**REPORTABLE (91)**

**ZIMBABWE MANPOWER DEVELOPMENT FUND**
**v**
**(1) MCR VENGESAI (2) AGNES VENGESAI**

**SUPREME COURT OF ZIMBABWE**
**GARWE JA, GOWORA JA & PATEL JA**
**HARARE: OCTOBER 23, 2017 & NOVEMBER 26, 2019**

*S. M. Hashiti*, for the appellant

*T. Zhuwarara*, for the respondents

**GOWORA JA:** On 30 November 2016, the High Court issued an order in which it allowed the application for the registration of an arbitral award granted in favour of the respondents. In addition, the High Court dismissed an application for a counterclaim mounted by the appellant. The costs of the matter were awarded to the respondent.

**THE BACKGROUND FACTS**

The appellant, the Zimbabwe Manpower Development Fund, is a statutory body set up in terms of the Manpower Planning and Development Act [*Chapter* 28:02]. The respondents are the beneficial owners of an entity known as Vengesayi Architects, which is a duly registered architectural firm under the laws of Zimbabwe. For ease of reference the appellant will be referred to as ZIMDEF and the respondents as Vengesayi Architects.

In 1998 the parties entered into an agreement in terms of which Vengesayi Architects would provide architectural services to ZIMDEF in respect of construction of a building on premises owned by ZIMDEF. Under the agreement, Vengesai Architects was commissioned to provide ZIMDEF with a professional team comprising a project manager, contract engineers and a quantity surveyor. In 2005 there was a stoppage of work on the project at the instance of the main contractor, Zimbabwe Jiangsu International, who demanded additional payment to cushion them against the inflation costs in respect of which the contract had not made provision for. At the time the project was suspended it is common cause that Vengesayi Architects had been paid in full for all the work and services provided up to that point.

The project was resumed in 2011. The resumption was initiated by an instruction from ZIMDEF to Vengesayi Architects which was couched as follows "resume the supervision services". At the stage that the stoppage occurred all design work had been completed.

On 7 August 2014, Vengesayi Architects sent an invoice to ZIMDEF.

The fee notes read as follows:

"Current cost of works as per payment certificate no 18 US17,651,679,12
Architects fees 6 percent of (17,651,679,12) US 1,059,100,75
Add VAT 15 percent OF (1,173,033,61) US 158, 865,11

| | | |
|---|---|---|
| Less fees paid on Fee note No 1 | US 318,661,11 | |
| Fee note No 2 | US 57,551,98 | |
| Fee note No 3 | US 136,880,38 | |
| Fee note No 4 | US 88,629,66 | |
| Fee note No 5 | US 120,705,58 | |
| Fee note No 6 | US 19,443,23 | 741,871,94 |

Amount now due (3-4)(1,217,965,86-741,871,94) **US476,093,92**
Amount in words: Four hundred seventy six thousand ninety three dollars ninety two cents only."

It is common cause that after receipt of the fee note a dispute arose. ZIMDEF contended that it had paid a total of 4.5 percent of the total fee structure. This was premised on its opinion that at the time that work on the project was stopped it had paid for all the work done up to that stage. It was of the view that the only role left for all the consultants to the project, including Vengesayi Arcitects, was merely that of supervision of the project. On the other hand, Vengesayi Architects was of the contrary view that, upon resumption, it could still charge 6 percent of the total costs of the works based on the outstanding works to be still completed. It is also common cause that upon resumption of the project, it was accepted that remedial work needed to be carried out.

Subsequent to this development a dispute arose between the parties regarding the calculation of fees due to Vengesayi Architects. Such fees are calculated in accordance with guidelines provided in the Architects (Conditions of Engagement and Scale of Fees) By-Laws S.I. 829/1980. The dispute centred on the respective parties' interpretation of the relevant clauses relating to the calculation of fees and the applicable percentage rates.

When they were unable to agree, the matter was referred to arbitration in accordance with clause 17 of the contract.

The arbitrator found that Vengesayi Architects had established that the charges raised upon resumption of the project were justified. He found the charges to be consistent with the provisions of S.I. 829/80. He also found that the claim for interest at 15 percent was unjustified and concluded that interest should be awarded on the basis of the normal prevailing rate of interest.

He dismissed the counter-claim by ZIMDEF for damages. Ultimately, he issued an arbitral award in the following terms:

1. That ZIMDEF shall pay to Vengesayi Architects the sum of USD 476 093.92 together with interest thereon at the rate of 5 percent from 7 August 2014 to date of payment in full.
2. That ZIMDEF shall pay the arbitrator's fee in full and 50 percent of the costs incurred by Vengesayi Architects on a scale as between party and party.

Armed with the arbitral award, Vengesayi Architects approached the High Court for its registration under the Model Law, specifically, Article 35 of the Schedule to the Arbitration Act [*Chapter* 7:15], the "Model Law". In turn, ZIMDEF made a counter application for the setting aside of the arbitral award under Article 34 of the Model Law.

The application for the registration of the arbitral award succeeded with ZIMDEF being ordered to pay the costs of suit. The counter application was dismissed with costs. This appeal is against both the dismissal of the counter application as well as the order registering the arbitral award.

The grounds of appeal are extensive. The only issue that arises from the said grounds was whether the court *a quo* was guilty of a misdirection in failing to find that the award was contrary to the public policy of Zimbabwe. It should therefore either have refused to register the award or it should have set the award aside for the same reason.

**THE LAW GOVERNING ARBITRAL AWARDS**

Parties to a contract may, by written agreement, choose arbitration as the process by which any disagreement or dispute arising from their agreement are resolved. An independent and impartial person can be chosen directly or indirectly by the parties themselves. The principal characteristic of this process is that the dispute is removed from the jurisdiction of the courts. In addition the parties do not have a right of appeal against the decision of the arbitrator. This is principally because the arbitration process is meant to bring about finality to litigation.

The final and binding effect of an arbitral award was considered by this Court in *Cone Textiles (Pvt) Ltd v Redgment & Ors* 1983(1) ZLR 88, where this Court said[1]:

> "The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal, and they have agreed that the award shall be final and binding: *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68, at 77. It is for these reasons that a court will be most reluctant to interfere with the award of an arbitrator."

This principle was followed in *Ropa v Roesmart Investments (Pvt) Limited & Anor* 2006(2) ZLR 283. At 286B-D, GWAUNZA JA, (as she then was) said:

> " … that the effect of an arbitral award is to bring finality to the dispute between the parties. The respondent relied for this submission on the following passage set out in Butler and Finsen, Arbitration in South African Law and Practice at p271:
>
> > "The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end: the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless their arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action."
>
> This position applies with equal force in Zimbabwe. Applied to the circumstances of this case, it is evident that the parties' "arbitration agreement" that is the consent order, did not provide for a right of appeal to another tribunal. To the contrary, the order in question

[1] At p92

> effectively provided that the arbitrator's decision would bring finality to the dispute by "binding" the parties."

However, under limited and legally prescribed circumstances, application can be made to the courts for the review or setting aside of arbitral award. Within this jurisdiction, provision for the setting aside of an arbitral award may be found in Article 34 of the Schedule to the Arbitration Act [*Chapter* 7:15], the Model Law. This law provides as follows:

> 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—
>
> (b) the High Court finds, that—
>
> (ii) the award is in conflict with the public policy of Zimbabwe.

It has often been stated that public policy is a concept which is not easy to define. It has, as a consequence, been referred to as a nebulous concept. In relation to awards, an award may be said to be contrary to public policy if it is opposed to the interests of the State, or of justice, or of the public. The interests of the community or public are of paramount interest and where an award is contrary to law, or morality or runs counter to social or economic interests, a court on application may be moved to set aside such award. However, our courts, whilst accepting that an award may be set aside as being contrary to public policy, have held that this power must be exercised very sparingly and only in cases where the award, as stated by GUBBAY CJ in *ZESA v Maposa* 1999 (2) ZLR 452 (S), would constitute:

> "…….a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider 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."[2]

**THE FINDINGS MADE BY THE ARBITRATOR**

The issues identified for determination by the arbitrator were set out as follows:

i) Whether or not the claimant was entitled to the interim fee that I have set out above taking into account the history of the matter and the facts around the construction works.

ii) Whether or not the claimant has been overpaid on the basis and in the amount alleged by the respondent; and

iii) Whether or not the respondent was entitled to be paid damages by the claimant as a result of the alleged failure in the management, maintenance and upkeep of the building site and the quantum of such damages.

The arbitrator remarked that the manner in which the parties formulated their respective claims had presented some difficulty for him. He found that they differed on the manner in which the regulations should be applied in calculating the architectural fees due to Vengesayi Architects. On the one hand the view of Vengesayi Architects was that its mandate had continued until completion of the project, whereas ZIMDEF took the position that only supervision remained and that therefore there was no need for Vengesayi Architects to have raised the fees it did. There was thus a dispute of fact between the parties as to what the precise role of Vengesayi Architects was upon it being requested to resume work on the project.

[22] At p 466F-G

In view of the impasse ZIMDEF sought professional advice from the Architects Council. The letters in which advice was conveyed to ZIMDEF were placed before the arbitrator who placed reliance on them in determining the dispute. The letters obtained by ZIMDEF when seeking advice are not on the record but pertinent portions have been referred to in the arbitral award. Neither party has impugned the contents as quoted by the learned arbitrator.

The arbitrator resolved the dispute in favour of Vengesayi Architect and found as follows:

> "I have little difficulty in accepting the Claimant's view and evidence that the design of the project and the working drawings around it had to be revisited and Claimant was therefore entitled to further fees in this respect. It is significant in that when these further fees were raised and appropriately described they were not disputed by the respondent. It seems to me with respect that the line of defence now adopted had not been seriously taken previously and was only articulated after the demand for the disputed interim fee was made.
> ……
>
> The view I express above is fortified to some extent by a letter addressed by the Chairman of the Architects Council of Zimbabwe to the respondent and dated 5 November 2013."

The letter from the then Chairman of the council was quoted as reading:

> "You implied in your letter that fees for the stages preceding supervision i.e sketch designs, working drawings and part supervision had been paid, thereby suggesting that only supervision fees are payable for the balance of construction work. Supervision would normally constitute a quarter of the total fees charged (e.g. 25 percent of 6 percent of the value of outstanding works. However, there may be some new elements that could be required and architects work on these would be charged for at full fees as these will need to be designed, detailed and specified. Alternatively, by agreement the new elements could be charged on time basis."

The learned arbitrator placed reliance on the letter in determining the dispute. Despite seeking an opinion and advice from the Council, ZIMDEF completely ignored the correspondence

with the said Council. The letter in my view sets out a clear *modus operandi* for parties who find themselves in a situation akin to the one confronting the parties herein on how to proceed. If the project had not been suspended there would not have been a contest between the parties as to the correct application of the tariff of fees.

The arbitrator accordingly found that the fees raised by Vengesayi Architects were consistent with the position taken by the Chairman of the Architects Council. He found no reason to disallow the claim.

**WHETHER OR NOT THE AWARD IS CONTRARY TO PUBLIC POLICY?**

The issue before this Court in my view is not whether or not the court *a quo* erred either in registering the award or in refusing the application to set it aside. The sole issue is whether or not the award is contrary to the public policy of the land, and therefore whether the finding by the court *a quo* that the award did not violate public policy is correct.

The contention made by ZIMDEF is in three parts. Firstly, it is contended that the arbitrator deliberately disregarded the provisions of the Third Schedule of S.I. 829/80, specifically s 14(3) thereof relating to the calculation of fees payable to Architects. The next argument proffered is that the arbitrator calculated fees due to Vengesayi Architects in terms of rates not specified in S.I. 829/80. Lastly, it is contended that the arbitrator awarded to Vengesayi Architects payment of fees for work already completed and paid for.

It is evident that ZIMDEF wishes to have the arbitral award overturned. The question to be answered is whether, ZIMDEF has, before this Court or the court *a quo*, met the burden that is imposed upon a litigant wishing to do so in establishing that the award is contrary to public policy.

In *NetOne Cellular (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe and Anor* SC-89-05 CHIDYAUSIKU CJ at p 5 of the cyclostyled judgment stated as follows:

> "A proper reading of Article 34 of the Arbitration Act (*sic*), in my view, reveals that it prescribes the power of the High Court in relation to the setting aside of arbitration awards. A litigant who wishes to set aside an arbitral award by way of an application to the High Court has to satisfy the stringent requirements of Article 34 of the Arbitration Act (*sic*)." (Emphasis added)

As argued by Vengesayi Architects, the test to be applied in determining whether or not an award is in conflict with the public policy of Zimbabwe was set out in *ZESA v Maposa (supra)*. In considering this very pertinent and important principle it is necessary to have regard to the merits of the respective positions of the parties as presented before the arbitrator and how the court *a quo* dealt with the issue.

The court *a quo* reasoned as follows:

> "The law governing the setting aside of awards on the grounds of public policy is settled. An arbitral award cannot stand where it is shown to be in conflict with the public policy of Zimbabwe. The meaning of the words 'public policy' is not given in the Act. Courts have had to rely on interpretations of the word given in case law. The intention of the legislature in allowing awards to be set aside on the grounds of public policy was to permit a situation where if an award was shown to be manifestly incorrect and was considered to be objectionable and repulsive to the people of the country, would be set aside. The courts are slow to interfere with the discretion of arbitrators. A court dealing with an application to set aside an award has to be satisfied that the decision and conclusions reached by the arbitrator reaches a faultiness which constitutes a palpable inequity and is outrageous in its defiance

> of logic or acceptable moral standards that the public good would be injured and the enforcement of the award would be offensive to ordinary and reasonable thinking Zimbabweans. It must be shown that the award goes against standards of logic and morality. A court will only set aside an award on grounds of public policy where a litigant has shown more than a mere wrong statement of the law. The litigant must show the existence of some illegality or immorality that amounts to a violation of public policy which constitutes a palpable inequity. The task of setting aside an arbitral award is fairly onerous and the standard of proof is very high."

That this is a correct statement of the law on the courts' approach within this jurisdiction in applications under Article 34 cannot be disputed. The court *a quo* found as a fact that the award did not violate the public policy of the land. The issue before this Court is therefore whether in so finding the court *a quo* misdirected itself as argued by ZIMDEF.

The defence to the claim as presented before the arbitrator was to the effect that Vengesayi Architects had not followed the provisions of the law in seeking payment of its fees after it had been instructed to resume supervision of the project. A fee note claiming 6 percent of the revalued total cost of the project was transmitted to ZIMDEF. The contention by the latter is that the calculation of the fee is in violation of the bylaws governing the tariffs chargeable by architects and that to that extent the claim is contrary to public policy.

It is clear that the starting point to the determination of the dispute is an examination of the law regulating the calculation of fees due to an architect under the bye-laws. These are provided for in sections 13 and 14 of S.I. 829/80 as follows:

**PART III**

**FEES CHARGEABLE**

13. 1. The fees provided in this Part shall not be lower than the scale and variations referred to in the First, Second, Third, Fourth and Fifth Schedules.

(a) No architect shall charge a fee that is lower than the fees prescribed in this part.

13.(2) The architect shall inform his client and obtain his formal acceptance, before he renders the service concerned, of the fees which he intends to charge, whether the fees are in excess of those referred to in ss (1) or not

**General fees**

14.1 Subject to the provisions of this Part, the fee for designing and supervising the construction of any building shall be a percentage of the final cost of the works according to the fee scale shown in the First Schedule and the variations to it as shown in the Second Schedule.

14.2 The final cost of the works shall include the cost of the mechanical, electrical and other services which are an integral part of the design.

14.3 The fees referred to in the First and Second Schedules shall be calculated in accordance with the provisions of the Schedules on the percentage of

(a) the final cost of the complete work; or

(b) when payments are to be made before the final cost can be ascertained-

(i) an estimate by the architect or quantity surveyor for the complete work;

(ii) the lowest *bona fide* tender for the complete work, excluding any amount in that tender in respect of contingencies, if no contract is entered into;

(iii) the contract sum;

Provided that; when work is executed wholly or in part with old materials, or where material, labour or carriage is provided by the client,

the percentage shall be calculated as if the works had been executed wholly by a contractor supplying all labour and new materials at such rates as were applicable at the time when the work was executed.

14.(4) The fees payable in respect of any stage of the work of an architect shall be calculated according to the provisions of the Third Schedule, which the architect may require to be paid at the end of the appropriate stage, except the fees for preparation of the brief, which shall be payable on the acceptance of such services;

Provided that, in the case of a large contract, the architect may require interim payments to be made.

14.(5) Where the work of an architect relates to buildings which fall into more than one category, the fees shall be calculated in accordance with the provisions of that section in respect of each category.

As is evident from the fee note submitted to the arbitrator for purposes of adjudication of the dispute, payment under the contract was requested for and made in stages. Clearly the parties were conducting their business in accordance with the provisions of s 14(3) of the regulations. In terms of s 14(3), the calculation of fees shall be made in accordance with the scales set out in the Third Schedule, which provides:

**THIRD SCHEDULE** (section 14(3)

Fees by stages

**Project**

Twenty-five per centum of total fee, made up as follows: -

(a) brief five per centum of total fee

(b) preliminary design ten per centum of total fee

(c) final design ten per centum of total fee

**Contract**

Fifty per centum of total fee

Working drawings, schedules and contract documentation

**Supervision**

Twenty-five per centum of total fee

Issuing interim and final certificates, architect's instructions and further drawings

ZIMDEF has argued that the agreement between the parties as provided for in terms of the law, contemplated payment in three phases which were broken down as follows: -project phase which would be 1.5 percent of the 6 percent, contract phase another 3 percent out of 6 percent and the supervision phase which constituted 1.5 percent out of the total 6 percent.

As contended on behalf of ZIMDEF the initial payment was in Zimbabwe dollars. The initial project cost, upon which the fee note would be chargeable was calculated in the now moribund Zimbabwe dollar. It is common cause that the initial fee notes were denominated in the local currency. It is accepted that 4.5 percent of the cost of the project was paid for before its suspension.

The claim before the arbitrator was itself not set out with specificity. It is common cause that when the project was resumed the country had adopted a multicurrency regime. The

parties did not revalue the project to reflect the new currency regime. They proceeded with the contract regardless. Vengesayi Architects then sent a fee note in United States Dollar.

In fairness to the court *a quo* and counsel before the court, neither Vengesayi Architects as the claimant nor ZIMDEF presented a good case before the arbitrator.

The claim as presented to the arbitrator was in the United States Dollar. There is no indication as to how much the initial cost of the project was pegged at in the local currency and how it was converted to United States Dollar. All that is presented is a fee note. There was no attempt made to explain how the new claim premised in foreign currency was arrived at. It is evident that the arbitrator simply accepted the figures as presented by Vengesayi Architects.

It seems to me that there is merit in the contention by ZIMDEF that the arbitral award permitted Vengesayi Architects to recover an amount that it had not justified entitlement to. There is no correlation between what was initially billed for and what was invoiced for payment upon finalization of the project. What was left to be paid was supervision stage. It is suggested that there was thus no legal basis for Vengesayi Architects to recalculate the fees on the basis of a 6 percent of the total cost.

The question therefore is whether this failure by the arbitrator to advert to these clear omissions in the claim presented before him renders the arbitral award contrary to the public policy of the country. The question is whether or not such alleged failure on the part of the arbitrator would be a factor leading to a conclusion that the award is in conflict with the public policy of the

country. The issue that arises from these contentions is whether a wrong award resulting from a failure to place proper figures before the arbitrator renders such award as an affront to the public policy of the land.

Unfortunately this is not the approach adopted by ZIMDEF. Its focus is on an alleged failure by the arbitrator to apply the law. The contention is that the arbitrator ignored the law in finding for Vengesayi Architects. It is suggested that Vengesayi Architects, upon resumption of the project, was only entitled to payment of 1.5 percent of the total cost and that by virtue of the award Vengesayi Architects was granted the right to recover more than the amount lawfully prescribed under S.I 892/1980.

It is common cause that the project was revalued in United States Dollar upon resumption. The agreed figure appearing on the fee note sent to ZIMDEF was USD 17 651 679.12. It is also agreed that of that figure an amount totaling USD 741 871.94 was paid by ZIMDEF before a dispute arose between the parties. As concluded by the arbitrator neither of the parties raised a query regarding the revalued cost of the project in United States Dollars.

The difficulty in this matter was occasioned by the stoppage of construction resulting in the project being revalued in a different currency to that initially contracted for. This resulted in a change of the amounts chargeable. The starting point would have been for Vengesayi Architects to establish what it received in Zimbabwe Dollars. It would then have sought to convert such sum into United States Dollars. There was no independent valuation of the total cost of the project notwithstanding that any fee chargeable is based on such valuation. A mathematical exercise

should then have been undertaken to confirm that indeed the amount being claimed for the final phase did comply with the law providing for such fees. None of this was done. Instead bald figures were placed before the arbitrator who merely accepted them at face value. The issue then becomes whether or not such alleged failure on the part of the arbitrator would be a factor leading to a conclusion that the award is in conflict with the public policy of the country.

The only inference one can draw from the assertions made by ZIMDEF is that the arbitrator was wrong in the manner in which he dealt with the award or that he erred in some way in the award itself. Is an error in the making of an award such that a conclusion must be made that the award is in conflict with public policy. As was stated by GUBBAY CJ in *ZESA v Maposa(supra)* the fact that the arbitrator made an error in making the award does not per se lead to a conclusion that the award is in conflict with public policy. The onus is on a party alleging a violation of public policy to establish that the award is contrary to the fundamental conceptions of morality and justice of Zimbabwe. It is trite that he who alleges must prove. In *Nyandoro v Hokonya & Ors* 1997(2) ZLR 457(S), at 459D this Court said:

> "The general principle is that he who makes an affirmative assertion, whether plaintiff or defendant, bears the onus of proving the facts so asserted. However, where a negative assertion can be said to be an essential element of a party's claim or defence, that party bears the burden of proving it. *Kreigler v Minitzer & Another* 1949(4) SA 821(A), at 828; *Mandebvu v Pearce t/a F & B Builders* SC 127/97."

As a result not only is a party expected to prove the facts asserted, it is also required that when litigating such party is mandated to motivate its case before the court in order to persuade the court to find for it. In *Delta Beverages (Pvt) Ltd v Murandu* SC 38/15, this Court emphasized the need for parties to ensure that they argue their cases persuasively. The court said:

> "Parties are expected to argue their cases so as to persuade the court to see merit, if any, in the arguments advanced for them. They are not expected to make bald unsubstantiated averments and leave it to the court to make of them what it can."

In this matter, a bald allegation is made that the arbitrator failed to interpret the law. The failure is not elaborated on the record. It is not stated how the arbitrator should have proceeded and the result he ought to have arrived at or reached. This fails to reach the threshold set as to what constitutes a violation of public policy. As stated in *Netone Cellular (Pvt) Ltd v Communications and Allied Workers Union of Zimbabwe and Anor (supra)*, the bar to have an arbitral award set aside on such grounds is extremely high. The challenge to the award before this Court was that there was some error of the law, or, in addition, that another court faced with the same facts would have reached a different conclusion to that reached by the arbitrator. This is insufficient, as mere faultiness on the part of the arbitrator will not be held as being contrary to public policy.

And yet, a perusal of the arbitral award will show that the arbitrator awarded what the law provided. In terms of s 13(1) of the regulations no architect shall charge a fee that is lower than the fees prescribed in Part III of the regulations. The calculation for the fees chargeable are provided for in the third Schedule. As appears from the fee note submitted to the arbitrator Vengesayi Architects claimed 6 percent of the total cost of the project. In my view this is in keeping with the law regarding the level of fees an architect is permitted to claim.

In addition to the above, the Model Law in Article 34(5) has set out some of the considerations which a court must have regard to in deciding whether or not an award conflicts with public policy. Paragraph 5 reads as follows:

(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.

The list set out above is not exhaustive, there are other issues to be considered in such endeavour. However, apart from a bald contention that the award is in conflict with public policy, there has been no attempt on the part of ZIMDEF to spell out how the conflict is said to have arisen. It is common cause that the award does not fall into the category of awards referred to in paragraph (5) above.

As regards the question relating to the issue of prescription, the contention is made that the arbitrator did not have regard to the provisions s 9B of S.I. 829/80 when determining the dispute. The provision of in question reads as follows:

> "An architect shall ensure that in any contract he enters into with his client, his liability for negligence or other misconduct on the course of his professional duties is limited to a five-year period after-
> 9B(a)completion of work under contract; or
> 9B(b)occupation of the building to which the contract relates; whichever is the later
> Provided that no such limitation shall apply to the architect's liability for design defects which endanger human life."

The terms of reference in terms of which the matter was referred to voluntary arbitration do not make reference, either in specific terms or by implication, to any alleged negligence on the part of Vengesayi Architects as a basis for a claim by ZIMDEF before the arbitrator.

However, there was in fact a counter-claim for damages for what ZIMDEF alleged were negligence and breaches of its obligations by Vengesayi Architects in relation to the project. The former alleged that Vengesayi Architects had been grossly negligent in the following respects:

(i) Damage from the top floor to the ground floor for the eastern section of the building as a result of water ingress from an improperly fixed and poorly supervised roof damage system;

(ii) A flooded basement with up to two metres of water had wreaked havoc through the destruction of wecrolock gates of the basement drainage system;

(iii) Leaking windows in the office tower because the window casement had not been properly supervised during installation;

(iv) Extensive vandalism and theft of materials on site despite the presence of the respondent and his claim of supervision of the project including security by Cobra Security on site;

(v) Extensive growth of bushes and grass.

ZIMDEF claimed a total sum of USD 1 678 995.61 as damages for breach of contract, alleging that Vengesayi Architects had failed to provide it with reports on the status of the building.

The arbitrator permitted Vengesayi Architects to file a response to the counter-claim and the issue of prescription raised its ugly head.

In disposing of this issue the court *a quo* said:

> "By alleging that a wrong finding regarding prescription and in respect of the counter-claim was made, the respondent is basically saying that a wrong decision was made. The finding

> of prescription standing alone, even if wrong, cannot be so bad that it goes beyond mere faultiness to constitute a palpable inequity. That the arbitrator committed an error in law or fact should not be the focus of an application of this nature. In the absence of further and better particulars on the likely effects of the award, I am unable to find that it has been shown that the award is so bad that it goes beyond mere faultiness and constitutes a palpable inequity."

I must agree with those remarks. The attack on the reasoning by the arbitrator was that he was wrong in law on his finding on prescription. Over and above that, the arbitrator ventilated the issue on prescription and dealt with the question as to when the alleged debt would have arisen. Whilst ZIMDEF contended that the debt arose in 2015 when the final quantification of the cost of the works was done, it was the stance of Vengesayi Architects that as early as 2011 ZIMDEF had become aware of the degradation to the building requiring remedial work for which it was seeking damages.

The arbitrator found that the facts supported the position adopted by Vengesayi Architects and concluded that the debt arose in 2011. In this context the arbitrator relied on a report dated 6 July 2011 addressed to ZIMDEF by Vengesayi Architects setting out in detail the remedial and outstanding work to be done on the project.

On the basis of the facts as presented and on an interpretation of s 16 of the Prescription Act [*Chapter* 8:11], the arbitrator found that the counter-claim for damages had prescribed. It is evident that the arbitrator was not invited by the parties to consider the issue of prescription in accordance with the provisions of clause 9B of S.I 829/1980. This provision was first related to by ZIMDEF in its counter application to have the award set aside. The contention is made that the

arbitrator determined the question of prescription without taking into consideration the provisions of the above clause.

Does that failure constitute a palpable inequity such that the notions of justice within Zimbabwe are violated?

The arbitrator made the following statement in relation to the question of prescription:

> "…In reply the respondent accepted that the extent of the damage was observed and compiled at the resumption of works in 2011 but that the quantification of the actual cost of those works was only done at the end of the final project in 2015 and that therefore prescription did not arise. Unfortunately for the respondent this stance contradicts the facts of the matter. Bearing in mind that what is critical in so far as the timing of this claim is concerned is when it became due, it is clear from both the Claimant's statement of defence and the reply filed on behalf of the respondent that both parties accept that the loss allegedly sustained by the respondent occurred or respondent became aware of it in 2011. What is more as has been indicated above respondent sought and obtained from all its consultants including claimant an indication of the costs of the remedial work and this was provided in 2011. As a matter of fact Claimant's own fee claim of 4 November 2011 originally submitted by it to the respondent contains among other pieces of information a differentiation between remedial works and outstanding works."

It is pertinent to note that in that excerpt the arbitrator is analyzing the facts as presented to him by the parties. He dealt with the question of prescription as argued by the parties in line with the provisions of s 16 of the Prescription Act. There is no reference in any of the papers to clause 9B of the by-laws as contended by ZIMDEF.

The arbitrator, in my view, could only deal with the dispute in the manner presented to him. He has no mandate to depart from the dispute and embark upon a research of the law in order to assist a party before him. Civil litigation in this jurisdiction is adversarial and a court,

tribunal or adjudicator is not empowered to prosecute a dispute on behalf of any of the parties to dispute. To do so would be a gross irregularity and would be perceived as bias in favour of one of the parties.

It seems to me that ZIMDEF is seeking to make out a case different to the one argued before the arbitrator. If the latter was not requested to determine the question of prescription based on the by-laws, it was not open to him to do so. ZIMDEF was content to answer the defence of prescription as presented by Vengesayi Architects and argued by both.

It is clear that the court *a quo* was correct in dismissing the application for the setting aside of the award. The award is not contrary to the public policy of Zimbabwe. In the premises, the decision to register the award was entirely correct.

This in my view should be the end of the matter. There are however certain contentions made on behalf of ZIMDEF that require attention by this Court.

Mr *Hashiti* contended that the court *a quo* erred in holding that ZIMDEF's recourse against the arbitral award lay in an appeal. I am not convinced that the criticism is well placed. The court *a quo* made remarks in which it criticized the manner in which ZIMDEF sought to challenge the award. The court *a quo* was of the opinion that a litigant who chooses the root of arbitration had limited options for challenging an award from arbitration. The court stated:

> "…The respondent is effectively asking for a rehearing of the matter and asking the court to substitute its own findings for those of the arbitrator. A court dealing with an application to set aside an award will not set aside the award even in the face of glaring errors and may not substitute its own findings for those of the arbitrator. The option open to a litigant is to appeal

> the decision. By choosing the arbitration route, the respondent did so at its own peril. A litigant who chooses arbitration as a mechanism for dispute resolution is implied to have accepted the outcome of the arbitration even if it turns out to be wrong, for as long as the arbitrator followed the correct procedures. The motivation for arbitration proceedings is to bring disputes to finality leaving an aggrieved party with the option to appeal the decision."

The ground of appeal in the circumstances of this case and within the context of the remarks by the learned judge can only be described as mischievous. It is based upon a misconception of the learned judge's reasoning in general. It completely ignores the *ratio decidendi*, which was correct, that, in determining the application under Article 34, the High Court does not sit as an appeal court, and the court refused to be drawn into doing so. The learned judge did not suggest nor should her remarks be taken to mean that ZIMDEF should have sought an appeal against the award.

In conclusion, the appeal is devoid of merit and should be dismissed.

Accordingly, the appeal is hereby dismissed with costs.

**GARWE JA:** I agree

**PATEL JA:** I agree

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