REPORTABLE (10)

GREAT ZIMBABWE UNIVERSITY
v
(1) VENGESAYI ARCHITECTS (2) DANIEL TIVADAR N.O.

SUPREME COURT OF ZIMBABWE
BHUNU JA, UCHENA JA & KUDYA JA
HARARE, JUNE 8, 2021 AND JANUARY 27, 2023

E.T. Matinenga, for the appellant

T. Zhuwarara & S Bhebhe, for the first respondent

No appearance for the second respondent

KUDYA JA: The appellant appeals against the whole judgment of the High Court (the court *a quo*), handed down on 15 January 2020. The court *a quo* partially set aside, with costs, the arbitral award rendered by the second respondent (the arbitrator) on 9 June 2017 in an arbitration between the appellant (the university) and the first respondent (the architect). The basis for the order *a quo* was that the impugned portion was contrary to the public policy of Zimbabwe.

THE FACTS

The appellant is a university created in terms of s 3(1) of the Masvingo State University Act *[Chapter 25:24]* as amended. It is a statutory body corporate imbued with perpetual succession and legal capacity.

The first respondent is an architectural partnership established in 1987 by Mutumwapavi Charles Richie Vengesayi and his wife. The second respondent is the arbitrator appointed by the parties to determine the dispute between them. His arbitral award generated the proceedings *a quo* and before this Court.

The university was established in 1999 as the Masvingo State University (MASU). It was christened the Great Zimbabwe University (GZU) in 2007. It is a multi-campus institution of higher learning with a presence, *inter alia,* in the city of Masvingo. Some of its buildings are found at Masvingo Teachers College, Masvingo Polytechnic, the Andrew Louw Complex and the City Campus.

The architectural master plan for the development of the buildings at the city campus was designed by Maboreke Architects and approved in 2004.

The university acquired 1 207 ha of virgin land abutting the southern shores of Lake Mutirikwi, some 31 km south of the city of Masvingo. It divided the land into the Chivai Site, Compromise Site and Inspirational Site and sought to develop its main campus thereon. The State President, as the Chancellor of the University, deliberately convened the 2004 graduation ceremony at the undeveloped main campus. He mooted the development of a university with national appeal, befitting the status of the nearby World Heritage Great Zimbabwe Monument.

On 20 September 2007, in the aftermath of a brainstorming workshop for the designing of the GZU master plan layout attended by the architect and five other leading architectural firms, the university published the "Draft Master Plan Brief Design of the Layout

Plan for the New University Campus for the GZU". The university sought to appoint an architect to draw up and conclude the main campus master plan. It shortlisted three of the six brainstorming workshop participants and then interviewed them on 8 February 2008.

The architect was offered the appointment on 10 March 2008. The first paragraph of the offer letter from the Vice Chancellor and Chairperson of the GZU Building Committee, Professor Maravanyika (Maravanyika) reads:

> "I write on behalf of the GZU Building Committee to offer you appointment as Architect to conclude the new GZU campus master plan according to the attached Master Plan Brief, Certificate of Site Visit and Memorandum of Agreement. This appointment is with effect from the date of signing the attached form of agreement." (my emphasis)

On 17 March 2008, the parties consummated the agreement. The architectural services required of the architect comprised the designs and drawings (drawn to scale) of all the construction that would be undertaken on the main campus. The architect was required not only to provide such services in its own right but also to coordinate the other civil, mechanical, structural, engineering and land surveying designs, drawings and works of the other specialist consultants engaged by the university.

The conditions of payment would be governed by the First, Second and Third Schedules of the Architects (Conditions of Engagement and Scale of Fees) By-Laws, S.I 829/1980, as amended by SI 222/1994, SI 426/1999 and SI 110/2013 (the 1980 By-Laws) as read with Architects (Professional Conduct) Regulations 1976 RGN 810/1976. Payment to the architect would be made by the university from the Public Sector Investment Projects funds (PSIP) allocated by Treasury in the annual budget of the Ministry of Higher and Tertiary Education, Science and Technology Development (the parent ministry).

On 20 March 2008, the architect raised a commitment fee of ZW$10 trillion, which was then equivalent to US$1.2m and submitted it to the university on 27 March 2008. This was followed on 4 December 2008 by a further fee note F01ref 307/05/95/10 for US$1 056 589.44. The total construction cost of the Administration Block (AB), under item K, was estimated at US$1 023 982 while the estimated architect's fees would be US$184 316. The university forwarded these fee notes to the Minister of the parent ministry. He refused to pay on the ground that the project could be done more cheaply. The project therefore stalled in 2008.

In 2009, the Minister directed the university to rationalize the faculties between the city campus and the main campus. Notwithstanding the non-payment of the commitment fee, on 2 July 2010, the architect presented to the university building committee its first draft master plan design layout, which incorporated the ministerial directive. Thereafter, in August 2010, it presented the draft to the faculty deans.

On 30 June 2011, the architect presented its draft master plan layout to the Minister and construction experts from the Ministry of Public Works. On 14 July 2011, it further furnished them with the "Architect's Design Brief and Design Report (the architect's brief). The architect's brief included the HSC brief, which was derived from the Vice Chancellor's "Paper SEN/21/09: GZU Vice Chancellor's Department: Proposal to Establish an Institute for Cultural Heritage Studies (dated) 20 September 2009".

On 25 July 2011 the parent ministry suspended all master plan activities at the university. Resultantly, the university furnished the parent ministry with the architect's latest land use master plan draft, the architect's brief, a brochure and the architect's fee note of US$1.2m.

On 4 November 2011, the architect raised the fee note F03 for the master plan land use and infrastructural services design layout for the rest of the main campus and the Heritage Studies Centre (HSC) of US$6 679 851.19. It was premised on Cost Estimate No. 2 computed for the architect by Mukorombindo and Associates Quantity Surveyors (the QS) on 13 October 2010. The cost estimate was "based on recent historical data sourced from tenderers and square metres provided by Vengesayi Architects." The "Statistical Information-Space Allocation, Space Costs and Architect's Fees" dated 20 March 2008, and Schedule 1 for the "Rest of the Campus and Schedule 2 for the HSC" were attached to it.

Schedule 1 embodied the space floor for the Administration Block (AB) of 5 579.9m2 with an estimated cost of construction of US$5 738 000. The total estimated cost of construction in that schedule was US$500 570 000. Schedule 2 depicted the space floor of the HSC of 28 300 m2 with an estimated cost of construction of US$15 747 000. The architect subsequently submitted four fee notes on 5 June 2013 for US$170 823.30, 10 June 2013 for US$31 005.31, 11 June 2013 for US$1 200 000 and 5 November 2013 but signed on 3 December 2013 for US$15 810 783.69. The latter fees note was premised on a net project cost of US$254 601 991.96.

The university passed all the fee notes to the parent ministry for payment without demur. It, however, acknowledged indebtedness in the sum of US$1.2m, paid out US$1m and left an outstanding balance of US$200 000.

The master plan was approved by the parent ministry on 3 December 2012. It was based on the statistical information compiled by the architect on 3 October 2012, which replicated the information provided in the earlier 20 March 2008 report. Thereafter, on

11 December 2012, the architect requested the university to formally instruct it and the other consultants to produce the tender documents (comprising working drawings and bills of quantities). The preparation of these documents by the consultants was coordinated by the architect between 11 December 2012 and 28 February 2014. During that period, the architect submitted three progress reports to the university. These reports did not make reference to any oral variation of the specification embodied in the two statistical information reports.

The tender for the construction of the two blocks was based on the impugned drawings. It was won by Zantong International Zimbabwe (Pvt) Ltd, which had the lowest bid of US$294m. On 24 February 2014, the university and the winner signed the construction contract. Construction did not commence due to lack of funds and the subsequent dispute that is now before us.

Pursuant to s 5 as read with s 6 of the First Schedule of the Architects Act *[Chapter 27:01]* the university lodged a complaint to the Chairman of the Architects' Council of Zimbabwe (ACZ) against the architect's gross professional misconduct in the execution of its mandate, which resulted in ostentatious and opulent buildings that were designed to defraud it of US$16 212 612.80. The chairman made the finding that:

> "Appendix 4 dated 5 November 2013 confirms the net project cost based on the lowest tender. **If appendix 4 is a reflection of the project status of what was tendered then the architect is not at fault**. It means that Vengesayi Architects' fee invoice you are contesting is legitimate. Great Zimbabwe University should have not allowed the architect to proceed with work to tender when they were not in agreement. As pointed out it's usually rare that a project is tendered with no relevant approvals by the client. The brief outline empowered the architect to **carry out detailed space planning requirements for the buildings thus fulfilling the mandate of the commission**". (My emphasis).

He reasoned backwards that as appendix 5 was date stamped by VCZ on 10 July 2013, it constituted the university's approval of the project status based on the information embodied therein. Further that, the university's signature on the building contract affirmed its acceptance of the entire project as designed by the architect. The mediation by the ACZ did not resolve the dispute. Thereafter, further numerous negotiations and correspondence for the payment of the outstanding claim with the Minister and his officials, Treasury and the construction experts from the Ministry of Public Works did not yield any positive results.

By letter dated 22 October 2015, the architect demanded payment for the claimed amount and interest at the rate of 18 per cent per annum reckoned from 1 December 2013 to the date of payment in full. The demand was for "model making, disbursements, creating the master plan and various work in respect of the Administration and Heritage Studies Centre Blocks."

The issues for arbitration were crystallized by the Chairman of the ACZ on 1 April 2016. The arbitrator was to determine firstly, whether the architect, had deviated from the contract by providing a floor area of 60 000 m2 instead of 5 760 m2 for the AB and 81 000 m2 instead of 28 300m2 for the HSC. Secondly, whether it was entitled to claim fees on the construction costs of US$294m in respect of the two blocks for its architectural drawings.

It was common cause that the architect provided the coordination, designs and drawings firstly for the main campus Master Plan and secondly for the Administration Block and Heritage Studies Centre. It was further common cause that the university accepted and approved the architectural services rendered for the master plan brief layout and the claimed cost of US$1.2m. It disputed ever accepting or approving the impugned drawings in respect of

the AB and HSC. It was also common ground that the architect did not furnish its pre-tender report of the variation between the estimated 2010 costs and actual September 2013 costs to the university.

THE ARBITRAL PROCEEDINGS

a. THE PLEADINGS

The gravamen of the architect's pleadings before the arbitrator was that it was entitled to payment in the sum of US$16 212 612.80 and interest thereon for the architectural services rendered firstly, for the main campus master plan and secondly, for the AB and HSC. It also sought costs on the higher scale and the reimbursement of all costs associated with and incidental to the arbitration process. The architect provided the coordination, designs and drawings firstly, for the main campus Master Plan and, secondly, for the AB and HSC. The claim was premised on the written agreement of 17 March 2008, the 1980 By-Laws and its uncontroverted workmanship.

The university contested the claim on the ground that the architect's workmanship detracted from the written agreement, master plan brief and its derivative 'statistical information, space allocation and projected architect's fees' dated 20 March 2008, and the affirmations embodied in the certificate of site visit. Instead of drawing designs for an AB covering 5 579.9m2 for 564 occupants at an estimated cost of US$8 238 000, it drew designs for 60 000m2 for 7 143 occupants. The HSC figures increased from 28 300m2 to 81 000 m2 and 3 000 to 10 000 occupants and cost of US$15 747 000. The construction cost conversely increased from US$24m to US$294m for the two blocks against an initial estimated cost of US$516 317 000 for the construction works of the main campus contained in cost estimate No.

2. The university also averred that increases were unilaterally made by the architect without consultation or approval, in violation of ss 3, 5 (1) (a) and 10 (f) of the 1980 by-laws.

It was common cause that the architect did not plead estoppel nor the purported subsequent oral variation of the master brief in its replication. It did not also dispute the averment in para 3.7.4.2 of the response that the sizes of the two blocks were overblown. Rather, it maintained that it was entitled to payment on the ground that it had performed the impugned architectural services.

It was also common ground that the onus lay on the architect to establish on a balance of probabilities that it performed the mandate prescribed in the written agreement.

b. THE EVIDENCE

The parties produced, between them, voluminous documentary evidence encompassing approximately 1000 pages. The transcript of the oral testimony of the two witnesses called by the parties traversed some 620 pages. The architect called the evidence of its principal architect Mutumwapavi Charles Richie Vengesayi (Vengesayi) while the university called the testimony of its vice Chancellor Professor Rungano Jonas Zvobgo (Zvobgo).

Vengesayi participated in the brainstorming workshop, the interview, the consummation of the agreement, the performance of the mandate and the vigorous pursuit for payment of the claimed amount. It was common cause that the former vice chancellor of the university, Professor Maravanyika (Maravanyika) interacted with the architect from the brainstorming session in 2007 until his resignation in July 2012. Thereafter, Zvobgo took over the vice chancellorship on 12 October 2012.

In oral testimony, Vengesayi conceded that the claimed amount was not premised on the statistical information embodied in and derived from the master brief layout provided to his partnership on 10 March 2008, which formed part of the agreement consummated on 17 March 2008. He also conceded that the claim was also not founded upon the client's brief for the HSC, which was furnished to his partnership in September 2009. He introduced in oral testimony, for the first time, that Maravanyika had verbally varied the statistical information in respect of the drawings for AB. He was uncertain of whether the variation was communicated to him in March or April 2008. He was also unsure of the place where the oral communication was made. He, however, did not state whether the same fate visited the HSC drawings nor the date on which the instructions to vary them were issued. It was clear from his testimony that he unilaterally modelled the drawings of the AB on the whole university in one building concept on American Universities, including his *alma mater*, which were established in the 1800s.

The searching cross examination that Vengesayi was subjected to, established that he was an untruthful and unreliable witness. His testimony was demonstrably at variance with the common cause documentary evidence and the probabilities.

The university's sole witness disputed the purported oral variation. Like his counsel (during the cross examination of Vengesayi), Zvobgo squarely placed the onus to call Maravanyika to prove its variation claims on the architect. He conceded that the architect abided by its mandate to draw the accepted and approved master plan layout design for the main campus. He, however, vehemently disputed that the university had authorised and approved the impugned separate drawings for the AB and HSC. It was common cause that the drawing of the construction designs for the two blocks was a separate exercise that followed

the approval of the master plan for the entire campus but was not based on the approved master plan. It was his uncontroverted testimony that presentations of the impugned drawings and the periodic progress reports by the architect did not disclose the specifications of the two blocks. He maintained that the use of these drawings in the subsequent construction tender documents were premised on the reasonable but mistaken belief that they abided with the university's written main brief layout designs for each block. He further stated that the preparation and production of the tender documents were in terms of the 1980 By-Laws, initiated, co-ordinated and driven by the architect. The university merely relied on the architect's professionalism, expertise, knowledge and good faith in pursuing the tender process. In addition, the various specialist consultants' reports to the architect did not contain the floor sizes of the two blocks notwithstanding that the specialists based their drawings on the impugned floor sizes. Subsequent investigations by two independent architects commissioned by the university at the prompting of the Minister, disclosed that the architect had unbeknown to the university deviated from the two written briefs without its authority or approval.

The intensive cross examination he was subjected to failed to establish that Maravanyika orally varied the specifications in the written briefs. The university did not have any record of compliance with the mandatory statutory requirements for approving deviations from the initial architectural specifications.

c. THE CONTENTIONS BEFORE THE ARBITRATOR

The architect contended that it had pursuant to the written agreement, duly discharged all the prescribed architectural services. In this regard, counsel for the architect argued that the written contract was fluid. It allowed the university to issue verbal instructions varying the specifications embodied in the written briefs. While conceding that it had not

pleaded the oral variation, the architect strongly argued that this is what Maravanyika had done. It sought to rely on the purportedly unwritten mandate to design the HSC to confirm the existence of the oral variation to the AB instructions. It, therefore, submitted that it had not exceeded the remit of or the scope of works in the written agreement. In the alternative, it contended that by submitting the impugned drawings to tender and vigorously pursuing payment of the claimed amount with its parent ministry, the university had impliedly accepted and approved the impugned drawings.

It not only premised its alternative argument on the doctrine of quasi mutual assent, but also relied on estoppel. By reference to the pronouncements made in *Power Coach Express (Pvt) Ltd v Martin Millers and Engineers* HH 121/2010 at p 6; *Robinson v Randfontein Estate GM Co Ltd* 1925 AD 198, *Still v Milner* 1937 AD 105 and *Mtuda v Ndudzo* 2000 (1) ZLR 718 (H) at 719D-F, counsel for the architect entreated the arbitrator to consider the real dispute raised and fully ventilated by the evidence and not limit himself to the pleaded case.

Lastly, the architect argued that the use of the impugned drawings in the construction tender would unjustly enrich the university.

The university contended that the impugned drawings were unsanctioned. They exceeded the prescribed mandate. Further, that the architect failed to discharge the onus on it to establish the oral variation. It also contended that the alternative arguments could not be invoked in the face of the clear provisions of the 1980 By-Law and academic writings on the point, which precluded the payment for unsanctioned architectural services. It also argued that the architect could not benefit from its wrongful breach of the agreement. The university, therefore, disputed liability in any amount exceeding the conceded balance for the master plan

brief for the main campus of US$200 000. It, accordingly sought the dismissal of the excess claim with costs on the higher scale.

In reply, the architect argued that the arbitrator was precluded by the law from destroying the contract freely and voluntarily executed by the parties.

d. THE FINDINGS OF THE ARBITRATOR

The arbitrator found that the claim was for the enforcement of the written contract. It was based on breach of contract and not on compromise or estoppel. Nor did the architect seek restitutionary relief. He also held that the architect did not plead any variation of the agreement.

He further found the architect's sole witness was an unsatisfactory and incredible witness. He premised this finding on the five factors enumerated in para 15 of the arbitral award. These were that the architect accepted Annexure 1 (the statistical information document dated 20 March 2008 computed in terms of Table XIII of the Model Building By-Laws as amended by SI 310/1985) embodying the area and population size of the AB. Secondly, the admitted "huge differences" in the sizes between annexure 1 and the impugned drawings, which the witness conceded constituted a "totally new brief". Thirdly, obvious discrepancy between the witness' oral testimony that annexure 1 related to the city campus and the documentary evidence that related it to the main campus. Fourthly, the failure to plead the verbal variation. Lastly, its failure to plead the oral variation while identifying Maravanyika as the key player during the interactions between parties before, during and after the consummation of the written agreement.

The arbitrator held that the fundamental shift from the pleaded case, which, without amendment, was adverted to in oral testimony, was not only prejudicial to the respondent but was also fatal to the claim. He also held that the architect further shifted its case by seeking restitutionary relief in its closing submissions by praying for payment "on the basis that the work carried out by claimant is worth the amount claimed".

The prejudicial nature of the shift in the architect's case is encapsulated in para 25 of the arbitral award in these words:

> "The respondent came to defend the case against it on the basis of the case that was put forward by the claimant in its pleadings. Claimant's shift during its oral evidence has been so fundamental that it simply cannot be said that respondent could have been prepared for it or foreseen it. For all I know, respondent could have prepared its cross examination differently, adduced further documentation, called additional witnesses etc. It would be wholly unfair to respondent to judge its evidence in the context where it prepared its evidence to meet a different case."

The arbitrator placed the duty to call Maravanyika to establish the existence of the totally new oral brief on the architect. He found the failure to do so to be fatal to its claim. He also found the absence of any contemporaneous correspondence of the variation to be inconsistent with the oral instruction. He further held that the assertion that the university's officials knew or must have known of the variation from merely looking at the impugned drawings was not supported by the evidence or the probabilities. He opined that a layman and even a professional quantity surveyor such as the university's own internal quantity surveyor Sithole would not know the specifications of the impugned drawings by merely looking at them.

On the totality of the documents specifically attached to the pleadings and those referred to in evidence and closing submissions, the arbitrator rejected the purported oral

variation to the written agreement. He held that the architect had breached the written agreement between the parties. It exceeded the design sizes specified in the master plan brief and contemporaneous documents by a factor of 10 for the AB and a factor of 3 for the HSC. This resulted in the increased building costs and the proportionate increased fees. He ruled that the architect could not benefit from its own breach. He awarded the architect the conceded outstanding amount of US$200 000 for the master plan drawings. He, therefore, dismissed the rest of the claim with costs on the lower scale and ordered the architect to meet the university's share of his fees.

Aggrieved, the architect sought the setting aside by the court *a quo* of a part of the arbitral award, which related to the dismissal, costs and fees on the ground that it offended against the public policy of Zimbabwe. The university contested the application.

THE CONTENTIONS *A QUO*

The architect made the following submissions in the court *a quo*. The arbitrator took leave of his senses, abdicated his functions and turned justice on its head by failing to apply his mind to the evidence and issues before him. In addition, he failed to provide reasons for the award. The totality of the evidence before the arbitrator established that the written specifications had been verbally varied by Maravanyika. The duty to call Maravanyika lay on the university and not on the architect. An adverse inference lay against the university for failing to call both Maravanyika and especially its internal quantity surveyor, Sithole who went along with the unauthorised drawings. Additionally, the finding that the oral variation should have been reduced to writing was inconsistent with the provisions of s 5 of the 1980 By-Laws. In any event, it was unfair and unjust for the university to keep and use the impugned drawings and yet decline to pay for them.

The impugned award was therefore, in the light of these apparent shortcomings, palpably inequitable so as to constitute a serious subversion and negation of justice and fairness between the parties. Further, the university was estopped from denying the effect of its conduct, which reasonably led the architect to believe that the drawings had been accepted and approved. This was exemplified by accepting progress reports without demur, vigorously pursuing payment with both the parent ministry and the Treasury and utilizing the drawings in the construction tender process. In any event, so the architect argued, the finding that the architect should have pleaded estoppel was incorrect, as estoppel cannot found a cause of action but constitutes a defence. The adverse inference drawn against the architect for not calling an expert witness overlooked the fact that Vengesayi was an expert in his own right.

The cumulative effect of these shortcomings was that the impugned award destroyed the contract executed by the parties by undermining the sanctity of contract. It was, therefore, contrary to the public policy of Zimbabwe.

The university made the following contrary contentions. The evidence disclosed that the architect unilaterally altered the floor specifications. It failed to discharge the onus on it to establish the verbal alteration. It also failed to discharge the heavy onus to impugn an arbitral award under articles 34 and 36 of the Model Law. The arbitrator correctly answered the factual and legal issues that were before him. The architect could not properly invoke estoppel and quasi mutual assent in order to benefit from its own wrong. In any event, the university was oblivious of the wrong until it was raised by the parent ministry and confirmed by the review of its two architects' commission. In any event, cheating and fraudulent acts are contrary to public policy. The application constituted a disguised appeal. The analysis of the arbitrator could not be faulted. The application ought to be dismissed with costs on the punitive scale.

THE FINDINGS OF THE COURT *A QUO*

The court *a quo* set aside the impugned portions of the arbitral award. It held that the arbitrator had destroyed the contract between the parties and made an absurd costs order. It concluded that the impugned portions of the award were not a mere error of fact or law but a subversion and negation of justice and fairness. It, therefore, found the impugned portions contrary to the public policy of Zimbabwe and set them aside with costs.

The university is aggrieved by the judgment of the court *a quo* and appeals to this Court on the following grounds.

THE GROUNDS OF APPEAL

1. The learned judge erred at law in finding in the main that the arbitrator's award dismissing first respondent's claim conflicted the public policy of Zimbabwe.
2. 1n particular to 1, the learned judge erred in finding that the arbitrator **"destroyed"** the contract between the parties instead of upholding it.
    2.1 This finding was a misdirection on the part of the learned judge *a quo* in that he failed to appreciate, as the arbitrator did, that it was first respondent who destroyed the written contract between the parties by completely departing from its terms.
    2.2 The finding was a further misdirection on the part of the learned judge *a quo* in that he failed to appreciate, as the arbitrator did, that the oral agreement relied upon by the respondent was neither pleaded nor proved in evidence.
3. The learned judge *a quo* erred at law in implicitly finding that there was an obligation on the part of the arbitrator to call witnesses to prove first respondent's case.

4. The learned judge in the court *a quo* failed to distinguish as the arbitrator properly did, between the admitted liability (of which the $20 000.00 was part) for the preparation of the Master Plan and the disputed work related to the architectural drawings.
5. In all the circumstances, the judge *a quo* failed to apply the law applicable to the setting aside of an arbitration award to the facts before him and further failed to preserve the arbitral award by not strictly applying the public policy defence.

PRAYER

WHEREFORE the appellant prays that the appeal be allowed with costs and the order of the court *a quo* be set aside and substituted with the following:

"The application be dismissed with costs."

THE CONTENTIONS BEFORE THIS COURT

Mr *Matinenga* for the appellant attacked the analysis and construction of the judgment of the court *a quo*. He contended that the arbitral claim was premised on the written contract of 17 March 2008 and not on any alleged verbal variation, compromise or estoppel. He submitted that the architect was disentitled to an award in excess of US$200 000 because it failed to abide by the terms and conditions of the written agreement. The unsanctioned huge differences were contrary to s 5 of the 1980 By-Laws. They were therefore a nullity to which no liability could attach.

He contended that the architect's case stood or fell on its statement of claim. He relied on the provisions of article 23 (1) of the Model Law for that proposition. The article enjoins a claimant to state the facts supporting his claim, points at issue and the relief or remedy sought, and a respondent to state his defence against such particulars. He further argued that,

while the architect could not plead estoppel in its statement of claim, once the university raised the defence of unauthorised huge space specification differences, it was in turn required to plead estoppel in replication. He also contended that the court *a quo* improperly substituted its own discretion for that of the arbitrator. It wrongly impugned the arbitrator's factual findings, which were properly premised on the evidence and the probabilities.

Per contra, Mr *Zhuwarara* for the first respondent argued as follows. The architect was entitled to payment. The court *a quo* rightly held that the impugned portion of the arbitral award violated public policy. It was also contrary to public policy for totally ignoring s 5 of the 1980 By-Laws. The mainstay of his argument was that the appellant was obliged to pay the claimed amount because it sought to use the impugned drawings in the construction of the main campus. He thus contradicted the correct issue that is set out in para 7.5 of his written heads that:

> "To the extent that 1st respondent had rendered architectural services to the appellant in terms of a valid and binding contract and in terms of the mandate given by the appellant, it goes without saying that the 1st respondent would be entitled to recover its fees. See *Nicolaides v Skordis* 1973 (2) SA 730 (N) at 734-735 and *Esbach v Steyn* 1975 (4) SA 503 (A)." (My emphasis).

The real dispute between the parties before the arbitrator, on which the court *a quo* ought to have premised its decision, was whether the impugned handiwork of the architect was prescribed by the contract. The university did not *per se* attack the computation that was based on the impugned drawings. It was also clear that the dispute was never over the master plan drawings but on the architectural drawings pertaining to the AB and the HSC.

THE ISSUE

The issue for determination on appeal is whether the court *a quo* erred in holding that impugned portions of the arbitral award were contrary to the public policy of Zimbabwe.

THE LAW

a. CASE LAW

The law on the point was set out by this Court in *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 466E-G thus:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.
>
> Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

This Court again espoused the import and application of the above cited pronouncements in *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor* SC 30/17 at p 10 thus:

> "The import of these remarks is that the Court should not be inclined to set aside the arbitral award merely on the basis that it considers the decision of the arbitrator wrong in fact or in law. If the courts are given the power to review the decision of the arbitrator on the ground of error of law or of fact, then it would defeat the objectives of the Act. It would make arbitration the first step in a process which would lead to a series of appeals."

And at p 11:

> "These remarks ought to guide the Court in determining whether the award by the first respondent is contrary to public policy. 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."

In *Zimbabwe Management Development Fund v MCR Vengesayi & Anor* SC 97/19 at p 10 (the *Zimdef* case) GOWORA JA (as she then was) also articulated the need for a judge to deal with the parties' respective presentations before the arbitrator.

The submission by both counsel that the sanctity of contracts is a venerable tenet of public policy in this country was affirmed in *Book* v *Davidson* 1988 (1) ZLR 365 (S) at 378G. This principle is violated if an arbitrator destroys or creates a contract for the parties. See *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 86F-H, *Wells v South African Alumenite Company* 1927 AD 69 at 73 and *Printing and Numerical Registering Co v Sampson* (1875) LR EQ 462 at 465.

Again, it is trite that an arbitrator's failure to determine the dispute referred to him by the parties or to exceed his remit or to abide by the provisions of an applicable enactment referred to him by the parties is contrary to the public policy of Zimbabwe. See *Zesa v Maposa*, (*supra*), at 466D, *Stonewell Searches (Pvt) Ltd v Stone Holdings (Pvt) Ltd & Ors* SC 22/21 at p 16 and *Zimbabwe Manpower Development Fund v MCR Vengesayi & Anor* SC 97/19 at p 23.

b. THE RELEVANT STATUTORY PROVISIONS

The statutory provisions necessary for the determination of this appeal are articles 23, 34 and 36 of the Model Law and ss 3, 5, 10 and 11 of the 1980 By-Laws.

i. The Model Law

Article 23 stipulates;

> "(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars.
> (2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral

proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

The statement of claim prescribed in art 23 and the replication constitute the claimant's pleadings in arbitral proceedings. Butler and Finsen in *Arbitration in South Africa* at pp124-125 make the trite observation that they serve to alert and advise the opposing party and the arbitrator the basis upon which the claimant's case rests.

ii. The 1980 By-Laws

Ss 3 and 5, amongst others, specify the general duties of an architect to his client. They each provide that:

"3. In addition to the duties imposed by these by-laws, it shall be the duty of an architect to advise his client on and to prepare, the design of any proposed building.

5. (1) An architect shall ensure that-
(a) before initiating any stage of his duties referred to in Part II, he has the necessary authority of his client;
(b) before deviating in any material respect from a design approved by his client, he has the consent of his client thereto

(2) Where an architect becomes aware of any likely variation in the expenditure authorized by his client or the estimated period within which any work for his client will be completed, it shall be his duty to inform his client thereof forthwith."

The specific duties of an architect in regards to the project and contract are stipulated in Part II in ss 10 and 11.

"10. Before preparing drawings for his client, it shall be the duty of the architect to-
(a) hold preliminary discussions with his client for the purpose of determining the requirements and scope of the commission
(b) prepare a brief, outlining the requirements and planning proposals including the necessity or otherwise of appointing any specialist consultant or clerk of works
(c) advise on the form in which the project is to proceed;
(d) advise on town planning and on financial limitations set by the client
(e) prepare design drawings, which shall show the general layout, design, construction, outline specification of costs of work sufficient for the purpose of obtaining the approval of the client
(f) obtain the approval of his client of the design, specification, construction and cost of the work before proceeding in working drawings.

11. The architect shall proceed to contract stage as follows-
    (a) prepare working drawings, details, schedules and other documents necessary for the complete carrying out of the works; and
    (b) co-ordinate the work of any specialist consultants employed, and supply them with all the information required by them to complete their part of the works work; and
    (c) ensure that all necessary by-law and other building approvals have been received; and
    (d) call for, and receive, any tenders required, and advise on their acceptance; and
    (e) prepare for signature any contract documents required in connection with the work; and
    (f) select and recommend a suitable person for appointment as clerk of works."

Lastly, s 11 (4) of the Architects (Professional Conduct) Regulations 1976 RGN 810/1976 provides that:

> "An architect shall not prepare designs for buildings of a speculative nature or for the development of properties for which he has not been commissioned by a specific client."

Section 3 reposes a wide discretion on an architect to prepare the drawings of his client's buildings. The discretion is, however, subject to the requirement prescribed in both ss 3 and 5, that is, to advise and seek the client's authority and approval before embarking on or deviating from the contemplated designs.

The legal consequences of breaching these mandatory provisions is set out in Cheryl Loots' *Construction Law and Related Issues* 5th ed at pp 296-297 where the learned author pertinently observes that:

> "The process of design is a continuous one, but it is essential to the proper execution of the designer's obligations.
> Drawings are very often submitted to the employer for approval. The mere fact that the employer has approved **will not usually** absolve the designer **from any liability for negligence or breach of contract.** The employer relies on the skill and care of the designer in a specialist field in which the employer may have no detailed knowledge whatsoever.
> Where circumstances exist where it appears that the architect has failed to perform his obligations **under the contract because he produced plans and drawings which were not in accordance with his instructions in that the limit which the parties agreed to**

> **could not be achieved, such architect is not entitled to be paid any fees at all**. See *Nicolaides v Skordis* 1973 (2) SA 370 (N); *Du Plessis v Strydom* 1985 (2) SA 142 (T); *Wilkens Nel Argitekte v Stephenson* 1978 (2) SA 628 (O)." (My emphasis).

To the same effect is HS Mackenzie in *The Law of Building and Engineering Contracts and Arbitration* 5th ed at p 76, where he writes that:

> "Accordingly, an architect who is employed to prepare designs or preliminary sketches for a building, and who, exercising proper professional skill, complies with the instructions he has received, is entitled to remuneration whether the employer should decide to proceed further with the work or not, unless there are circumstances or agreements indicating clearly a contrary intention…An architect is not entitled to remuneration where his work is unskilfully done or not in compliance with his instructions. See *De Zwaan v Nourse* 1903 TS 814)"

According to Keating in *Building Contracts* 4th ed p 21:

> "By analogy with the duty of the valuer it seems to be no excuse where the plans and drawings are defective that he has shown them to the employer and told him to examine them himself."

The legal principle underscored by the above academic writings is that drawings which exceed the architect's remit are *void ab initio* and of no force or effect. Consequently, they do not enrich the client nor do they attract any payment.

ANALYSIS OF THE LAW AND FACTS

In my view, the best approach for dealing with an appeal of this nature was enunciated by GOWORA JA (as she then was) in the *Zimdef* case, (*supra*), at p 10, thus:

> "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 AGREEMENT OF 17 MARCH 2008

The agreement of 17 March 2008 provided in its preamble that it was subject to the provisions of the 1980 by-laws as amended, whose terms and conditions would, together with

those embodied in the agreement, form the sole basis of the appointment and payment of the architect. The provisions in the agreement that are relevant to the determination of this appeal stipulate that:

"1. The Architect will perform for the client the services listed below: -
   a) Taking client's instructions and advising client on project development and implementation-thus planning, design as per "Master Plan Brief-Design of the Layout Plan for the New University Campus for Great Zimbabwe University (Department of Works& Estates) ref: TFM/tfm/03/08", production of working drawings and contract documentation and construction supervision.
   b) Gathering and perusing existing documents i.e. Client's Brief, Maps, Physical Planning and National Parks Documents and MSU Site Plan.
   c) Calculating and quantifying Floor space of all buildings on campus using given occupancies and functions as per Model Building Bye-Laws Chapter II section 25 (1) and (2) and Table XIII.
   d) Estimating current cost of construction (replacement value).
   e) Co-ordination and facilitation for the production of an Environmental Impact assessment report as statutory requirement prior to development.
   f) Production of land use plan/local plan with planning guidelines for current and future applications.
   g) Design of buildings and infrastructural services for Master Plan Layout.

   In respect of Master Plan for Great Zimbabwe University and Ancillary Facilities.
2. The client will pay the architect for these services on the following basis (as indicated in the Schedules).
   As per SI 829 of 1980 (as amended) First, Second and Third Schedules for buildings requiring extensive specialised services. Buildings to aesthetically and technically harmonize with Great Zimbabwe Monument in order to suit the status of being sited within the proximity of a world heritage site. Architects fees shall be calculated using the Quantity Surveyors latest valuations which are not more than 14 days old. The fees shall be calculated in accordance with the provisions of the First, Second and Third Schedules on the percentage of the estimated costs of works and adjusted accordingly at the end of the contract. Date on fee note to be within 14 days of the quantity surveyor's valuation.
3. The copyright in any drawings, designs and specifications, and in the work executed from them shall remain the property of the architect."

Mr *Matinenga* assailed the reasoning in the judgment of the court *a quo*. The court *a quo* set out the issue before it, the law, the respective cases and contentions of each party before the arbitrator and before it. Thereafter, under the heading "Court findings on the issues raised by the parties" the court recorded that:

"As already afore stated this court finds in favour of the applicant."

Instead of providing the reasons for this finding, the court *a quo* regressed into regurgitating the architect's case and contentions before it. In between that regurgitation, it reasoned at p 1780 that:

> "On the face of such evidence the second respondent made a finding that no contract had been established but confusingly he awarded part of the sum claimed."

And held at p 1781:

> "This court therefore agrees that the arbitrator had no jurisdiction to destroy this contract. His conduct in refusing to enforce the contract is contrary to public policy. Similarly, the order by the arbitrator that claimant is to pay the respondents' costs (including respondent's share of the arbitrator's fees) on the lower scale is in the circumstances similarly absurd. In the circumstances of this case this court shares the view that the award in issue is therefore contrary to public policy and should be set aside."

The reasoning process of the court *a quo* is unfathomable. It merely decreed the architect's contentions before it to be correct. It did not give any reasons at all. It did not demonstrate how, in its view, the arbitrator's factual findings and legal conclusions were so disturbingly inappropriate as to render them palpably inequitable and injurious to the concept of justice in Zimbabwe. Rather, it substituted its own discretion for the arbitrator's. In the process, it fell afoul of the pertinent warning given by this Court in *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor*, *supra*, at p 12 that:

> "There is a distinction between creating a new contract between the parties and interpreting a contract in a manner which is unfavourable to a party."

In *casu*, the arbitrator considered the evidence led by the architect and its sole witness. He set out not less than five reasons why the evidence was incredible. The major reason being that the architect abandoned its pleaded case and sought to prove a different case,

without first amending its pleadings. His decision thereon is supported by article 23 of the Model Law. He was undoubtedly correct.

The architect relied on clause 1 (a) of the agreement for the argument that the agreement upon which its claim was based was fluid and not static. The contention was rightly rejected by the arbitrator. The clause circumscribed the instructions to the contents of the master plan brief. It was common cause that this limitation was also embodied in the letter of appointment of 10 March 2008 and its attached "Certificate of Site Visit" certified on behalf of the architect by Vengesayi on 17 March 2008.

The letter of appointment limited the design to the contents of the master brief plan provided to the architect together with the certificate of site visit and the *pro forma* agreement. The certificate specifically provided that:

> "I have carefully examined all facets of the site and have previously studied the master plan brief.
> I further certify that I am satisfied with the description of the work and explanations given by the promoter, and that I am perfectly acquainted with the work to be done as specified and implied in the brief."

It is apparent from a combined assessment of these three foundational documents that the agreement of 17 March 2008 was static and not fluid.

The arbitrator also rejected the contention that the written agreement was varied by the oral instructions given by Maravanyika. He held that the duty to call Maravanyika lay on the architect for two reasons. The first was that the onus lay on the architect to prove on a balance of probabilities the existence of the verbal variation. The second was that it was not pleaded but was raised for the first time in Vengesayi's testimony. The university contested the

assertion. The arbitrator drew an adverse inference against the architect for failing to call Maravanyika. That the architect had such a duty is clear from the analogous case of *MCR Vengesayi & Anor v Belvedere Nursing Home (Pvt) Ltd* SC 15/20 at p 5. In that case, faced with a kindred situation, the architect called the evidence of the managing director of the respondent therein to establish the existence of an architectural agreement between the parties.

It was quite apparent to the arbitrator that the Maravanyika version was merely a figment of Vengesayi's fertile imagination. This was because of the lack of any subsequent written evidence of such an instruction. A close reading of the voluminous documents produced by both parties during the arbitral proceedings makes no reference to the purported verbal variation. The provisions of s 3 as read with s 5 of the 1980 by-laws mandated the architect to advise on, prepare, seek authorisation and approval of any design. In respect of the purported verbal variations, the architect never invoked these mandatory provisions. The attempt to derive the verbal instruction from the HSC drawings was clearly misplaced. Contrary to its assertions that the drawings of the HSC designs were verbal, these were premised on the Faculty of Arts workshop held in May 2008. The workshop documents thereto were compiled on 20 September 2009 and incorporated into the written main brief for the HSC. Such communication culminated in the written instruction issued by Maravanyika on behalf of the university's building committee to the architect to transfer the HSC from the Inspirational Site to the Compromise Site on 12 January 2012.

The arbitrator did not find that the vigorous pursuit for the payment of the claimed amount by Zvobgo or the involvement of the university's quantity surveyor Sithole established any quasi mutual assent on the part of the university. This was because the architect failed to establish that both these key university staff were aware of the existence of the verbal

instruction when they so acted. It was common cause that they could not have had any knowledge thereof. The two assumed their respective offices long after the purported verbal instruction had been given and long after the architect commenced drawing the impugned designs. It was apparent from the overarching role the architect played that the university would not have known of the specifications used for drawing the designs by merely looking at them.

The suggestion that the Chancellor's instruction to draw bigger and prestigious buildings was a post 17 March 2008 phenomenon was also untrue. It was apparent from the background information supplied to the brainstorming workshop that the Chancellor's directive was made in 2004.

There was also plenteous evidence of written communication between Maravanyika and the architect in the form of letters, e-mails, and minutes of meetings. The verbal instructions are not referred to in any of them. Indeed, the existence of the purported verbal instructions of March or April 2008 was contrary to the fee note raised on 4 November 2011, which was in turn premised on the quantity surveyor's cost estimate No. 2 of 13 October 2010.

It is correct that estoppel is a defence, which cannot be raised as a sword but as a shield. See *Willowvale Mazda Motor Industries (Pvt) Ltd v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S); *Guarantee Investment Corporation Ltd v Shaw* 1953 (4) SA 479 (SR). However, as the facts that gave rise to estoppel were raised as happened in this case, in the appellant's response to the claim, the claimant ought to have raised it in its replication. This trite proposition is articulated in *Amler's Precedents of Pleadings* 7th ed p 195 thus*:*

> *"*A plaintiff wishing to rely on estoppel must plead it in the replication in reply to the defendant's plea where reliance is placed on the true facts. *Mann v Sidney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (G) at 107D."

Lastly, the attack on the finding that the architect sought disguised restitutionary damages and not *ad pecuniam solvendam* could not seriously be challenged. The manner in which the architect's cause of action was pleaded could reasonably lead to such a finding. The cause of action was premised on payment for the work done. In *Brennan's Diesel Services (Pvt) Ltd v Tenda Bus Services (Pvt) Ltd* 2014 (2) ZLR 480 (S) at 485B-F restitutionary damages are defined as "payment on the (value or worth of) work carried out by a claimant".

The conclusion that the architect was not entitled to "any fees at all" for the work done where such work failed to abide by the contractual prescripts was therefore unassailable. See *Du Plessis v Strydom* 1985 (2) SA 142 (T), *Nicolaides v Skordis* 1973 (2) SA 730 (N) at 735D-E and *Salonika v Coleman* 1938 SR 46 at 50.

All these findings were not interrogated *a quo.* They were not and could not have been found to be irrational or demonstrative of an arbitrator who had taken leave of his senses by making the impugned portions of the award.

Costs

There is no reason why normal costs on a party and party scale should not follow the cause.

Disposition

In the circumstances, all the grounds of appeal are meritorious and ought to succeed. The following order will ensue:

1. The appeal be and is hereby granted with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:

   "The application be and is hereby dismissed with costs."

BHUNU JA: I agree

UCHENA JA: I agree

Chihambakwe Mutizwa & Partners, appellant's legal practitioners.

Kantor & Immerman, first respondent's legal practitioners