REPORTABLE (117)

NATIONAL SOCIAL SECURITY AUTHORITY
v
(1) HOUSING CORPORATION ZIMBABWE (PRIVATE) LIMITED (2) PETER CARNEGIE LLOYD

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & KUDYA JA
HARARE: 13 MAY 2024 & 30 DECEMBER 2024

T. Mpofu, for the appellant

D. Tivadar, for the first respondent

No appearance for the second respondent

GUVAVA JA:

[1] This is an appeal against the whole judgment of the High Court (the 'court *a quo'*) dated 9 June 2023 in which it dismissed an application made by the appellant under case number HC 2938/19 for the setting aside of an arbitral award. It, in the same proceedings, granted an application made under case number HC 2554/19 by the first respondent for the recognition and registration of the same arbitral award. Both applications, which were heard by the court *a quo,* related to the same arbitral award that had been granted by the second respondent.

THE PARTIES

[2] The appellant is a statutory body established in terms of s 4 of the National Social Security Act [*Chapter 17:04*]. The first respondent is a company, duly registered in terms of the laws of Zimbabwe. The second respondent is an arbitrator appointed by the Commercial

Arbitration Centre. For convenience, in the course of the judgment he will be referred to as the arbitrator.

FACTUAL BACKGROUND

[3] This multi-million dollar dispute has been raging in the walls of the arbitration center and the courts' corridors for the past seven years. It made its way up to this Court on a previous occasion. It was remitted to the court *a quo* for a hearing *de novo.* After a rehearing in the court *a quo* the appellant noted a fresh appeal to this court. This is the appeal now before us.

[4] The dispute arose from the following facts. On 14 July 2017, the appellant and the first respondent entered into a housing offtake agreement (the 'agreement'). The agreement provided for the construction, by the first respondent and delivery to the appellant, of 8 000 housing units at an agreed price per housing unit. The first respondent was also obliged to purchase the land upon which the houses would be built. The houses were to be delivered in batches of 250 housing units over an agreed timeframe. In terms of the agreement, the appellant was to pay a deposit of US$16 million to the first respondent. The appellant duly paid the deposit on 4 August 2017.

[5] At the time that the dispute arose, the first respondent had constructed and completed a total of 53 housing units with other housing units being in various stages of completion. It, however, did not have title to the property where the houses were being built, neither had it paid for the property in full. The disagreement between the parties related to the operation and implementation of the agreement. Numerous meetings were held and correspondence exchanged between the parties in an effort to resolve the issues without success. The first respondent complained about the appellant's perceived failure to agree on an implementation date for the agreement, delay in appointing a project engineer,

failure to negotiate first respondent's inflation claim and failure to sign an addendum to the agreement. On the other hand, the appellant complained that the first respondent was not delivering the housing units in terms of the agreement. With no resolution of the impasse in sight, the first respondent wrote a letter to the appellant on 29 May 2018 cancelling the agreement on the basis of the alleged breaches.

[6] By agreement, the parties referred the dispute for arbitration. The second respondent was appointed as the arbitrator. The first respondent claimed that the appellant committed material breaches of the agreement and that such breaches amounted to repudiation of the contract. As a consequence of the alleged violations the first respondent claimed damages for the construction of 53 housing units in the sum of US$2 316 000.00 and loss of profit in the sum of US$56 542 364.00 together with interest *a tempore morae* and costs of the arbitration.

[7] On the other hand, the appellant denied having repudiated or breached the agreement. It denied that the first respondent was entitled to terminate the agreement as it purported to do. The appellant claimed that it was the one which was entitled to cancel the agreement on account of the first respondent's failure to deliver housing units in terms of the agreement. As a consequence, the appellant filed a counter claim in which it claimed cancellation of the agreement based on the first respondent's alleged breach, refund of the offtake deposit of US$16 million 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 of arbitration.

[8] On 25 March 2019, the arbitrator issued a final award and found in favour of the first respondent. It found that the appellant was in breach of the agreement and awarded damages for loss of profit in the sum of US$30 million. He dismissed the claim of US$2 316 000.00 for the 53 completed housing units on the basis that they could not be

transferred to the appellant and would therefore be retained by the first respondent. He dismissed the appellant's counterclaim for refund of the US$16 million deposit. The arbitrator reasoned that the sum of US$30 million was the profit which the first respondent would have made in terms of the contract had the agreement not been prematurely terminated due to appellant's breach.

[9] Armed with the arbitral award, the first respondent approached the court *a quo* for its registration under case number HC 2554/19. The appellant, clearly disgruntled by the turn of events, opposed the application for the recognition and registration of the arbitral award and filed a counter application in case number HC 2938/19 for the setting aside of the award. The appellant's application was made in terms of Article 34 (2) (b) (ii) of the Arbitration Act [*Chapter 7:15*] (the Arbitration Act) on the basis that the arbitral award was contrary to public policy. It contended that the award, requiring the appellant to pay USD 30 million for no work done, induced a sense of shock. It further alleged that the award was made contrary to the provisions of the agreement. It averred further that the arbitrator confused himself by dealing with the agreement as a construction contract as opposed to an offtake agreement which gave the first respondent an obligation to construct houses at its own cost and deliver the houses to the appellant. The appellant's obligation was to purchase the completed housing units for the agreed sum of US$38 000 per unit. In the appellant's view, damages could only have arisen where the first respondent had produced completed housing units and failed to find an off - taker or if it found one, the purchase price offered was lower than the amount which the parties had agreed on in the agreement.

[10] A chamber application to consolidate the two applications was filed under case number HC 5556/19 and granted by FOROMA J on 15 July 2019. The two consolidated applications were set down for a first hearing before MUSITHU J who handed down a

judgment under case number HH 481/20 on 22 July 2020. In the said judgment, the application for relief sought under HC 2554/19 for the registration of the award was granted.

[11] The appellant was not satisfied with the judgment and appealed to this Court under SC 338/20. The appeal was heard on 13 September 2021 before a bench comprising MAVANGIRA JA, UCHENA JA and CHATUKUTA JA. At the hearing of the appeal, counsel for the appellant sought leave to amend its grounds of appeal by adding a new ground of appeal that raised a point of law. The ground of appeal attacked the validity of the proceedings before MUSITHU J on the basis that the first respondent, in its application for recognition of the arbitral award, did not attach an authenticated copy of the arbitral award. The court upheld the procedural point.

[12] In judgment number SC 20/22 the Court stated that the failure by the first respondent to comply with the provisions of Article 35(2) of the Arbitration Act in failing to provide an authenticated award, was fatal to its application *a quo*. The court further noted that the judgment of MUSITHU J did not determine the application for the setting aside of the arbitral award under case number HC 2938/19 which had been made by the appellant. It thus found, in addition to the failure to comply with Article 35 of the Arbitration Act, that the failure on the part of the court *a quo* to determine all the issues before it constituted a gross irregularity and as such the decision had to be set aside and the matter remitted for a hearing *de novo* before a different judge.

PROCEEDINGS *A QUO*

[13] Prior to the fresh hearing of the application in the court *a quo*, and on 23 November 2021, the first respondent filed a 'NOTICE OF FILING' of three documents authored by the arbitrator. The documents were titled; 'Original signed and authenticated Partial Award,

Original signed and authenticated Final Award and Original signed and authenticated Corrected Award'. The corrected award reflected that the original awarded amount of US$30 million was set aside by the arbitrator and substituted with an amount of US$22 million. The first respondent filed the documents in an effort to deal with the criticism that had arisen in SC 20 /22 that the award by the arbitrator was not authenticated as required by Article 35 of the Arbitration Act. The arbitrator further corrected the arbitral award and substituted the initial amount after realising that the judge *a quo* had found that he had made an arithmetical error in his computation of the damages. All this was done by the first respondent and the arbitrator without the involvement or knowledge of the appellant.

[14] A hearing *de novo* was conducted before the court *a quo* and it decided to deal with the application for setting aside of the arbitral award first. The appellant alleged that the arbitral award should be set aside as the decision was improperly arrived at. It was alleged that the arbitrator refused to allow the parties to delineate the issues for determination and that further, he had created his own issues and adjudged them. Further that the award was not in accordance with the agreement. In dealing with these arguments, the court *a quo* held that the record showed that counsel for the first respondent had listed the four issues for determination before the arbitrator. The court found that these were the issues that the arbitrator determined and as such the complaint by the appellant was without merit.

[15] The court *a quo* dismissed the complaint raised by the appellant that during the hearing before the arbitrator the expert, Mr Stuart, did not produce the primary documents which he relied on to reach his conclusion on the amount of the damages. It held that the appellant could not be heard to complain at this stage when it had not seriously

questioned the expert's report during the arbitral proceedings. The court *a quo* also found that the award related to general damages and not special damages and was therefore not in contravention of the agreement. It ultimately found that the appellant had failed to satisfy the recognized grounds for setting aside the award. In the result it dismissed the application for the setting aside of the arbitral award.

[16] Having dismissed the application to set aside the arbitral award, the court *a quo* proceeded to determine the application for the registration of the arbitral award. The court found that the first respondent had complied with the provisions of Article 35(2) of the Arbitration Act by filing a certified copy of the final award, certified copy of partial award and a certified copy of the Housing offtake agreement which incorporated the arbitration agreement. In the result the court disposed 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."

[17] Totally aggrieved by the decision of the court *a quo*, the appellant again mounted an appeal to this Court on the following grounds of appeal:

1. The court *a quo* erred in not coming to the conclusion that HC 2254/19 had been disposed of by the Supreme Court in SC 338/20 and could not thereafter be related to by it.

2. The court *a quo* erred at any rate on finding that first respondent could and had, by attaching an authenticated copy of the award to a filing notice, remedied the defect that had been observed upon by the Supreme Court in SC 338/20 and that it was in any way common cause that a proper award was before it.
3. The court *a quo* erred in not engaging the contention that the arbitrator had lost jurisdiction to authenticate the award and that the *ex parte* approach made to him by first respondent for such purpose was invalid.
4. The court *a quo* misdirected itself in not dealing with the live issue before it being that the arbitrator had awarded special damages contrary to the provisions of the agreement between the parties and that the award was on that basis contrary to public policy.
5. The court *a quo* erred in upholding an award made in favour of a party that had failed to establish a cause of action and in not engaging with the question of the existence or otherwise of such cause.
6. The court *a quo* erred in not holding that the award of a thumbsucked USD30 million to first respondent for work that was not done and profit for a product not supplied, is in and of itself contrary to public policy and not justified by any legal principle but offends instead the law governing bilateral synallagmatic contracts.
7. The court *a quo* erred in holding that the point taken on the sufficiency of the approach to expert testimony was an evidentiary point and so erred in not holding that expert computations which are not based on primary evidence are invalid.

8. The court *a quo* erred in not holding that the refusal by the arbitrator to delineate the issues and his identification and determination of such issues in the award without consulting the parties was fundamentally irregular and contrary to public policy.

APPELLANTS' SUBMISSIONS ON APPEAL

[18] Mr *Mpofu* for the appellant, submitted arguments firstly, with regards to the registration of the arbitral award. He submitted that the matter relating to the registration of the arbitral award had been disposed of by this Court under SC 20/22 when it found that the arbitral award had not been authenticated as required by the Arbitration Act. It was his submission that the court *a quo* had no legal basis to engage the issue as its hands were tied by this Court's determination that failure to provide an authenticated arbitral award was fatal to the application for the registration of an arbitral award.

[19] He submitted further that Article 35 of the Arbitration Act places an obligation on a person who is seeking recognition of an arbitral award to file an authenticated arbitral award in order to found his cause. On the other hand, this obligation is not placed on a person seeking the setting aside of an arbitral award in terms of Articles 34 and 36. He argued therefore that the *ex parte* approach to the arbitrator was taken contrary to any law seeking the authentication of an award. He argued that this was done in circumstances where the court had already found that the award had not been authenticated. He complained that this was done without notice to the appellant and that at the time the approach was made, the arbitrator no longer had the authority to authenticate the award which he had issued two years prior. Counsel submitted that, as this was a statutory prohibition, the arbitrator could only have authenticated the award with leave from the court. Such leave was not sought. He further submitted that the

authentication certificate was placed before the court *a quo* in an irregular manner as it was filed through a filing notice and not by way of an affidavit. It was counsel's submission that the court *a quo* should have found that the authenticated award was not properly before it.

[20] With regard to the issue relating to the setting aside of the award, counsel submitted that the arbitrator issued a remedy that was contrary to what the parties had agreed to. In expanding this point, counsel argued that the arbitrator awarded the first respondent all the profit it would have made if it had built the 8000 housing units when it is common cause that it did not deliver any housing units to the appellant. Counsel submitted that the arbitrator could not award general damages on the facts of this case but had in fact awarded special or consequential damages which was contrary to the damages that could be awarded in terms of the contract between the parties. It was counsel's submission that the award, being one specifically prohibited by the contract, was therefore contrary to public policy and ought to be set aside. On the remaining grounds of appeal that he had not addressed, counsel submitted that he was abiding by the heads of argument he had filed of record. He therefore prayed that the appeal be allowed.

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

[21] Mr *Tivadar,* for the first respondent, submitted that the whole appeal revolved essentially on the fourth ground of appeal which dealt with the basis for the setting aside of the arbitral award. He submitted that a proper reading of the award showed that the arbitrator correctly awarded general damages and not special damages. He further submitted that the arbitrator was permitted in terms of the agreement to award general damages. The agreement only prohibited the award of consequential damages (special damages) and indirect damages and these had not been awarded. He further explained that what was

restricted by the agreement was only the nature of damages claimable and not a claim for damages. It was therefore his argument that the arbitrator had properly exercised his powers by awarding the damages sought. He also submitted that the court *a quo* had correctly determined that the award related to general damages and not special damages. He therefore submitted that the award, being in compliance with the agreement, was not contrary to public policy and should not be set aside. He did not argue with any conviction in respect to the question whether or not it is a requirement for an award that is to be set aside be authenticated. Indeed, he would have been hard pressed to do so as there is no requirement of this nature under articles 34 and 36 of the Arbitration Act.

[22] With regards to the arguments dealing with the registration of the award he submitted that authentication of the arbitral award, is not a juridical act but mere confirmation that the award is the final one issued by the arbitrator. He thus submitted that it was not necessary to engage the appellant in order to get this done. It was his submission that it therefore did not matter at what stage it was authenticated. It was telling that he made no comment on the timelines which are set out in the Arbitration Act which explicitly set the period when an arbitrator's jurisdiction ends. He however conceded, and properly so in our view, that if the authenticated award was not procedurally placed before the court, it could not be related to and therefore the award could not be registered.

[23] In respect to the question of whether or not the issue of the registration of the award was not disposed of by the determination by this Court under SC 20/22 it was counsel's submission that the court merely remitted the whole matter for a hearing *de novo* before a different judge. He denied that the court's judgment had the effect of disposing of the matter of the registration of the award.

[24] In my view, on the above grounds, this appeal turns on the following issues:

i. Whether or not the court *a quo* erred in not concluding that case number HC2254/19 had been disposed of by judgment number SC20/22.

ii. Whether or not the subsequently authenticated arbitral award could be registered.

iii. Whether or not the arbitral award was properly authenticated.

iv. Whether or not the court *a quo* failed to determine the issue of the type of damages which were awarded to the first respondent.

v. Whether the damages awarded were general or consequential (special) damages and if actually special, whether the award is contrary to public policy.

ANALYSIS

Whether or not the court *a quo* erred in not concluding that HC 2254/19 had been disposed of by SC 20/22.

[25] Under SC 20/22 the Court ordered the remittal of the consolidated matters to the court *a quo* for a hearing *de novo*. In its judgment the Court noted the failure by the first respondent to comply with the provisions of Article 35(2) of the Arbitration Act. The Court held that the award had not been authenticated and therefore there was no compliance with Article 35 of the Arbitration Act. It was on this basis and other infringements that the court ordered a remittal to the court *a quo* for a hearing *de novo*.

[26] The appellant was of the view that the above finding by the Supreme Court meant that, as the judgment by MUSITHU J registering the arbitral award was set aside as there could be no registration of an unauthenticated arbitral award, the matter relating to the registration of the arbitral award was determined. The court *a quo* however interpreted the order of the Supreme Court as follows:

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

[27] The court *a quo* was alive to the directive made by the Supreme Court in its order that the matter be heard afresh. The order of the Supreme Court did not delineate the issues for determination during the hearing *de novo* but simply directed the court *a quo* to hear the matter afresh. It is an accepted principle that a hearing *de novo* is a fresh hearing wherein the court hears the entire case again and both questions of fact and law are determined as if there had been no hearing in the first instance.

[28] While it is apparent from the judgment that the finding with regards to the authenticity of the arbitral award was made in obiter *dictum* and did not inform the order of the court, it showed that the application for registration which MUSITHU J had granted had been granted erroneously as the arbitral award had not been authenticated. This obviously showed that the court *a quo* had erred and misdirected itself in granting an order for the registration of the award without complying with Article 35 (2) of the Arbitration Act. In such circumstances the Supreme Court could only order a remittal of the matter for a hearing *de novo.* To crystalise that the remittal of the matter related to both consolidated matters, the Supreme Court in its disposition held that:

> "In the result; the decision of the court *a quo* in respect of registration of the award and dismissal of the application to set aside the award has to be set aside and the matter remitted to the court *a quo* before a different Judge for a hearing *de novo*."

[29] Clearly therefore, the appellant's first ground of appeal cannot stand. The decision of the Supreme Court did not dispose of the application for registration made under HC 2938/19. It therefore remained a live issue before the court *a quo.*

Whether or not the court *a quo* failed to determine the issue of the type of damages which were awarded to the first respondent.

[30] The parties agree that the crux of the appeal is to be found in the fourth ground of appeal attacking the order of damages which were awarded to the first respondent by the arbitrator. In my view therefore it is only right that I deal firstly with the issue raised in HC 2554/19 relating to the setting aside of the arbitral award. The determination of this ground of appeal calls for the resolution of three issues. Firstly, it must be determined whether the court *a quo* failed to deal with the issue of the type of damages awarded by the second respondent in its determination. Secondly, whether general damages were in fact awarded in the particular circumstances of this case and not special damages and thirdly, whether the award was contrary to public policy.

[31] With respect to the first issue, the law provides that a court must determine all the issues placed before it by parties in their pleadings. Further, a court must give reasons for any order that it makes. Failure to deal with all issues and to decide all matters will result in the decision of the court being vitiated. See *Gwaradzimba N.O.* v *CJ Petron & Co. (Pty) Ltd.* 2016 (1) ZLR 28 (S). A reading of the decision of the court *a quo* shows that this is not an issue that should detain the court. In para 44 of its judgment the court a *quo* stated that:

> "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 is clear from the award, was mindful of the distinction and his award speaks loudly to the distinction."

[32] Though not eloquently put, the court *a quo* did pronounce itself on the issue of the damages. It aligned itself with the reasoning and findings made by the second respondent in awarding the first respondent general damages. The argument by the appellant that the court *a quo* did not deal with the issue relating to the damages is thus without merit.

Whether the damages awarded were general or special damages and if special, whether the award is contrary to public policy

[33] The second issue to interrogate is whether the damages awarded were indeed general damages (as found by the arbitrator) or special damages as alleged by the appellant. As indicated above the court *a quo* aligned itself with the findings of the arbitrator. It is necessary in my view to state at this juncture that this issue is important as clause 22.1 of the agreement prohibits an award of consequential (special) or indirect damages. In order to properly deal with this issue, it is necessary to set out the difference between special and general damages. In *Holmdene Brickwork (Pty) Ltd* v *Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687 D-E damages were defined as follows:

> "General or intrinsic damages are those which flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach.
>
> Special or extrinsic damages are those damages that, although caused by the breach of contract are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach."

GOWORA J (as she then was) in *Rowland Electro Engineering (Pvt) Ltd* t/a *Sita Sound Forex* v *Zimbabwe Banking Corporation Ltd* 2007 (1) ZLR 1 held as follows at 13 A - B:

> "General damages are the loss which a plaintiff suffers as a direct result of the breach of the contract, or is the intrinsic loss suffered by the plaintiff and is due to the diminution of the value of the subject matter of the contract or the impairment of its use. On the other hand, special or extrinsic damages constitute loss flowing indirectly from the breach of the contract and extend to all the property. However, in order to hold a debtor liable for special damage, a

> plaintiff needs to show that the damage was within the contemplation of the parties when the contract was concluded."

[34] The agreement between the parties provided the remedies available in the event of a breach by either party. I quote hereunder in full, the relevant clauses of the agreement that deal with breach and the findings made by both the arbitrator and the court *a quo*. Clause 22.1 of the agreement provides as follows:

> "In the event of either Party committing a breach of this Agreement and failing to remedy such breach within the notice period specified in this Agreement for such particular breach, or in the absence of a specified notice period, within 14 (fourteen) days of written notice, then the aggrieved party may terminate this Agreement with immediate effect and pursue any remedies available to it at law provided that neither party shall be liable to the other for any consequential damages or indirect loss." (Emphasis added).

Clause 22.3 further stated:

> "Any termination by either party found to be in breach of this agreement shall result in a payment to the aggrieved party of 10 (ten) percent of the remaining contract value..."

[35] The arbitrator, in deciding on the damages to award the first respondent had regard to a number of factors. He considered that the first respondent was claiming damages for loss of profits that it would have earned "had the agreement continued to its conclusion".

He also noted that the appellant had raised the issue that the first respondent could not claim consequential or special damages as well as indirect damages in terms of clause 22.1 of the agreement.

The arbitrator considered the authorities which he had been referred to by the parties and noted *inter alia* that a party can be entitled to claim damages if the loss in question can be fairly considered to have arisen naturally or directly from the breach, (general damages) or; if the loss though indirect, can reasonably be presumed to have been in the

contemplation of the parties at the time of the conclusion of the contract; (special or consequential damages). He also noted that the exclusion clause in the agreement referring to 'consequential damages' serves to exclude 'special damages'. He however, noted that a claim of loss of profits does not necessarily amount to a claim for special damages as such profits may be claimed under general damages and that in considering whether the loss of profits amounts to general damages, a consideration of the core motive of the contract must be looked at. The arbitrator found that the core motive of the contract was for the first respondent to make profits.

[36] Having made the above finding the arbitrator proceeded to assess the substantive relief sought by the first respondent. He found that the first respondent had failed to deliver the completed 53 housing units to the appellant and that the piece of land (Lot 1 Caledonia) which the first respondent had acquired to build the houses had not been paid for in full. Only $3 million out of the total purchase price of $13 million had been paid to a company called Caledonia Enterprise (Pvt) Ltd. The property therefore could not be transferred to any other party. The arbitrator found that the first respondent could not claim the amount of US$2 316 000 for the total housing units as it did not deliver these housing units to the appellant.

He therefore found that any damages to be claimed by the first respondent could only arise in respect of **the housing units which it may have been expected to complete and deliver**. The arbitrator had regard to the expert report prepared by Mr Dave Stuart, a qualified quantity surveyor. The arbitrator noted that the evidence of Mr Stuart had not been 'meaningfully challenged' by the appellant.

The arbitrator found that the loss of profits being claimed by the first respondent was arrived at based on the following assumptions: revenue of US$304 000 000.00 (being 8

000 houses at US$38 000.00) less total project net cost of US$247 157 736.00 being the computation arising from Annexure SC 19.

[37] The arbitrator concluded that, based on the above considerations, the damages claimed by the first respondent fell into the category of general damages and were unaffected by the restriction stipulated under clause 22.1.

He reasoned that the contract between the parties was not simply one of purchase and sale but was in fact an ongoing engagement which would have lasted for several years had it not been interrupted. The arbitrator noted that the agreement had some common features to a sale such as periodic payments over the period of the agreement and at the end of the day the appellant obtaining a large number of constructed houses.

The arbitrator then concluded the award as follows:

> "79. Bearing all 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 restrictions of the proviso in clause 22.1.
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> 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 material 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 part HCZ's motivation was to make a profit. That it was not able to make the contemplated profit was as a direct result of the termination of the Agreement on account of the conduct of NSSA.
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> 81. It follows that I find that HCZ's claim does not fall foul of the provisions of clause 22.1."

[38] It is not in dispute that a claim for loss of profit may fall under either special damages (consequential) or general damages. This position was stated in the case of *Gloria's*

Caterers (Pty) Ltd t/a *Connoisseur Hotel* v *Friedman* 1983 (3) SA 390 (T) at p 393E-394A where NESTADT J stated as follows:

> "…. A claim for damages in the form of loss of profits is not necessarily special damages. Such loss of profits may be general damages. It depends on the circumstances of each case and in particular the type of loss of profits being claimed. In the *locus classicus* on the subject, namely *Victoria Falls & Transvaal Power Co Ltd* v *Consolidated Langlaagte Mines* Ltd 1915 AD 1 INNES CJ at 22 said:
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> > 'Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom ….. Moreover, it is the duty of the complainant to take all legal steps to mitigate the loss consequent on the breach …. It follows that damages for loss of profits can only be awarded when such loss is the direct, natural or contemplated result of non-performance.'"

Thus, a claim for special damages or consequential damages, as they are also referred to, may only be awarded depending on how they arise and also if they were in the contemplation of the parties.

[39] The claim by the first respondent was based on the profit it would have made had the contract been concluded. In other words that is the money it would have made had it delivered 8 000 houses to the appellant. However, if one looks at the findings by the arbitrator it is apparent that he failed to consider the circumstances under which the claim for loss of profits was made. In *Gloria's Caterers (Pty) Ltd* t/a *Connoisseur Hotel* v *Friedman* (*supra*) the court stated that in order to decide whether the claim for loss of profit falls under special damages or general damages there must be an investigation on whether or not the damages flow directly as a result of the breach. The arbitrator failed to take into account key critical facts relating to the contract.

[40] The first of these factors was that he was working merely on assumptions as the agreement between the parties did not set out a number of important factors. The agreement did not stipulate the bill of quantities required to build the 8 000 houses.

Further it did not include essential features like the overhead expenses which would obviously flow from the project such as *inter alia* office rentals, consumables and salaries which would have been borne by the first respondent. The loss of profit that the arbitrator thus came up with was a super profit and purely thumb sucked as it lacked the above components. Secondly, the arbitrator failed to consider that the first respondent would not have been able to transfer the property to the appellant as it had no rights of ownership. As such the damages claimed could not have flown naturally from the breach by the appellant. These damages could only be special damages. Thirdly, an examination of clause 5 as read with clause 6 of the agreement stipulates the nature of the agreement between the parties. The first respondent and the appellant concluded a housing offtake agreement. The first respondent was to construct 8000 housing units at its own cost and thereafter sell them to the appellant at the purchase price of US$ 38 000 per unit. The appellant paid an offtake deposit to initiate the agreement in the sum of USD 16 million. The agreement however failed to take off due to several reasons. What is clear from the nature of the agreement is that any profit which the first respondent was to make could only arise after it had completed the housing units and sold them to the appellant. It could not have been in the contemplation of the parties that the failure by the appellant to agree to a commencement date (in circumstances where the first respondent had started construction work and completed 53 houses) or failure to negotiate an inflation claim, or to sign an addendum or failure, to appoint a project engineer (the basis of the breach) would have entitled the first respondent to an award of damages in the sum of USD 30 million for houses that were never built or delivered.

[41] We agree with Mr *Mpofu* that the loss claimed by the first respondent could not be defined as general damages but were in fact special or consequential damages. General damages are clearly discernible. They are claimed typically in cases where the amount

awarded is based on the actual losses suffered. The facts of the present case show that the damages which were claimed by the first respondent before the arbitrator were for profits which it may have realised had the agreement materialised to finality. Actual loss was not suffered by the first respondent. Its claim was clearly for consequential damages. These consequential damages although flowing from a breach of the agreement were not reasonably foreseeable by the parties and could not have been within their contemplation. As could be assessed from the evidence of Mr Stuart, the loss of profits required a computation of assumed values and were thus consequential in nature. These were damages for loss of future profits and such damages were not envisaged by the agreement in terms of clause 22.1. The arbitrator fell into error by failing to consider the facts and circumstances of the case, thereby failing to arrive at the finding that the loss of profits claimed by the first respondent could not be regarded as general damages. Its profits were vested in the offtake of the houses which it would have built for the appellant. If another person had bought the houses at less than the USD38 000.00, the difference in price would have been the loss of profit which would have been suffered by the first respondent. As the damages claimed by the first respondent were not directly linked to any loss they would have suffered, they were consequential in nature.

[42] The appellant's fourth, sixth and eighth grounds of appeal all raise the issue of whether or not the arbitral award is contrary to public policy. Counsel for the appellant argued strongly in the main, that an award which was contrary to the provisions of the agreement was contrary to public policy.

[43] Applications for the setting aside of arbitral awards are filed in terms of Article 34 of the Arbitration Act. The basis of setting aside the arbitral award *in casu* was that it was contrary to the public policy of Zimbabwe as provided for in terms of Article 34 (2)(b)(ii)

of the Arbitration Act. The meaning of an award that is contrary to public policy has been discussed in numerous judgments in this jurisdiction. In *Peruke Inv (Pvt) Ltd* v *Willoughby's Investments (Pvt) Ltd & Anor* 2015 (1) ZLR 491 (S) at 499 H-500 A this court stated as follows:

> "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."

PATEL JA (as he then was) further quoted with approval the *locus classicus* on the subject which is the case of *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) 452 (S) at 466E-G where GUBBAY CJ had occasion to discuss the import of Article 34 (2) (b) (ii) of the Arbitration Act as follows:

> "An arbitral 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 recognise and enforce an award by having regard to what it considers should have been the correct decision…**Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and 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 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." (Emphasis is my own)

[44] The import of the above remark was clarified by MALABA DCJ (as he then was) in *Alliance Insurance* v *Imperial Plastics (Pvt) Ltd & Anor* SC 30/17 at p 11 as follows:

> "The question that should be in the mind of a Judge who is faced with this ground for setting aside an arbitral award is that, in light of all the submissions and evidence adduced before the arbitrator, is it fathomable that he would have come up with such a conclusion. If the answer is in the affirmative, there is no basis upon which to set aside the award. The appellant's submissions should be considered in the light of these remarks."

It has also been held that an award that violates the sanctity of a contract between parties is contrary to public policy. This position finds authority in *Legacy Hospitality Management Services Limited* v *African Sun Limited & Anor* SC 43/22 at p 10 where the Court held that:

> "In order to determine whether the arbitral award offends public policy as contended by the appellant and vehemently disputed by the first respondent, due consideration to the agreement entered by the parties ought to be made."

The Court further held as follows at p 11 that:

> "In compliance with guidelines outlined in Article 34(2)(ii) on what constitutes an award that conflicts with public policy, the courts have been scrupulous to interpret that provision narrowly. In doing so, the courts have been cognisant of the need to protect the principle of sanctity of contract."

[45] Having found that the arbitrator erred in categorizing the damages claimed by first respondent as general damages when they were clearly special damages, I pause to consider whether this Court may in fact interfere with the finding by the arbitrator. The above case authorities make it clear that a finding by an arbitrator may only be interfered with in very limited circumstances. It is not every wrong finding made by an arbitrator that warrants interference by a court of law. This principle prides itself on the need for finality in litigation particularly where the parties have chosen arbitration to bring about a quick resolution to their dispute. This choice between the parties must ordinarily be respected. However, when the error by the arbitrator is so glaring and wrong that it has the effect of bringing about a grave injustice then the Court must intervene.

[46] The court *a quo,* in our view, erred in two respects. It merely aligned itself with the finding of the arbitrator without interrogating that finding in spite of the appellant having questioned the damages awarded. Secondly, it erred in finding that the appellant was making a plea for mercy on the basis that as a public entity it should not be made to use

hard earned public funds to pay damages for breach of contract. This was not the basis upon which the appellant sought to have the award set aside. The appellants were not seeking the sympathy of the court. The appellant's claim was that the damages awarded were not within the contemplation of the parties neither were they allowed in terms of clause 22.1 of the agreement. A breach does not automatically give a party *carte blanche* right to claim anything it wishes. What can be claimed must be as agreed to in the body of the contract.

[47] The contract between the parties was very clear as it set out the damages that could not be claimed in the event of a breach. Under clause 22.1 an aggrieved party to the agreement could claim damages in terms of the law 'other than consequential damages or indirect loss'. In addition, in terms of clause 22.3, the claim for damages could not exceed 10% of the remaining contract value. However, the latter damages would have been impossible to compute in the circumstances of this case as the agreement did not have an overall contract sum, or priced bill of quantities or even a sum to cover overhead costs.

[48] Simply put, the arbitral award ran contrary to the terms of the agreement, which terms the parties had agreed upon. The first respondent could not under the agreement be awarded consequential damages. In my view, the finding of the arbitrator that the damages were general damages in circumstances where they were not, allows this court to interfere with that finding. The finding was so erroneous that it culminated in an award that was, as described by GUBBAY CJ in *Zimbabwe Electricity Supply Authority* v *Maposa* (supra) as follows:

> "where the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or acceptable moral standards that a sensible and fair-minded person would consider that the conception of justice in

> Zimbabwe would be intolerably hurt by the award it would be contrary to public policy to uphold it."

The error by the arbitrator had the effect of clothing an award which was contrary to clause 22.1 of the agreement. Referring to the damages as general damages when they were special damages had the effect of taking them outside the restriction imposed in that clause. The court *a quo* thus erred by declining to set aside the arbitral award in circumstances where the damages were in breach of the agreement between the parties and thus clearly contrary to public policy. The fourth, sixth and eighth grounds of appeal must succeed. The application for setting aside the arbitral award must be granted.

[49] The finding that the arbitral award must be set aside puts to rest the issues raised in relation to the registration of the arbitral award. Had the court *a quo* found, as it should have done, that the award was contrary to public policy it would has dismissed the application for registration of the award. I will thus, not interrogate the issues that were raised regarding the registration and authentication of the award as they fall away due to the above finding.

DISPOSITION

[50] The court *a quo* fell into error with regards to the application for the setting aside of the arbitral award, in finding that the damages claimed by the first respondent were general damages. They were clearly special damages or consequential damages which could not be awarded by virtue of the prohibition in clause 22.1 of the agreement. The application for the setting aside of the arbitral award should have been allowed as the award is contrary to public policy. The appeal will succeed on this basis. The issue of the registration of the award therefore falls away as there is no longer an award to register.

[51] In the result it is ordered that:

1. The appeal be and is hereby allowed with costs.

2. The judgment of the court *a quo* is set aside and is substituted as follows:

   (i) " The application in case number HC 2938/19 for the setting aside of the arbitral award rendered by Peter C. Llyod on the 25th of March 2019, as subsequently amended, is hereby granted.

   (ii) The application in case number HC 2554/19 for the registration of the arbitral award rendered by Peter C. Lloyd on the 25th of March 2019, as subsequently amended, is hereby dismissed with costs.

   (iii) The arbitral award rendered by Peter C. Llyod on the 25th of March 2019 as subsequently amended is set aside with costs."

UCHENA JA : I agree

KUDYA JA : I agree

Mawere Sibanda, appellant's legal practitioners

Zigomo Legal Practitioners, 1st respondent's legal practitioners