred that the second respondent referred the applicant's request to delienate issues for determination at the commencement of the proceedings and proceeded to delienate his own issues. It was averred that the second respondent did not then advise the parties what the issues he had delineated here. It was averred that evidence was led without a particularization of the parameters of adjudication. It was averred that because arbitration is party driven and that by refusing to allow parties to debate and delineate the issue, this rendered the proceedings irregular. The applicant averred that due to the second respondent's refusal to have parties delineate the issue, the following issues which were critical to its 'cause' were not properly dealt with specially:

> "(1) 6.8.1. Whether in terms of the agreement, the claimant has a cognizable claim at law? [Materially the alleged breaches]
>
> 6.8.2. Whether the claimant delivered the housing units in the manner prescribed in the agreement. [Whether the strict letter of the agreement had been followed]
>
> 6.8.2(*sic*) Whether the first respondent ever mitigated damages."

The applicant averred that by depriving the applicant the right to delineate issues, the second respondent held an irregular adjudication and conferred himself his own jurisdiction and determined his own made case.

[37[The applicant averred that the first respondent granted a relief not contemplated by the parties because he created a contract for the parties yet the terms of the bespoke agreement were expressed and not subject to alteration whether parties allowed each other latitude.in negotiations or granted each other indulgences. The applicant quoted clauses 29.4 and 29.5 of the agreement as supportive of its assertion. Clause 29.4 provided that no party is bound by any express or implied terms, undertakings representation, warranty, promise not recorded on the agreement. Paragraph 29.5 provided that no alteration, variation or cancellation by agreement of both parties' amendment or deletion from the agreement has force unless reduced to writing and signed by the parties to the agreement. The applicant therefore submitted that the second respondent created a contract for the parties. It was submitted that the second

respondent was not guided by the agreement and thus rendered an award which was contrary to the public policy of Zimbabwe. It was further submitted that by not being guided by the agreement, the second respondent failed to appreciate that the obligation for payment on the part of the applicant would only arise upon delivery and transfer of the housing units. Further the applicant averred that the claim for loss of profit was not within the contemplation of the parties or the agreement.

[38] The applicant next averred that there was an improper adjudication. It averred that the second respondent adjudicated on matters which did not arise from the agreement nor were they contemplated so. In substance it was averred that parties never contemplated that their negotiations and interactions would result in an agreement from which a claim for damages could be mounted. The applicant averred that the second respondent failed to take cognisance of clause 29.6 of the agreement which provided that indulgencies, extensions of time and other relaxations and latitudes did not constitute a waiver of rights and obligations arising from the agreement.

[39] Lastly it was averred that it was against the public policy of Zimbabwe to make the award in favour of the applicant for the simple reason that its e-mails and telephone calls went unanswered. The applicant prayed for remittal of the matter for fresh arbitration before a different arbitrator.

[40] The first respondent opposed the application. In doing so, through the opposing affidavit its representative Dirk Johannes Swarts, it raised preliminary points that the representative of the applicant Cynthia Mugwira sought to introduce fresh evidence which could have been given during the arbitration proceedings yet although listed as a witness, she chose not to testify. It was averred that the applicant did not provide the record of proceedings and cited a wrong section of the Arbitration Act. The issue of quoting the wrong section was dealt with at the beginning of the judgment. The first respondent averred that the applicant did not question the authenticity of documents produced including the quantum of damages experts report. The applicant averred that it was Cynthia Mugwira who witnessed the signing of the offtake agreement and further signed the applicants board resolution which approved the addendum to the agreement dated 29 March 2018. The resolution was not implemented by the applicant. The first respondent averred that it had reservations about the *bonafides* of Cynthia Mugwira in her depositions.

[41] The first respondent noted that the second respondent had found that the applicant was in breach od the offtake agreement in three respects, namely:

(i) A refusal to agree the commencement date as provided in clause 8.2 of the agreement;

(ii) A refusal or right to negotiate with the first respondent regarding the inflation claim.

(iii) A breach of clause 24.3 of the agreement which required that each party should take steps as are necessary to ensure that the agreement comes into effect and its conditions and terms are maintained.

[42] The first respondent averred that the applicant was content to hammer on the damages awarded as being contrary to public policy but did not concede or confess that its breaches which it did not deny were in fact contrary to the public policy of Zimbabwe. The first respondent averred that the applicant had not alleged that the acceptance by the first respondent of the applicant's repudiation was contrary to public policy. The applicant noted that the quantum of damages had not been challenged by the applicant and that the second respondent had reduced the quantum awarded.

[42] In relation to the allegation that the first respondent failed to appreciate that the agreement was not an offtake one as opposed to an ordinary contractual agreement, the first respondent noted correctly that the second respondent was properly directed as to the nature of the agreement. It is noted that the second respondent in the award correctly denoted the agreement as different from the ordinary contractual agreement. Indeed, a perusal of the award at para 15 (incorporated by reference) headed "The agreement" shows that the second respondent properly differentiated it. The criticism of the applicant is not well founded nor established. I think that it has no merit.

[43] In relation to the allegation that the second respondent failed to appreciate that loss of profit could only come into focus if there had been construction and delivery of 8 000 houses, the first respondent responded that the issue was misunderstood by the applicant because the claim of loss of profit arose from the applicant's repudiation manifested in conduct that made performance on the agreement impossible. Therefore, the first respondent's position was that

but for the applicant's repudiation it would have performed on the agreement and made a profit which opportunity was then lost.

[44] I have considered the award in para(s) 14-31 in which the second respondent dealt with the issues of consequential damages and indirect loss. The parties addressed the second respondent on the issue of profit. Argument had been made by the applicant's counsel, *Advocate Zhuwarara* that damages for loss of profit could only be claimed when such loss is the direct, natural or contemplated result of the breach. The second respondent after considering no less that six superior court authorities stated inter alia when summarizing the principles arising from them and specifically at para(s) 78.5-81 of the award;

> "78.5. A claim for loss of profits does not necessarily amount to a claim for special damages. Such profits may be claimed under the head of general damages. The circumstances of each case must be looked at, having reference to the type of profits being claimed and whether they flow naturally from the breach, and,
>
> 78.6 that an important consideration to be taken into account in making a determination as to whether loss of profits amount to general damages is whether a core motive of the contract was for the claimant to make or obtain profits.
>
> 79. Bearing these factors in mind, I come to the conclusion that what is being claimed in these proceedings all falls within the category of general damages unaffected by the proviso in clause 22.1.
>
> 80. I say this because the nature of the contract was not simply one of purchase and sale, as suggested on behalf of NSSA but an ongoing engagement which if not interrupted, would have lasted for several years. It was not a conventional building contract, from which it differed in natural respects as I have noted, but did have some features in common with such an agreement, e.g. periodic payments over the period of the agreement and at the end of the day NSSA ending up with title to a large number of constructed houses. Clearly, for its past, HCZ's motivation was to make a profit. That it was not able to make the contemplated profit was a direct result of the termination of the Agreement on account of the conduct of NSSA.
>
> 81. It follows that I find that HCZ's claim does not fall foul of the provisions of clause 22.1."

The second respondent therefore found that the claim for profit was not excluded by clause 22.1 as consequential damages. It must follow in my determination that the submission by the applicant that the second respondent was misdirected in treating the offtake agreement as an ordinary contract and awarding loss of profit damages on that basis was incorrect because the second respondent as clear from the award was mindful of the distinction and his award speaks loudly to the distinction.

[45] In relation to the issue of mitigation of damages, wherein the applicant complains that the second respondent did not have regard to and that it was an issue which the applicant wanted to ventilate but was disabled by the second respondent's refusal to have the parties delineate issues, the first respondent averred that the issue did not appear anywhere in the applicant's statement of defence in the arbitration proceedings. A consideration of the statement of defence shows that the applicant did not plead mitigation. In fact, the applicant did not challenge the first respondent's quantification and the evidence given to support the damages qualification. The first respondent has also made the submission that in this application, the applicant did not even disclose what mitigation steps it considered the first respondent should have taken. I am not persuaded to accept that the second respondent can be faulted in relation to the issue of mitigation of damages now raised for the first time in this application.

[46] In relation to the applicant's submission that the second respondent engaged in an anomalous adjudication because he did not delineate issues and thus created his own issues and adjudicated upon them, the first respondent denied that the second respondent created his own issues. A consideration of the record of proceedings shows that the second respondent interrogated the issue of issues with the parties' legal practitioners. The legal practitioners addressed the court. The applicant's legal practitioner in relation to the issues submitted on p 10 of the transcript which is p 564 of the record of proceedings noted that there was a back and forth between the parties on the issues but submitted that, that notwithstanding, the course of defining issues was appropriate whether that be done by order "or" "determination" so that the parties are aware in order that the issues could be covered in cross-examination.

The first respondent's legal practitioner advocate *Tividar* submitted that there were four issues for determination, these being as stated on p 5 of the transcript and p 556 of the record. He submitted that since the tribunal was dealing with a breach of contract, the issues were "Was there an agreement? Was it breached? Did that cause a loss, and if so what are the loses…?"

[47] The first respondent rendered a ruling on the preliminary issues which included admissions and issues for determination. The ruling is located at p 17 of the transcript which appears on p 568 of the record. The second respondent noted that he did not consider it appropriate to make a formal ruling on the question of admissions because admissions were a prerogative of parties to make. In relation to issues the second respondent noted that the setting out of what the parties considered to be the issues was an exercise which could have been

carried out by the parties prior to the hearing and agreed upon. The second respondent stated after noting that the parties had not followed a course of agreeing issues before hand:

> "……as far as I am concerned and arbitration, it is not a course of action which causes me any difficulty because for my part, it seems that the issues are reasonably clear from the pleadings and that the prospect of evidence in cross examination straying from the real issues between the parties is not a real danger. I think the parties understand, and I think I have an appreciation of what the issues are and I think between us we will be able to keep the evidence and the questioning within the four corners of the record."

[48] What is of further significance is that a reading of the record does not show that the applicant's legal practitioner was precluded from raising any issue through cross examination. The deponent to the founding affidavit does not say what issue it was that the first respondent precluded it from raising. There was nothing illegal, irrational or unprocedural about the course which the second respondent adopted and there is nothing one can discern from the record to suggest that either counsel was uncomfortable with the way the proceedings were conducted. The applicant did not in the closing submission suggest that the applicant had been prejudiced by failure to present its case by the procedure adopted on the issues. I find no merit in the complaint by the applicant. The suggestion that the second respondent created his own issues and adjudged them was I can only say an unfortunate submission not borne by the record and stated in bad taste.

[49] In relation to the complaint that the applicant was a public institution with a duty to manage public funds for the benefit of the old age pensioners and that to order the applicant to pay RTGS$46 million in return for nothing defied logic, was outrageous in its defiance of logic and violated the public policy of Zimbabwe thereby, is an issue that speaks to sympathy as opposed to law. If the applicant is a body corporate with power to sue and be sued and to enter into contracts as it did in this case, then it is bound to the transactions which it concludes together with the risks of loss and profit involved. What is in fact consistent with the public policy of Zimbabwe is as submitted by the first respondent in para 57 of the opposing affidavit at p 532 of the record that there is observance of the rule of law in Zimbabwe and that all bodies corporate with power to sue and be sued be they private or public are not above the law and the law requires them to comply with their obligations and duties.

The other point to note is that the issue of the applicant's status and consequences of it being ordered to pay damages was not raised in the arbitration proceedings. The position appears to be that the applicant did not perhaps prepare to accept that the arbitration proceedings could go against it as was the result. The issue I think is simply that the public

policy of Zimbabwe is that the rule of law applies blindly to every justice entity. *In casu* it was competent to order damages against the applicant. The duty of the applicant was expected to be that of seeking that the damages to be awarded be in a reduced sum. The applicant did not do that. It therefore seems to me that the harm and loss to the applicant occasioned by being made to pay the damages awarded against it was due to the human factor. Those who superintended over the agreement and were lackadaisical in performing the applicant's obligations thereby breaching the agreement with the consequences of cancellation for repudiation which resulted were the enemies of the applicant and enemies of the public policy of Zimbabwe and not the first respondent nor the second respondent. The complaint raised on this aspect that a huge payment by the applicant will deplete public funds and that this would be contrary to the public policy of Zimbabwe has no merit and stands dismissed.

[50] During the hearing on 7 September 2022, argument was raised by the applicant's counsel that the expert who gave evidence during the arbitration proceedings did not produce primary documents relied upon to reach his conclusions. The expert was Mr Stuart. The applicant sought to rely on the two authorities of *Guardian Royal Exchange Assurance Rhodesia Limited* v *Jeti* 1980 ZLR 436 and *Levy* v *Tune – O –Mizer Centre (Pvt) Ltd* 1993(2) ZLR 378(SC). I directed the parties to file supplementary submissions to address the two authorities and their impact on the applicant's arguments.

The applicant's counsel argued that even though the applicant did not challenge the expert evidence of Mr Stuart, the first respondent nonetheless had a duty to ensure that the expert evidence was reliable and a basis given for the conclusion reached. The applicant gave an example that the figure of $14 million given under the heading "P & G Fixed Costs or Preliminary General Costs" related to salaries, staff accommodation, office accommodation staff movements. The applicant submitted that the second respondent did not produce the primary documents to support the figure of $14 million.

[51] The first respondent submitted that the raising of the point was in the nature of an ambush. Reference was made to the case of *Mutasa* v *Telecel International &Anor* 2014 ZWHCC 331 wherein MATHONSI J (as he then was) berated the practice of parties not pleading their evidence in affidavits in order to put the other party on guard so that party properly responds in the opposing affidavit. The first respondent has argued that I should not allow the point to be argued. Having already directed parties to address the point it appears iniquitous to refuse to consider the point. I therefore allow that it be argued. I, however, totally agree with

the *dicta* in the *Mutasa case* that it is unacceptable for a party to raise evidential matters after the filing of the opposing affidavit in the hope of influencing the court to rule in its favour.

[52] Having agreed to consider the point, the applicant's contention is that a failure by the arbitrator to consider whether or not an expert's conclusions are informed upon a consideration of primary evidence was intolerably hurtful to the conception of justice in Zimbabwe. The first respondent rightly in my view averred that the applicant did not in the founding affidavit address the issue of the report of the expert. If anything, the report was produced by the first respondent. The first respondent avers that it did not attach the primary documents there was no fore warning that the applicant disputed the expert's report. I must note that in the arbitration proceedings, the applicant did not again take issue with the primary documents relied upon by the expert. It is too late in the day to cry foul on the part of the applicant. This was a matter in relation to which discovery at the instance of the applicant could have been requested of the first respondent to make.

[53] The first respondent in any event submitted that the evidence of the expert at pp 999 and 1012 of the record of proceedings testified that he examined the primary documents comprising invoices, payment certificates ledgers and "invoices and supporting documents" which he said were numerous comprising ten (10) lever arch files. He stated that his understanding was that the documents were available for inspection by the applicant. The evidence was not refuted by the applicant nor challenged. The applicant had its opportunity to interrogate the report with the expert and has not explained why it did not do so.

[54] With reference to the cited authorities, the cases dealt with a different factual scenario involving road accidents. I do accept that the expert is there to assist the court with the final decision being that of the court. In the arbitral proceedings the expert went through his figures and there was no challenge from the applicant. It also appears to me that whether or not it is necessary for the court to itself call for the primary documents depends on the circumstances of each case. In the *Guardian Royal case*, the court had allowed the police officer who investigated the case to express his opinion on liability for the accident. The court noted that the police officer's duty was to investigate and not to draw conclusions I am not sure that I agree with the assertion but will leave it at that. The court gave an example of finger print evidence wherein the material on which the finger print expert's opinion is based or derived must be placed before the court. I must note that the issue of finger print evidence is covered

by statute in the Criminal Procedure and Evidence Act. The example cannot be of general application.

There are other instances like pathologists who examine dead bodies. The court does not require the dead body which in fact is the primary evidence for it to personally examine it in order to test or authenticate the opinion of the pathologist. Again, the Criminal Procedure and Evidence Act provides for the acceptance of the experts reports. The example given in the *Royal Guardian case* is distinguishable in as much as its applicability is inappropriate. It seems to me that in the arbitral proceedings the general rule that, what is alleged and not disputed is deemed admitted must apply. If the applicant did not deny or avoid the expert evidence as given, then it accepted it, period. The two cases do not assist the applicant and the issue raised must be dismissed.

[55] In conclusion upon a consideration of all documents filed of record and helpful submissions of counsel I am not satisfied that the applicant has established any of the recognized grounds for setting aside the award including those which it pleaded. The application must fail.

[56] I turn to case number HC 2554/19 wherein HCZ is the applicant and NSSA the respondent. The applicant seeks the registration of the arbitral award which I have dealt with in case number HC 2938/19 as an order of court. Counsel for both the applicant and the first respondent did not substantively address that application with the applicant's counsel submitting without rebuttal from the first respondent's counsel that no issue arose in relation to that application. The position taken was that it had to follow that, failure of the application for setting aside the arbitral award, the award was registrable. The corollary would ensue if the application for setting aside of the award succeeded in that the application for registration of the award would fall away. Counsel's attitude was understandable because the grounds for opposing the registration are the same ones ventilated in the application for setting aside the award.

[57] Notwithstanding the concessions of counsel, the court can only register the award if it is satisfied that the requirements for registration are met. The recognition of an arbitral award is provided for under Article 35 of the First Schedule to the Arbitration Act. The arbitrator issued a final award on 25 March 2019. The respondent was ordered to pay to the applicant $30 000 000.00 with interest thereon at the prescribed rate of 5% per annum from 22 February

2019. The amount as noted at the beginning of the judgment was upon a recalculation consensually done reduced to $22 million and the arbitrator reduced the award to this amount.

[58] The applicant complied with the provisions of Article 35(2) which lists documentation which must be provided by the applicant seeking registration of the arbitral award. The following documents were attached to the application:

(a) Certified copy of the final award

(b) certified copy of partial award

(c) certified copy of the Housing Take off Agreement which incorporated the arbitration agreement.

In the circumstances, I was satisfied that the arbitral award as consensually amended is registrable as an order of the court.

[59] **DISPOSITION**

I therefore dispose the two applications as follows:

IT IS ORDERED THAT:

1 In case number HC 2938/19, the application be and it is hereby dismissed with no order as to costs.

2 In case number HC 2554/19, the application succeeds and the following order ensues:

(a) The arbitral award made in favour of the applicant by the Honourable Arbitrator Peter C. Lloyd on 25 March 2019 as subsequently amended by the reduction of the amount of $30 000 000.00 to $22 000 000.00 is registered as an order of this court as follows:

(b) The respondent shall pay to the applicant the sum of $22 000 000.00 together with interest thereon at the prescribed rate of 5% per annum from 22 February, 2019 to the date of full payment.

(c) The respondent pays costs of this application.

Mawere and Sibanda, applicant (NSSA) legal practitioners
Zigomo legal Practitioners, respondent's (HCZ) legal practitioners