MALBECK (PVT) LTD
versus
NETONE CELLULAR (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 October 2021 & 3 February 2025

Opposed Court Application

T Nyahuma, for the applicant
G Ndlovu, for the respondent

CHITAPI J: The applicant and the respondent are in contest over an arbitral award issued by D A Whatman. The issue which the arbitrator had to deal with was a narrow one. The applicant supplied automatic voltage regulators to the respondent in terms of a written agreement between the two parties dated 18 December 2018. The dispute between the parties pertained to the mode of payment. It was common cause that an amount of $398 500.00 remain due to the plaintiff. The applicant claimed that payment of the 398 500.00 be affected in United States of America (USD) dollars whilst the respondent tendered payment of the same amount in Zimbabwe gold dollars then referred to as ZWG. The dispute was in terms of the agreement referred to arbitration. The principal issue was the form of currency to be paid by the respondent in the discharge of the agreed balance.

The matter fell on the interpretation of statutory instrument No 33/2019 and its impact on the mode of payment of the balance to the applicant, that is, whether such payment be rendered in $USD or in $ZWG. The parties settled agreed facts which incorporated the agreed issue for determination as set out in para 11 of the agreed facts. It is convenient to reproduce the statement of agreed facts with para 11 in bold lettering. The statement reads as follows:

STATEMENT OF AGREED FACTS

1. In 2008, respondent called for tenders for the supply of 400 Automatic Voltage Regulators ("the Regulators"). Claimant was the successful tenderer.
2. The Parties then entered into a written contract in December 2018 for the supply of the Regulators. A copy of that contract is annexed hereto and marked Annexure 1. The documents comprising the relevant Tender Number NET/NP/05/18 are Annexure 2 hereto.
3. As appears more fully from Annexure 1 hereto, the contract price was the sum of US$ 797 000.00 and provides for a deposit of 50 percent of the sum to be paid. Respondent paid the deposit of the sum of us$398 500.00 on 14 February 2019.
4. On the 11th of July 2019, the Respondent wrote to the Claimant advising it that it had not received the first batch of 200 regulators, despite having paid the deposit, and as such was now formally demanding delivery of the first batch of regulators within 10 days of receipt of the latter.
5. A further letter of demand was sent to the Claimant on the 6th August 2019, demanding that the Claimant deliver the regulators or risk the Respondent cancelling the agreement.
6. On the 17 October 2019, Claimant delivered the first batch of the regulators being 200 in number and which delivery was accepted by Respondent.
7. On 22 January 2020, Claimant delivered to Respondent, the remainder of the 200 Regulators which delivery was again accepted.
8. The Parties are agreed that payment in respect of the remainder of the Regulators would only become due on delivery. The Parties are also agreed that the balance due to Claimant in terms of Annexure1, is the sum of US$398 500.00.
9. It is Claimant's position that it is entitled to payment in the sum of us$398 500.00 payable in ZWL at the interbank rate prevailing as at the date of payment.
10. It is Respondent's position that it is only obliged to pay the sum of zwl398 500.00 and relies on the provisions of Statutory Instrument 33 of 2019 (later incorporated into the Finance Act Number 2 of 2019) in this regard.
11. The sole issue for determination is whether or not, on the facts of this matter, Respondent is able to invoke the provisions of the legislation and pay the said sum of ZWL398 500.00 or whether it is liable to pay the sum of US398 500.00 calculated at the interbank rate prevailing as at the date of payment.
12. Both parties intend filing heads of argument in respect of their adopted positions.

The parties then filed heads of argument followed by a virtual hearing held via zoom on 25 January 2012. The zoom hearing was necessitated by the COVID 19 national lockdown.

The arbitrator rendered his award on 1 February 2021 (wrongly dated 1 February 2019). The arbitration noted the sole issue for determination as follows:

> "The principal issue for determination by the Tribunal is a matter of law as to whether the agreed balance is one payable in ZWL$ by converting a US dollar balance by the auction rate or whether it is now payable in ZWL$ at one to one by operation of law."

The arbitrator determined as follows:

> "The adjudication of this tribunal must therefore be that the obligation of the respondent to pay for the regulators in terms of the agreement constituted a liability on the 22nd February 2019 and is therefore a liability captured by these legal provisions. As at 22 February 2019 the US$ liability became a ZWL liability at one to one by operation of law on that date."

Resultantly, the arbitrator made an award as follows:

> "The respondent shall pay the Claimant the amount of ZWL$398 500.00 within seven days of the date hereof together with simple interest on that sum at the rate of 5% per annum from the 21st January 2020 to the date of payment."

Each party was to bear its own costs and to share equally the costs of arbitration.

Consequent upon the arbitral award being issued the applicants' legal practitioners requested the arbitrator to provide them with a transcript of the record of proceedings. The request was made by e-mail dated 8 February 2012 addressed to the arbitrator. In the response sent by e-mail on the same date, the arbitration stated as follows in material particular.

> "Transcripts are not normally availed in Arbitration matters and certainly not required to progress the matter if that is your wish. In any event, if I am not mistaken, it was you that recorded the hearing"

Two further correspondences ensued between the arbitrator and the applicants' legal practitioners. The latter wrote as follows on e-mail to the arbitrator.

> "Thank you for your reply to my request. Please note that we do not intend to have a legal debate with your Honourable self on what the law says regarding transcripts in arbitrator proceedings. Suffice to state that we require the transcript for purposes, if needs be, of taking the matter further and that, for that reason, the transcript cannot be produced by us but by the tribunal. Kindly let us know when a copy will be available."

The arbitrator maintained his position and responded:

> "All duly noted but I am not going to provide a transcript – I would add that this has been confirmed by the High Court Registrar as unnecessary in many matters. The Arbitration Act is very clear on the process to be followed. I would recommend checking this with your counsel."

The issue of the record of proceedings or transcript of the record is a major issue which the applicant relies upon in seeking the setting aside of the arbitrator's award in issue. The applicant averred that it was contrary to the public policy of Zimbabwe for the arbitrator to fail to keep and maintain a complete record of proceedings because such failure constituted an abrogation of the arbitrators duty to keep such record for proper scrutiny where required. It was contended that the arbitrator was by law required to keep such record.

In response the respondent averred that the arbitrator had kept a full and complete record and that the applicant had in fact attached the record as Annexure 2 to the founding affidavit. It was the respondent contention that the issue for determination was set out in the statement of agreed facts and that the facts were not disputed. It was contended that the issue for determination was a point of law. The respondent averred that the applicants rights to a fair trial under such circumstances was not infringed upon. The respondent contended further that the applicant did not advise at the pre-hearing meeting that a transcript record was necessary and that it only raised the issue following the release of the award which was not in the applicants favour. It was averred that parties were free to agree on the procedure to adopt in the conduct of the arbitral proceedings. The respondent averred that the applicant was now creating its own cause of action by raising the issue of a transcribed record.

In reply the applicant contended that Annexure 2 to its founding affidavit did not constitute the entire record because it consisted of pleadings filed by the parties in the proceedings without a record of what transpired or was submitted orally by the parties. The applicant averred that the arbitrator did nor have to await a request from the parties to keep a proper record of proceedings because record keeping is a dictate of the law. Whilst accepting that the record contained filed documents, the applicant averred that parties made oral submissions which the arbitrator ought to have recorded. The applicant submitted that there was no indication in the award that the oral submissions were considered by the arbitrator. The applicant averred that the respondent did not comment on or deny allegations of public policy violations in the award itself.

I have considered the position of the arbitrator in relation to the issue of the record or a transcript of the record. The arbitrator did not state that he did not keep a record of the proceedings. In his first response as quoted herein before the arbitrator stated that… "transcripts are not normally availed in Arbitration matters and certainly nor required to progress the matter…"

In the second response and again quoted herein above the arbitrator literally refused to provided a transcript. He stated:

"All duly noted but I am not going to provide a transcript…"

The arbitrator in support of his refusal also noted that the High Court Registrar had confirmed that a transcript "was not necessary…" The arbitrator without being specific stated that the Arbitration Act provided for the process to be followed. This type of response is unhelpful. It is not clear what the process referred to by the arbitrator as located in the Arbitrator Act was.

It therefore seemed to me that the issue is not that the arbitrator failed to keep a proper record of proceedings. The arbitrator did not say so. the arbitrator refused to provide the transcript requested on the basis that a transcript of proceedings is "normally" not availed in arbitration proceedings and that the Registrar of this court had confirmed that position. I should immediately comment that the unnamed Registrar who purported to give advice to the arbitrator that a transcribed record was not necessary overstepped his or her function. The Registrar's office is not created to give legal advice to parties or to legal practitioners.

Section 55 of the High Court Act [*Chapter 70.6*] provides for the appointment of Registrars, deputies, assistants and others officers of the court including the Sheriff and deputies alike. The Registrar is an administrative official; see *Getrude Mutasa & Anor* v *Registrar of Supreme Court & 2 Ors* SC 27/18 wherein GUVAVA JA dealt with the duties of a Registrar (which I will not repeat) albeit in the context of the Supreme Court Registrar. Clinically what is relevant for purposes of this matter is that a Registrar is imbued with administrative functions only some of which are imposed by statute. Where a party or a legal practitioner decides to seek legal advice which the Registrar should not in duty give, then such party is in peril if whatever advice given turns out to be incorrect. In *casu*, if the arbitrator relied upon the advice of the Registrar that a transcript is not necessary to be filed in completed arbitral proceedings which have escaled to the High Court, then he took a gamble. If the position communicated to him was wrong then the arbitrator must live with it. Fortunately no particular registrar was mentioned by name otherwise corrective administrative interventions would have been recommended to keep that Registrar in check and re-orient him or her.

The position that obtains is therefore that the arbitrator refused to avail a transcript of the complete record of proceedings. The assumption must therefore be that the arbitrator was or is a

position to provide the transcript but considers it unnecessary to do so and could not be bothered to do so. Whether or no the arbitrator can lawfully refuse to avail a transcript of proceedings which have escalated from his hands to the High Court needs to be answered. If the arbitrator may lawfully refuse then that issue ends there. If the arbitrator may not lawfully refuse to avail the record or transcript then the court must decide on the fate or effect of such refusal.

I must first deal with a side issue. At the initial hearing, it was observed that the applicant did not in its heads of argument sufficiently traverse the issue of the alleged violation of the public policy of Zimbabwe by the arbitrator in not treating the contract between the parties as involving a foreign obligation. The heads of argument barely addressed the issue in any notable detail. I issued an order directing the parties counsel to file supplementary heads of argument to traverse in more detail matters raised in para(s) 4, 5 and 6 of the applicants' heads of argument. I also reserved the question of the scale of wasted against the applicant costs occasioned by the postponement.

The matter raised in para(s) 4, 5 and 6 were the alleged failure by the arbitrator to treat the transaction in dispute as involving the payment of foreign obligations exempt from Statutory Instrument 33 of 2019. The applicant had also submitted that the respondent had not specifically denied that the arbitral award violated the public policy of Zimbabwe and that such failure to deny meant that respondent accepted the contention.

In the supplementary heads of argument the applicant prefaced them with an acknowledgment that the leave granted to parties to file supplementary heads of argument related only to matters covered on para(s) 4, 5 and 6 of the applicants' main heads of argument. Quite unexpectedly the applicant then averred that it was entitled to go beyond the terms of the leave and was on the authority of *Pharaoh Musikwe* v *Douglas Nyajona & 2 Ors* SC 17/2012 entitled at its whim to address "…even these points of law that are not canvassed in applicant's original Heads of Argument so long the points of law related to are adverted to in the founding affidavit."

The applicants counsel then quoted from the same judgment wherein ZIYAMBA JA stated at p 2 of the cyclostyled judgment:

> "Undoubtedly a point of law can be raised at anytime even though not pleaded. However, this is subject to certain considerations one of which is that the point of law at this juncture would cause prejudice to the party against whom it is made."

It is therefore clear that the practice to allow the raising of the point of law does not provide a *carta blanche* right to the person who wishes to raise a point of law. The court has a discretion to be exercised upon a consideration of all the circumstances in which the point is sought to be raised. The discretion as with any other must be judiously exercised. In this case the court gave a specific directive on what the supplementary heads of argument should cover. The window granted was not intended to give the applicant an extended window to reconsider its case and recess to the library to find extra ammunition to advance its case. The applicant submitted that there was no prejudice to the respondent because the respondent had ample time to deal with the new points of law in its own supplementary heads of argument.

The respondent in its supplementary affidavit objected to the applicant filing heads of arguments on matters other than the ones arising from para(s) 4, 5 and 6 of the applicants' main heads. The respondent noted that the heads of argument now dealt with abandoned issues. The respondents' objection has merit. The applicant sought to raise the issue that it was inimical to the public policy of Zimbabwe for the arbitrator not to produce a transcript of the proceedings. The other point was that the arbitrator dealt with an issue not before him in that he ordered that payment of the outstanding balance be calculated at the rate of $1 USD to $1 ZWL yet the respondent had not counter claimed that payment be so denominated.

The respondent was correct that the applicant abandoned the two issues now sought to be raised. Just to set out the paper trail, at the commencement of hearing Mr *Ndlovu* for the respondent took a point *in limine* that the applicants' heads of argument did not address the issues of the incomplete record and the fact of the arbitrator having granted an order not prayed for in the award. Mr *Nyahuma* for the applicant and after exchanges with the court asked for the matter to be stood down. The request was granted. On resumption Mr *Nyahuma* applied for leave to file supplementary heads of argument. Mr *Ndhlovu* opposed the application for leave. Counsel cited the case of *Muskwe* v *Law Society of Zimbabwe* SC 72/20 to advance his objection that where a party does not in heads of argument advance a ground raised in the grounds of appeal, the ground of appeal not motivated stands abandoned. Indeed the following extract taken from the said judgment of GWAUNZA DCJ at p…..of the cyclostyled judgment reads.

> "[17] The appellant avers that the disciplinary Tribunal relied on irrelevant extraneous and manufactured facts. It is contended through his first ground of appeal that the judgment of the Tribunal demonstrates that it related to another person not the appellant. The appellant in his heads of argument however, did not motivate this ground of appeal nor did he make any further reference

> to it. Accordingly, the first ground of appeal stands abandoned and will not be considered in this judgment."

Much the same applies *in casu*. Although the court is not sitting as a court appeal it nonetheless is asked to consider the arbitral proceedings and fault them on the basis of pleaded grounds to which the applicant stands bound. Where the grounds are not advanced in argument then, they should as said by the Supreme be considered abandoned.

When faced with the dilemma, Mr *Nyahuma* then applied to supplement grounds of appeal 4, 5 and 6 and his prayer succeeded. Counsel was denied the leave to supplement any other grounds or submissions. The conduct of Mr *Nyahuma* to then seek to introduce through the back door of other a points of law was ingenious but reprehensible. The two grounds of law raised did not arise after the grant of leave. These were points of law had already been raised by counsel but were not addressed. Counsels was denied an open check to supplement his heads of argument as he wished. Counsel improperly conducted himself in that regard. The supplementary submissions of Mr *Nyahuma* on the two points *in limine* are therefore expunged from the record of what the court shall consider in coming up with its judgment.

Even assuming that the points were properly raised and the court does not suggest that they would have no impact on the courts decision because in relation to the alleged incomplete record, the applicant would have borne the onus to ensure that the record is made available since it is the party that required to use it. The applicant could have sought an order to compel the arbitrator to provide the record. This is in conformity with r 62(5) of the High Court rules which obliges the court, tribunal or board whose proceedings are brought on review to lodge with the Registrar within twelve(12) days of service of the review application the original record and copies of the record of proceedings subject of review. The proviso to the rule states that:-

> "Provided that it shall be the responsibility of the party seeking review to ensure compliance with this subrule."

To make matters worse, the applicant did not cite the arbitrator. Had the applicant done so, it could have asked for the arbitrator to be ordered to answer on and provide the record in the same proceedings. The arbitrator as noted earlier in the judgment refused to produce the transcript. The applicant was under the circumstances not without a remedy. The applicant did not use the remedy of a compulsion order. In the founding affidavit, the applicant dealt at length with the issue of the legal obligation of the arbitrator to prepare and present a record of proceedings. It is

not necessary to debate the issue of whether a record be kept because the issue is the refusal by the arbitration to transcribe and produce the transcript. The applicant is to blame for want of a transcript of proceedings.

The next issue is whether or not this application cannot be determined without a record of proceedings. The applicant submitted that the record did not contain a transcript who said what. It was not contended what it was that the parties said and especially the applicant which would impact on the decision and in what manner. The record before the court therefore comprises all pleadings and the parties arguments on paper, that is heads of argument placed before the arbitrator. No evidence was led. It must be taken in the absence of allegations to the contrary by the applicant that the transcript would have comprised the parties speaking to their heads without detracting from them. I say so because the applicant did not attempt to list what was submitted on its behalf or on behalf of the respondent which is not captured in the heads of argument. I would not be persuaded that absence only of what the legal practitioners submitted to motivate their arguments which were already on record would amount to such an incompleteness of record as would prejudice the applicant or the respondent in the circumstances of this case from presenting their parties positions effectively to the court. The parties agreed issue was a matter of law and of interpretation and application of the law.

The next point that the arbitrator rendered a judgment not applied for or counter claimed for by the applicant is a red herring and an objection in *terrorum*. In para 11 of the statement of agreed facts dated 20 December 2020 placed before the arbitration, it is stated:

> "The sole issue for determination is whether or not on the facts of this matter, respondent is able to invoke the provisions of the legislation and pay the said sum of ZWL398 500.00 calculated at the interbank rate prevailing as at date of payment."

This was clearly a point of law as facts were not in dispute. In para 10 of the agreed facts it was sated:

> "10. It is respondents position that it is only obliged to pay the sum of ZWL398 500.00 and relies on the provisions of Statutory Instrument 33 of 2019 (later incorporated into the Finance Act number 2 of 2019) in this regard."

The arbitrator determined that in line with S.I 33/2019., the discharge of financial and contractual obligations was to be deemed to be denominated in RTGS dollar at the rate of $1 USD to 1RTGS dollar. The arbitrator then determined that the respondent was obliged to pay the

respondent the balance of the agreed amount at the rate of 1USD to 1 RTGS dollar. The arbitrator did not by any stretch of imagination create his own order. It consequentially follows that even if the points under dispute as having been unprocedurally sneaked in by Mr *Nyahuma* had been properly invoked, they would have been dismissed for want of merit.

That leaves the sole issue of whether the arbitrator misinterpreted the law on the application of the revaluation law S.I 33/19. The applicant averred that the arbitrator ought to have found that the transaction to which the contact related involved the purchase and payment by the applicant of the goods supplied to the respondent offshore. The applicant averred that the contract in question involved the discharge of a foreign obligation and was exempt from revaluation in terms of the exception to the application of S.I 33/2019 AS PROVIDED FOR BY S 44C of the Finance Act. The arbitrator reasoned as follows:

> "The exception referred to in s 44C(2) of the Act is for "foreign loans and foreign obligations." The utilization of a US dollar price in the agreement alone does not make the transaction a foreign obligation given that the US dollar was the currency and price of reference in local contracts at the time of the agreement.
> The effect of my adjudication that the agreement was concluded on the 18th December 2018 and the clear interpretation of the above is that as of the 22nd February 2019 the US dollar liability of the respondent within the agreement was deemed to become a local currency debt at one to one in terms of statute and that the devaluation of such currency does nor alter the amounts of the debt due and owing."

The arbitrator rejected the applicants contention that the provisions of s 22(1)(e) of the Finance Act applied. The provision reads:

> "(2) that after the first effective date any variance from the opening party rate shall be determined from time to time by the rate or rates at which authorised dealers exchange the RTGS dollars for the United States dollar on the willing seller willing buyer basis."

The arbitrator reasoned that s 22(d) and (e) should not be conflated because to do so would mean that the same statute deems assets and liabilities to be denominated at 1 to 1 and at the same time allow the values to again revert to USD on the following day for value determination at a parity calculated on the basis of a milling buyer and willing seller using authorized exchange dealers' rates.

The arbitrators reasoning cannot be faulted because as he correctly reasoned the position had been put beyond doubt by s 22(4)(a) which stated that

> "(a) it is declaned for the avoidance of doubt that financial or contractual obligations that were concluded or incurred before the first effective date, that were valued or expressed in United States

> dollars (often than assets and liabilities referred to in s 44C (2) of the Principal Act shall on the first effective date."

So far so good then about what the law decreed. The question is did the contract in question involve the incurring of foreign debt and obligations and did the arbitrator misapply the law to the facts. In the case of *Breastplate Services (Private) Limited* v *Carrbria Africa* PLC SC 66/2020 cited by the respondents' counsel wherein it was stated that the term" foreign loans and obligations denominated in any foreign currency was not defined on either s 44C (2) of the Reserve Bank Act or S I 33/20219 or in any relevant legislation. PATEL JA (as he was) then stated:

> "Its meaning in any given case must be ascertained from the factual circumstances of the parties involved and the material substance of the transaction that they have entered into."

In casu, the applicant and respondent are locally registered and trading companies in Zimbabwe. A careful consideration of the contract between them shows that it envisaged that the applicant would obtain foreign currency from the Reserve Bank in order to pay the foreign supplier. This meant that the applicant would have had to purchase the foreign currency from the Reserve Bank & not outside the country. There was no evidence produced to show the source of funds which the applicant stated that it obtained. It does not appear necessary to split hairs. A foreign loan is obtained from offshore inasmuch as a foreign obligation is one where payment must be made offshore. The Creditor must not be a Zimbabwean registered and locally operating entity.

The applicant averred that liability was acknowledged in December 2019 as a $ USD debt he to the applicant. The correspondence produced showed that the respondent instructed its legal practitioners by letter dated 21 October, 2019 to claim a refund of the deport of US $ 381 173.92 paid on 14 February, 2019. In the last paragraph of the letter the respondent wrote:

> "We have attached hereto correspondence between the parties. We instruct that you demand refund of the deposit we paid in United States dollars being the currency in which the deposit was paid and damages for breach of the agreement the parties entered into."

By letter dated 4 November, 2019 the respondent's legal practitioners advised the applicant that it had breached the agreement for non-delivery of the goods and demanded the refund of the deposit in the sum of US 4 381 193.92. Effectively therefore the contract was terminated. At that stage it could not be said that the agreement was still extant nor was its performance sought. The supply of the regulators was therefore made after the termination for breach of the initial

agreement. The supply was made on 17 October 2019 and also on 22 January 2020 the latter after formal demand of deposit refund for breach. It cannot be said that the respondent stood by any revaluated agreement in terms of S.I 133/19 because it never said so but instead cancelled the agreement and demanded the refund of the deposit in USD. The subsequent delivery after demand cannot be said to have been made in terms of what the respondent now argues as falling within the anibits of a liability falling within S.I 133/19 because the agreement had been vacated by the respondent.

In my view the reasoning of the arbitrator that the liability of the respondent as at 22 February, 2019 was deemed to become local currency at one-to-one may have been correct. However, the contract was not honoured and the applicant vacated it and demanded its deposit back. The subsequent supply of the 200 regulators supplied on 22 January, 2020 should have been considered as a stand-alone event which could not be said to be a performance on the first agreement which the respondent had vacated.

The court is mindful that arbitral awards are not set aside willy nilly. In the case of *ZESA* v *Maposa* 1999 (2) SA 452 (S) at 466- E – G GUBBAY CJ In discussing the subject of setting aside on arbitral award on the ground that it is contrary to the public policy of Zimbabwe as envisaged in Article 34 (2)(b)(ii) of the Arbitration Act stated:

> "An arbitral award will not be contrary to public policy merely because the reasoning or conclusions of the arbitration 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 on appeal power and either uphold or set aside or decline to recognize and enforce an award having regard to what it considers should have been the correct decision. Where however, the reasoning or conclusions in an award goes beyond were faultiness or correctness and constitutes a palpable inequity that is so for reaching and outrageous in its defence of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be contrary to public policy to uphold it. The same applies where the arbitration has not applied his mind to the question or has totally misunderstood the issue and the resultant injustice reaches the point mentioned above" see also *Alliance Insurance* v *Impereal Plastics (Pvt) Ltd & Anor* SC 30/17."

In my view the failure by the arbitrator to consider the paper trial in this transaction especially the events which occurred after the revaluation under S.I 133/19, the repudiation of the contract and demand for a refund by the respondent in USD and the subsequent fresh supply of the goods after the contract was vacated was not only a question of mere faultiness but constituted an inequity so far reaching in its defiance of logic and had far reaching consequences on the

applicant's business by it being short changed, to a point that a sensible and fair-minded person would consider that the conception of justice would be contrary to public policy if upheld. The arbitral award in my judgment is contrary to the public policy of Zimbabwe. The issue of the payment to the applicant as discussed at the rate of one to one was reached without regard to the circumstances of the case. The application of a statute must be made against an established factual field.

The issue of costs remains in the courts discretion. Although the conduct of the applicants counsel in settling supplementary heads of argument was criticized, the court does not consider the conduct to be grave enough to warrant an adverse or punitive costs order against the applicant or its legal practitioner. An equitable order is one where costs must follow the event. The applicants prayer in the draft order that a different arbitrator should be appointed to hear the matter denovo is inappropriate in the circumstances of this case. I say so because of the views I have expressed on whether the agreement between the parties was still extant at the time that the second supply of the goods was made or that transaction should have been treated as a stand alone transaction.

Accordingly, the following order disposes of its matter.

IT IS ORDERED THAT

1. The arbitral award of Whatman DA dated I February 2021 is hereby set aside.
2. The respondent shall pay costs of the applicants.

Nyahuman's Law, applicants' legal practitioners
Gill Godlonton & Gerrans, respondents' legal practitioners