REPORTABLE (44)

ZIMBABWE JIANGSU INTERNATIONAL COMPANY (PRIVATE) LIMITED
v
(1) ZIMBABWE MANPOWER DEVELOPMENT FUND (2) CLASSIQUE PROJECT MANAGEMENT (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
MAKONI JA, MATHONSI JA & KUDYA JA
HARARE: 25 MARCH 2025 & 22 MAY 2025

T. Mpofu for the appellant

E. Mubaiwa, for the first respondent

No appearance for the second respondent

MATHONSI JA: The first respondent, is a statutory institution constituted in terms of the Manpower Planning and Development Act [*Chapter 28:02*], which contracted the appellant in November 2000 to construct a nine-storey building in Harare and subsequently took occupation of the completed building as its headquarters. It has in fact litigated in that name, almost at an industrial scale in the courts, but suddenly came across an idea, namely that it does not have legal personality to contract or to sue and be sued in its own right. Never mind that the discovery of its legal incapacity did not stop it litigating before both the arbitrator and the High Court in that capacity.

After having come second best in arbitration proceedings stemming from a dispute over payment due to the appellant for the construction of its nine-storey headquarters, the first respondent brought an application before the High Court (the court *a quo*) in terms of Article 34

of the Arbitration Act [*Chapter 7:15*] (the Model Law). It sought the setting aside of the arbitral award issued in favour of the appellant on the grounds, *inter alia*, that, not being a legal persona, it lacked capacity to contract with the appellant at the time that the parties' agreement was concluded. For that reason, the first respondent made a case that the agreement was invalid under Article 34 (2) (a) (i) of the Model Law.

The court *a quo* agreed with the first respondent and, by judgment delivered on 16 October 2024, it set aside the arbitral award. This appeal is against that whole judgment of the court *a quo*.

THE FACTS

The appellant is a company duly incorporated in terms of the laws of Zimbabwe. It was the beneficiary of an arbitral award entered against the first respondent, a fund established in terms of the Manpower Planning and Development Act [*Chapter 28:02*]. Like the appellant, the second respondent is also a company duly incorporated in terms of the laws of Zimbabwe and it acted as a project manager as per the contract entered into by and between the appellant and the first respondent.

The first respondent initially engaged the appellant, through a tender process presided over by the State Procurement Board, to construct a nine-storey building in Harare. The tender was awarded on 01 November 2000. The contract sum was pegged at ZW$ 497 318 100.00 and it is common cause that the building was constructed as agreed and that the first respondent took occupation of the building which it now uses as its headquarters.

The project was initially scheduled to be completed on 31 August 2002, but that deadline was not met and it was subsequently suspended on 29 April 2005, as the first respondent failed to make payments due to the appellant in time owing to hyperinflation the country was experiencing at the time. Following the multi-currency system in 2009, the appellant and first respondent re-priced the remaining works on the project in US Dollars. The agreed and approved price for the outstanding works was the sum of US$ 19 550 560.14.

On or about 02 July 2012, the appellant and the first respondent entered into what was called an Agreement and Schedule of Conditions of Building Contract ("the Building Contract") in terms whereof the appellant agreed to complete the outstanding works on the first respondent's headquarters within 36 weeks. This contract also provided that the first respondent would pay to the appellant the sum of US$ 19 550 060.15, for the completion of the outstanding works. The appellant was further entitled to obtain payment from the first respondent for re-measurement of work done, increased cost, variations and any other legitimate claim the appellant would make.

In terms of the agreement, the parties appointed Messrs Vengesayi Architects as the project architects and Messrs Gwaze & Partners as the project quantity surveyors. The second respondent was appointed as the project manager. In terms of condition 22 (a) of the agreement, certificates for payment of any sums due by the first respondent to the appellant were to be done by the project architect.

It was also part of the agreement that any disputes would be resolved or determined by the architect, and his decision would be final. The dispute would be referred to arbitration if

the appellant disputed the architect's determination. In August 2014, a dispute arose between the appellant and the project architects during the implementation of the agreement, which dispute resulted in the removal of Messrs Vengesayi Architects as the project architects. There was no replacement of the project architect as provided for in clause 3 of the agreement. This resulted in the second respondent assuming the role of interim payment certification. The role of valuation of the interim payment certificate remained with the Quantity Surveyor.

In November 2015, the first respondent's Quantity Surveyor issued the final account for the first stage works which included a retention fund, interest on alleged late payments of retention, interest on alleged late payments of interim payment certificates ("IPC") numbers 1-18, non-payment of IPC 19 and the *quantum* of IPC 20. A dispute arose between the parties concerning the payment of sums indicated on two payment certificates issued by the second respondent and the first respondent's failure to pay the interest amount to the appellant. The dispute was referred to the second respondent which tried to resolve the issue without success.

THE ARBITRATION

The first appellant and the first respondent requested the President of the Institute of Architects of Zimbabwe to appoint an arbitrator in accordance with clause 25 of their building contract. The appellant alleged that the first respondent failed to pay the appellant interest on due payments, failed to pay amounts due on the IPCs and that the first respondent had failed to pay interest accruing from the retention fund and interest on the late payments as a result of the first respondent opening a retention fund late. The appellant claimed 10% retention from the "first stage" project, from 27 June 2000 to 03 November 2005. The appellant further made a claim for interest on the late payment of the retention fund during the "first stage" from 6 January 2020.

In addition, the appellant was claiming interest which accrued as a result of the late opening of the United States Dollar retention fund for the "second stage" of the project and interest on late payments of the IPCs 1-18 by the first respondent. Further interest was claimed for the non-payment of IPC 3 from 22 March 2013 to 15 November 2016. All in all, the total amount claimed by the appellant was USD 11 263 966.89.

The first respondent counter claimed and alleged that interim payment certificate number 20 was a legal nullity as the USD was not legal tender in terms of Statutory Instrument 142 of 2019. The first respondent stated that the interim payment certificate number 20 ought to be paid in local currency as provided by statutory instruments.

In determining the matter, the arbitrator dismissed the claim in relation to damages on 10% retention and in his award, he ordered the first respondent to pay the appellant US$ 11 263 966.89 or its Zimbabwe currency equivalent at the prevailing interbank rate without interest thereon. The arbitrator also ordered the first respondent to pay the appellant USD 7,928,199.50 or its equivalent at the prevailing interbank rate.

In respect of the first respondent's claim in reconvention, the arbitrator ruled that USD 141 396.52 be deducted from the appellant's claim of USD 819 390.28.

THE APPLICATION BEFORE THE COURT *A QUO*

Disgruntled by the award, it filed an application to set aside the arbitration award in terms of Article 34 of the Arbitration Act [*Chapter 7:15*] in the court *a quo* on four grounds.

The first ground was to the effect that the first respondent was under an incapacity which rendered the agreement between the parties invalid under Article 34 (2) (a) (i) of the Model

Law. The second ground was that, in breach of Article 34 (2) (a) (iv), the arbitral procedure was not in accordance with the agreement of the parties. The third ground was that the award dealt with a dispute which was not contemplated by the terms of the submission of the dispute to arbitration. The fourth ground was that the arbitral award was in conflict with the public policy of Zimbabwe.

The first respondent submitted that the first respondent was not a legal *persona* and that for that reason, the proceedings before the arbitrator were a nullity. It submitted that section 23 of the Manpower Planning and Development Act (No.36 of 1984) established the ZIMDEF as a fund with no separate juristic personality from its sole trustee, the Minister responsible for the administration of the Act. It was further submitted that Part V of the current Act, that is, *Chapter 28:02*, does not change the position in that ZIMDEF remains a statutory fund that is not vested with legal capacity. It was the first respondent's case that the absence of such capacity meant that all juristic acts to be performed by the first respondent had to be performed through the responsible Minister. It is on that basis that the first respondent took the position that it was under an incapacity as contemplated by Article 34 (2) (a) (i) of the Model Law, as it could not validly assume obligations and acquire rights in its own name. In the first respondent's view, it could not enter into a valid or binding arbitration agreement with the appellant.

The first respondent further asserted that the arbitrator ruled on a point that was not before him contending that the arbitrator acted outside his mandate, as the parties referred to him a dispute which did not arise out of the contract. More so, the first respondent argued that the arbitral award was contrary to the public policy of Zimbabwe in that the award did not recognize

that the *in duplum* rule on interest had been violated. The appellant opposed the application and also filed its own application for the registration of the arbitral award sought to be impugned.

The court *a quo* determined the application on the single issue of legal incapacity and found it unnecessary to determine the rest of the issues raised in the application. In its view, the issue of the first respondent's legal status was dispositive of all the matters. On that note, the court *a quo* found that the first respondent is not a corporate body or juristic person, hence it could not sue and be sued in its own right. In arriving to that conclusion, the court *a quo* reasoned thus:

> "In my view the first point, if decided in favour of the applicant, that is ZIMDEF, disposes of the matter completely. The other points will automatically fall away and will need no determination on them. If the first point is decided in favour of ZIMDEF, then I do not need to consider the rest of the points.
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> I consider that the first point is strong. It is formidable. It is valid. ZIMDEF is not a legal person as could enter into valid contracts on its own. It is not a juristic person, despite the confusion from some previous judgments that seemed to suggest that ZIMDEF could be a party to the contract in its own right. Having considered those cases and the legislation governing the setting up and operations of ZIMDEF, I am satisfied that it is a mere fund, some kind of a savings account. It just stores money saved for some purpose. It was never constituted into a legal person with powers to sue and be sued."

The strain on the mind of the court *a quo* is palpable in its reasoning because, even after making the foregoing remarks, it went on to bemoan the badness of its decision, stating that it is "decisions like these that probably give the law a bad name." The court *a quo* further held that the arbitration proceedings were a nullity because only one party was in existence. Accordingly, it proceeded to set aside the arbitral award. In doing so, and despite having commenced by observing that what was before it was "a two-in-one application or case," it did not dispose of the appellant's application for registration of the arbitral award. It was left hanging in the air.

THE APPEAL

Aggrieved by the decision of the court *a quo*, the appellant filed the present appeal on the following grounds of appeal:

1. The court *a quo* erred by allowing the first respondent to take a point so late in the proceedings where consideration of the point involved such definite prejudice and unfairness to the appellant.
2. The court *a quo* misdirected itself in failing to consider that allowing the point of law amounted essentially to denying the appellant the right to be heard.
3. The court *a quo* misdirected itself in failing to abide by the *stare decisis* principle in that superior courts have recognised the first respondent as a statutory body which consequently can be sued in that name.
4. By failing to apply the principle of equity, the court *a quo* erred and misdirected itself by failing to appreciate that:
    (a) The first respondent entered into an agreement in the name it was cited by the appellant and further successfully mounted arbitration proceedings,
    (b) The appellant constructed and delivered to the first respondent its complete head office and after such delivery the first respondent failed and refused to pay the appellant the amounts properly due and owing to it.

RELIEF SOUGHT

1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* in case number R HCHC 328/23 be and is hereby set aside and substituted with the following:

    "It is hereby ordered that:

The application to set aside the arbitral award be and is hereby dismissed with costs."

At the commencement of the hearing, *Mr Mpofu,* who appeared for the appellant, moved for the amendment of the notice of appeal, more particularly, the prayer. Counsel for the respondent was not opposed to the application. By consent, the Court granted the application for the amendment of the notice of appeal. Accordingly, the amended prayer reads:

"1. That the instant appeal is allowed with costs.

2. That the judgment of the court *a quo* in case number HCHC 328/23 is set aside.

3. The matter is remitted to the court *a quo* for a hearing before the same judge of the outstanding issues raised by the first respondent (*sic*) together with the application brought by the appellant."

ISSUES FOR DETERMINATION

The grounds of appeal and submissions made by counsel yield only two issues for determination on appeal. They are whether the court *a quo* determined all the issues it was required to determine and whether the court *a quo* erred in finding that the first respondent has no legal personality.

Counsel for the appellant submitted that the point relating to the legal personality of the first respondent was taken very late in the proceedings thereby causing serious prejudice to the appellant as could not be rectified by an order for costs. In his view, had the point raised by the first respondent in the court *a quo* been raised earlier, the issue of the citation of the first respondent could have been corrected. Counsel added that, had the point been raised on time, the

appellant could have led evidence which would have resulted in the resolution of the issue without difficulty.

Mr *Mpofu* further submitted that the appellant had, before the court *a quo*, made strong contentions against the advancement of the point of law which the court *a quo* ignored and its failure to consider the contentions amounted to a misdirection. In this regard, it was argued on behalf of the appellant that, apart from the point of law being taken late, the first respondent was estopped from taking it, it having concluded an agreement as such, having enjoyed the benefits thereof and indeed having successfully filed a counter claim before the arbitrator, all of which the court *a quo* ignored.

Further, *Mr Mpofu* submitted that the first respondent had legal personality and accordingly it had the capacity to transact, to sue and to be sued in its own right. In fact, so it was argued, there are many instances in which the first respondent has been sued and superior courts have concluded that it enjoys legal status which decisions were binding on the arbitrator. The case was made that even if the question of the first respondent's legal personality had been an arbitrable dispute before the arbitrator, which it was not, the arbitrator would have held the proceedings valid by virtue of precedent. In counsel's view, a departure from the extant judgments of superior courts, which the court *a quo* did in the wrong forum, is the province of the appeal court and as such, the finality of arbitration should have been respected.

Counsel rounded off by submitting that the first respondent is constituted by s 47 (4) of the Manpower Planning and Development Act [*Chapter 28:02*] as a statutory trust whose trustee is specified in the Act. It was contended on behalf of the appellant that Article 34 (2) (a) of the Arbitration Act [*Chapter 7:15*] did not apply to the first respondent, as the provision only

applies to cases where a party does not have the capacity to contract at all. There is also the question of the non-citation of the arbitrator in the application which appears in the appellant's papers to the effect that, when seeking to impugn the award, the first respondent ought to have accorded the arbitrator the opportunity to defend his award. The point was not pursued with zeal by counsel in his submissions.

Per contra, *Mr Mubaiwa,* who appeared for the first respondent, submitted that the first respondent is not a legal person and had no legal capacity both at the time of contracting and at the time legal proceedings were instituted. He contested the appellant's argument about the timing of the point of law taken by the first respondent. In his view, Article 34 (2) (a) of the Arbitration Act allows a party to approach the court *a quo* with an application to set aside an arbitral award on the basis of legal incapacity. He submitted that the prejudice allegedly suffered by the appellant was not established.

Counsel submitted that section 47 of the Manpower Planning and Development Act creates the first respondent as an asset, and the expansiveness of the assets does not create legal personality as s 47 does not confer legal personality on the first respondent. Mr *Mubaiwa* also took the view that the conduct of the parties does not confer legal personality, hence, the fact that the first respondent entered into a contract with the appellant and filed a claim in reconvention before the arbitrator was of no moment.

On the failure to cite the arbitrator in the application to set aside the award, Mr *Mubaiwa* submitted that it was not necessary to cite the arbitrator in the proceedings *a quo* as the application was brought in terms of Article 34 of the Model Law. He submitted that the application was not an attack against the conduct of the arbitrator.

THE LAW

The law governing arbitral awards was set out in the case of *Zimbabwe Manpower Development Fund* v *Vengesai & Anor,* SC 97-19, at p 5, wherein GOWORA JA (as she then was) stated that:

> "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.
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> 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]:
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> > '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.'"
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> It was further stated on p 6 that:
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> "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.
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> Article 34 of the Arbitration Act provides as follows:
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> "*Application for setting aside as exclusive recourse against arbitral award*
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

[1] At p92

(2) An arbitral award may be set aside by the High Court only if -

(a) the party making the application furnishes proof that -

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question, under the law of Zimbabwe; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Model Law; or

(b) the High Court finds, that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(ii) the award is in conflict with the public policy of Zimbabwe.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The High Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if—

(a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award." (Underlining for emphasis)

It is clear from the above that a party can approach the High Court for the setting aside of an arbitral award if the agreement subject to the award was invalid. In the case of *Legal Hospitality Management Services Limited* v *African Sun Limited & Anor*, SC 43-22, at pp 12-13 this Court aptly stated that:

> "It is trite that parties to a contract are bound by the terms of the contract. If parties contractually agree to arbitration as a means of dispute resolution, then the court should be loath to interfere with decisions made by arbitrators. Intervention is only resorted to if the decision reached is in contravention of the Arbitration Act [*Chapter 7:15*] and/or is so irregular and illogical as to amount to moral turpitude on the part of the arbitrator. This principle was emphatically enunciated by MALABA DCJ (as he then was) in *Alliance Insurance* v *Imperial Plastics (Pvt) Limited & Anor* SC 30/17 wherein he stated, at p 5 of the judgement:
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> > 'The rationale behind the provision is that voluntary arbitration is a consensual adjudication process which implies that the parties have agreed to accept the award given by the arbitrator even if it is wrong, as long as the proper procedures are followed. The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34 (2). An application brought before the court under this provision is in essence a restricted appeal and the applicant should prove the grounds set out in order to succeed in its application."
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> The cautionary approach was lucidly enunciated in *Peruke Investments (Pvt) Ltd* v *Willoughby Investments (Pvt) Ltd & Anor* 2015 (1) ZLR 491 (S) and also *Zimbabwe Electricity Supply Authority supra…*
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> From the cases cited above, it appears settled that an arbitral award will not be lightly set aside on the basis that a party considers that the decision of the arbitrator is wrong. The court will not interfere with an award unless the reasoning of the arbitrator constitutes a palpable inequity so outrageous and far reaching in its defiance of logic or acceptable moral standards as to cause a fair-minded person to regard it as hurting all sense of justice and fairness. Article 34 is certainly not intended for the court to reassess a dispute on the basis that the appellant views the arbitrator's decision as wrong."

The first respondent is established by s 47 of the Manpower Planning and Development Act as amended by Act Number 12 of 2020 which provides:

> "**47. Zimbabwe Manpower Development Fund**

(1) The Zimbabwe Manpower Development Fund, established by section 23 of the Manpower Planning and Development Act, 1984 (No.36 of 1984), shall continue in existence under this Act.

(2) Subject to this Act, the object for which the Fund is established shall be-
(a) to develop skilled manpower and professions; and
(b) to support and promote the creation of –
(i) new knowledge;
(ii) research;
(iii) innovation;
(iv) science;
(v) technological and engineering solutions; and
(vi) business enterprises.

(3) The Fund shall consist of –
(a) any moneys which, immediately before the 1st November, 1995, formed part of or were payable to the Fund; and
(b) any moneys raised by any levy; and
(c) any moneys that may be payable to the Fund from moneys appropriated by Act of Parliament for the purposes of the Fund; and
(d) advances made to the Fund in terms of section forty-nine; and
(e) any other moneys to which the Fund may be lawfully entitled, including –
(i) any moneys accruing from the sale of any articles in terms of section sixty-four; and
(ii) any moneys accruing from the enforcement of any financial obligations arising out of regulations made for a purpose referred to in paragraph (g) of subsection sixty-nine; and
(iii) fees payable for any examination conducted or held with moneys from the Fund; and
(iv) gifts and donations from any person.

(4) The Fund shall be administered by the board, subject to this Act." (Underlining for emphasis)

In order to give effect to the object of the Fund described in s 47 (2), the Board may do any or all of what is set out in s 48 (2).

The point of law relating to the legal status of the first respondent was raised by the first respondent itself, well after the construction contract it entered into with the appellant had

been completed or performed and long after the arbitration provided for in that contract had been completed. In fact, it was raised for the first time in the application for the setting aside of the arbitral award. The appellant immediately took issue with the timing of it, citing serious prejudice on its part.

The question of prejudice to the appellant is one which the court *a quo* did not determine, content to only mention it in passing. In that regard, the remarks of GARWE JA, as he then was, in *Gwaradzimba NO* v *C J Petron & Co (Pty) Ltd* 2016 (1) ZLR 28 (S) 32 B-D are apposite. He said:

> "The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, "unless the issue so determined can put the whole matter to rest" – *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008 (1) ZLR 198 (S) 203D.
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> The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – *Kazingizi* v *Dzinoruma* 2006 (2) ZLR 217 (H); *Muchapondwa v Madake & Ors* 2006 (1) ZLR 196 (H) D-G, 201; *GMB* v *Muchero* 2008 (1) ZLR 216 (S) 221 C-D.
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> Although it is apparent in this case that the judge in the court *a quo* may have considered the question whether the matter was properly before him when he considered the merits, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances, this amounts to an omission to consider and give reasons, which is a gross irregularity-*S* v *Makawa & Anor* 1991 (1) ZLR 142."

The principles governing the taking of a point of law and the timing thereof were considered by ZIYAMBI JA in *Muskwe* v *Nyajina & Ors* SC 17-12 where at p 2 she stated:

> "In any event, this point was not taken in the court *a quo* and notice was given to Mr. *Zhou* shortly before the hearing. Had the point been raised in the court *a quo* the appellant would have had the opportunity to decide whether to move for an amendment to the summons

> either to cite the plaintiff in his personal capacity or substitute members of the clan as individual plaintiffs as it deemed fit.
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> Undoubtedly, a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations one of which is that the court has to consider whether raising a point of law at this juncture would cause prejudice to the party against whom it is raised.
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> In our view, there is great prejudice to the appellant who, if the matter is decided against him, stands to lose the appeal without argument."

While it is trite that, in common law, a trust possesses no legal personality, it being an arrangement, it is also a fact that the legislature has modified the common law regulating the citation of a trust in legal proceedings. This Court had an opportunity to pronounce itself in that regard in the case of *Patel & Anor* v *The Cosmo Trust & Ors* SC 165-21 where at pp 19-20 it stated:

> "[43] The position may now be taken as settled in our common law that a trust is not a legal persona and that it does not have juristic personality. It represents nothing more than an arrangement. As a rule, a trust can only institute proceedings in the name of the trustees. *Magnum Financial Holdings (Pty) Ltd v Summerly NNO* 1984 (1) SA 160. As a corollary, a trust is incapable of holding assets, entering into contracts or undertaking any other legal formalities in its own name. In *Crundall Brothers (Pvt) Ltd v Lazarus N.O. & Anor* 1991 (2) ZLR 125, the court accepted that a trust is not a legal persona and that the trustees are the persons to be considered as having the *locus standi* to sue or be sued. In *Musemwa & Ors v Estate Late Misheck Tapomwa & Ors* HH 136/16, the High Court of Zimbabwe aptly summarised the status of a trust in the following words:
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> > 'The concept of a Trust originated in English law over 900 years ago and continues to evolve. A Trust is a legal relationship of parties which usually involve the founder, Trustees and beneficiaries. The relationship is created by the founder who places assets under the control and administration of the Trust for the benefit of named persons, the beneficiaries. It is created by a Trust deed. A Trust has no legal personality and the common law does not recognise a Trust as having *locus standi* to sue in its own name. If a Trust is to be clothed with juristic personality, it would be a persona made up of assets and liabilities. In fact, the assets and liabilities in a Trust vest with the Trustee. When it sues or

is being sued, a Trust should be represented by its Trustees in whom the Trust's assets and liabilities vest.'

[44] That the above remarks correctly reflect our common law there can be no doubt. However, Order 2A of the High Court Rules, 1971 (which Rules were applicable but have been repealed and replaced by the High Court Rules, 2021, S.I. 202/21 with effect from 23 July 2021) provided that an associate, which includes a trustee, may sue or be sued in the name of their association. That provision has been re-enacted in Rule 11 of the High Court Rules, 2021. The Rule defines "associate", in relation to a trust, to mean a trustee. The Rules also provide that associates may sue or be sued in the name of their association. This means that a trustee can sue or be sued in the place of the trust and, conversely, a trust can sue and be sued in its own name. To this extent, therefore, the Rules have modified the common law in order to create *locus standi* for a trust." (Underlining for emphasis)

In view of the above, Order 2A of the High Court Rules, 1971 was applicable at the time. As enunciated in the *Patel* case (*supra*), the rules moved away from the common law position that a trust cannot sue or be sued in its own name.

CONSIDERATION

The court *a quo* determined the matter on the sole issue that the first respondent does not have legal personality, and as such, could not enter into a valid contract on its own. It found it unnecessary to consider the other issues placed before it having taken the view that the "other points will automatically fall away" rendering it unnecessary to determine them.

The appellant's case is, *inter alia* that taking that point of law very late in the day after it had constructed a nine-storey building for, and handed it over to, the first respondent and after the first respondent had litigated in that name before the arbitrator registering successes, was very prejudicial to it. It is also the appellant's case that the first respondent is estopped from taking that point of law the way it did.

While it is correct that in terms of Article 34 (2) (a) (i) of the Model Law in the Arbitration Act, an arbitral award may be set aside if the party making the application furnishes proof that a party to the agreement was under some incapacity, it is also correct that taking a point of law is subject to certain considerations. Those considerations include the question of prejudice to the party against whom the point is raised. See *Muskwe* v *Nyajina & Ors*, *supra*.

There is also the aspect of estoppel relied upon by the appellant, it being common cause that the first respondent has not only contracted, but it has also litigated in this case and other cases before it, in its name at a very large scale. Both the issue of the timing of the taking of the point of law and estoppel were issues that the court *a quo* was seized with and required determination.

For that reason, the question whether the arbitral award could be set aside on the basis of incapacity as claimed by the first respondent, could only be determined in tandem with the defences relied upon by the appellant. It is settled that a court must not consider only one of the issues raised and say nothing about other equally important issues raised. It is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision on the disputed issue. See *Gwaradzimba NO* v *C J Petron & Co (Pty) Ltd, supra*.

There was no determination on the issue whether it was appropriate for the first respondent to rely on its alleged lack of legal capacity in the circumstances of the case. In my view, it was not enough for the court *a quo* to dismissively say because "the law is the law" one must turn a blind eye to the other considerations having a bearing on the relationship of the parties. It is trite that a failure to resolve a dispute between the parties, or to give reasons for a determination

is a misdirection which vitiates the judgment of the court. Indeed, there was an omission by the court *a quo* which resulted in a gross irregularity entitling this Court to interfere with the judgment *a quo*. It must be vacated.

Having come to that conclusion, it becomes unnecessary for me to determine the issue whether the first respondent possesses legal capacity to contract or to sue and be sued. Suffice to say that the fact that the first respondent has been contracting and litigating in its name and the effects thereof is one which, at the appropriate time, will inform the decision of the court.

It also follows that the appellant's application for registration of the arbitral award, which was not determined by the court *a quo* remains on the table. It ought to be determined as well.

There is merit in the appeal which ought to succeed. On the issue of costs, there is no reason why they should not follow the result in the usual way.

In the result, it be and is hereby ordered that:

1. The appeal is allowed with costs.
2. The judgment of the court *a quo* in case number HCHC 328/23 is set aside.
3. The matter is remitted to the court *a quo* for a hearing before the same judge of the outstanding issues raised by the parties together with the application brought by the appellant.

MAKONI JA : I agree

KUDYA JA : I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Nyika Kanengoni & Partners, first respondent's legal practitioners