

SHURUGWI TOWN COUNCIL

Versus

UNKI MINES (PVT) LTD

And

THE HONOURABLE AHMED EBRAHIM N.O

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 17 OCTOBER 2022 AND 31 AUGUST 2023

Opposed Application

T. Tavengwa, for the applicant
A B C Chinake, for the 1st respondent

TAKUVA J: This is an application brought in terms of article 34 (2) (b) (ii) of the Arbitration Act (Chapter 7:15) for an order setting aside an arbitration award on the basis that it is contrary to public policy.

Applicant purchased a piece of rural land for purposes of extending its own boundaries and took title over the land by virtue of Deed of Transfer 1989/08 dated 25-09-2008. On that land, applicant produced a proposed subdivision of the whole land which it meant to construct multiple of smaller land parcels. A general map for the proposed subdivision was produced depicting and capturing the proposed new land parcels. These proposed subdivisions however were never taken out of the main or original land identified in deed of transfer 1989/08 with the result that applicant never took and does not have title over them.

Despite the above, the proposed subdivisions were made the subject of a sale between applicant and 1st respondent in terms of an agreement which submitted the parties to arbitration in the event of disputes. The merx of the sale were the proposed subdivisions as depicted on the map mentioned above. It later however became apparent that the map was invalid for its

purpose under the sale as it identified the wrong and incompatible portions of the land. Ultimately, a new map was produced which identifies land which is different from the land identified in the agreement itself.

A dispute arose regarding the number of stands and or subdivisions bought by 1st respondent and concerning the exact identity of the merx sold under the agreement, i.e. size or number of proposed subdivisions to be transferred to 1st respondent.

The dispute was submitted to arbitration before 2nd respondent who produced the arbitral award in dispute. Applicant received the award on 15 December 2017.

In referring the matter to the 2nd respondent the parties submitted a statement of agreed facts in the following terms;

“SECTION A: PREAMBLE

1. The parties entered into an agreement of sale of rights, interests and title over certain immovable property located at Impali Source Farm which is duly owned by the respondent on the 22nd October 2010.
2. The nature and extent of the immovable property sold and purchased is the subject matter of the dispute.
3. The agreement between the parties is in writing and made up of the main agreement and the two addenda.
4. The parties agree that the dispute relates to the identification of the property sold and bought by the claimant (1st respondent) which property is within Impali Source Farm.
5. The parties have as per clause 27.4 of the Agreement agreed to refer the dispute for the Arbitration and have at the same time agreed to waive the (45) forty-five day period prescribed by Clause 27.4 as exhibited by the execution and filing of this Joint Statement of Agreed Facts by their legal representatives duly authorized.

NOW THEREFORE THE CLAIMANT AND RESPONDENT HEREBY JOINTLY AND BY CONSENT SUBMIT FOR DETERMINATION BY THE HONOURABLE ARBITRATOR THE FOLLOWING LEGAL ISSUES ON THE PAPERS

SECTION B: ISSUES

- a) Whether or not Claimant purchased and is entitled to take immediate transfer of the proposed submission as identified in the agreement of sale and the addenda.

- b) Whether or not Claimant purchased 1 266 stands on Layout 2 within the proposed subdivision only as identified in the Agreement of Sale.
- c) Whether Claimant is entitled to an order compelling respondent to effect transfer within 14 (fourteen) days of the date of the Arbitral Award of the proposed subdivision as identified in the agreement of sale and the addenda.
- d) What order is to be made as to costs?

SECTION C: EXHIBITS

- 1. The Purchase and Sale Agreement and its addenda.
- 2. Approved subdivision layout depicting the Town Planning layout within the proposed subdivision.
- 3. Letter dated 13th November 2013 is by consent rendered inadmissible.
- 4. Any other relevant documents.”

The statement was signed by both parties’ legal practitioners on the 8th and 9th May 2017. After filing written submissions, the arbitrator was requested to prepare an award on the papers. The arbitrator subsequently issued an award which is neither signed nor dated – see record pages 13 – 20 and 317 – 324. Under “Conclusion” the arbitrator states, “My answers to the issues to be determined are thus as follows;

- (a) Whether Claimant purchased and is entitled to take immediate transfer of the proposed subdivision as identified in the Agreement of Sale and Addenda?

ANSWER: YES

- (b) Whether or not Claimant purchased 1 266 Stands on Layout 2 within the subdivision only, as identified in the Agreement of Sale?

ANSWER: NO

- (c) Whether Claimant is entitled to an Order compelling the respondent to effect transfer withi 14 (fourteen) days of the date of the Arbitral Award of the proposed subdivision as identified in the Agreement of Sale and Addenda.

ANSWER: YES

IN THE RESULT I FIND FOR THE CLAIMANT:

COSTS

Costs of course, must follow the event. The claimant has asked for costs on the higher scale. I see no reason to make such an order. The poor drafting of the contract, for which the present legal practitioners cannot be blamed, certainly led to great confusion and there was nothing *mala fide* in the respondent’s

defence of the claim. Indeed, given the slovenly way in which the contract was drawn up, such confusion was inevitable. The parties both faced a Herculean task in trying to make sense of it. Costs will therefore be on the ordinary scale.”

APPLICANT’S CASE

ARTICLE 34 (2) (b) (ii) of the Arbitration Acts states;

- “(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only –
- (a)
 - (b) if the 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 recognition or enforcement of the award would be contrary to the public policy of Zimbabwe
- (2)
- (3)”

Applicant raised objections *initio litis* which have to be decided upon. Firstly, applicant’s point *in limine* relates to the Arbitrator’s failure to keep a complete and proper record which speaks for itself regarding what he did. Reliance was placed on *S v Chidavaenzi* HH 13-08 and *S v Davy* 1988 (1) ZLR 386 (S).

It was contended that the entire proceedings ought to be set aside as a result of this infraction.

Secondly, 1st respondent filed a counter-application through an opposing affidavit together with a draft order. Applicant argues that this is incompetent in that an application in the High Court is made on a founding affidavit and brought under a Form 29. Just like a plea an opposing affidavit is a shield and not a sword. Its function is to present a defence. It cannot set out a claim or ask for a relief – See *Indium Investment (Pvt) Ltd v Kingshaven (Pvt) Ltd & Ors* SC 40-2015; *Sumbereru v Chirunda* 1992 (1) ZLR 240 H.

It was further submitted that the counter application together with its accompanying draft order ought to be struck out with costs as it is a product of an incompetent process.

As regards the point *in limine* taken by the 1st respondent that this application ought to have been made as an application for review, applicant contends that this view is unfortunate flying as it does against authorities which hold that applications of this nature are neither reviews nor appeals – See *ZESA v Maphosa* 1999 (2) ZLR 452 (S) at 466 E, See also *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor* SC 30-17.

On the merits, applicant contends that the award is a *brutum fulmen* in that the disposition of the award is incapable of enforcement as all it does is to list the terms of reference put to the arbitrator by the parties and next to each is the arbitrator’s answer for each. The arbitrator does not on the basis of these answers devise a formal order directing either party to do anything demanded before him. Put in another way, applicant argued that the list of answers provided by the arbitrator cannot be enforced by the Sheriff to demand any positive action from the applicant. See *Chetsangu & Ors v Timba & Anor* SC 47-16.

It was further applicant’s argument that the arbitrator failed to comply with time lines stipulated in Articles 31 and 33 resulting in him producing a “belated order” which is invalid – See *Mtetwa & Anor v Mupamhadzi* 2007 (1) ZLR 253, *Church of the Province of Central Africa v Kunonga & Anor* 2008 (1) ZLR 413 (S) at 418.

The further difficulty is that the order does not comply with the formalities of Article 35 in that nothing confirms its authenticity and originality.

Also, the substance of the award shows that the agreement sells subdivisions of land that do not exist as a matter of fact and law. At law a piece of land only exists where there is a diagram taken in respect of it. Title over it is in terms of a deed of title given in respect of that piece of land as described and captured on the diagram. A sale of land sells the title conferred by the deed of title as described in the diagram. Where only a portion of the land is meant to be sold, that portion must first be taken out of the original piece of land and given a separate and distinct existence to make it capable of being independently transferred.

In casu, the arbitrator authorizes an agreement that does not comply with the following provisions;

- (a) Section 39 of the Regional, Town and Country Planning Act relating to a permit to subdivide the land.

- (b) Section 40 of the Land Survey Act which requires that the land must be subdivided and a diagram be produced and approved.
- (c) Section 41 of the Deeds Registry Act requiring that separate title must be taken in respect of each of the new portions created by the subdivision.

While the agreement accepts that there is only one piece of land and one deed of title, it then proceeds to sell proposed subdivisions of that land when they do not exist at law. To that extent the agreement sells non-existent land and non-existent title – See *Tsamwa v Hondo & Ors* 2008 (1) ZLR 401 (H).

Applicant contends that the arbitral award that enforces such an unlawful agreement is contrary to public policy – *Xtrend – A – Home (Pvt) Ltd v Gulliver Consolidated & Anor* 2000 (2) ZLR 348 (S), *City of Gweru v Kombayi* 1991 (1) ZLR 333 (SC), *Dube v Khumalo* 1986 (2) ZLR 103 at 109A-F.

The next point relied upon by the applicant is that the arbitration award is contrary to public policy because it is absurd in its findings and at any rate interferes with the sanctity of the parties' agreement by;

- (a) rendering the rights of first refusal nugatory.
- (b) the award interferes with the express terms of the agreement which is contrary to public policy in that the agreement sets aside land for amenities and special interests while the new map or diagram casts that away – See *Delta Operations (Pvt) Ltd v Oregon Corporation (Pvt) Ltd* SC 86-06.
- (c) The reasoning that founds the award and the conclusions reached are outrageous in their lack of logic. The agreement itself provides that first respondent bought 1 266 stands. In fact clause 8.7 itemizes these stands side-by-side the total cost incurred by first respondent in the transaction. The agreement also says first respondent is to develop 3 303 stands. At the same time it says it sells and transfers the whole land. The new diagram suggests that the whole land is being sold. If the land was being sold as a whole, what was the purpose of clauses 8.1 and 8.7 in which 1 266 stands are sold? The agreement is confused. The new map adds to that confusion. The award then enforces that “added confusion.”

THE FIRST RESPONDENT'S CASE

First respondent submitted *in limine* that this application should not be heard until its own application for dismissal for want of prosecution under HC 2085/19 is heard and completed.

On the merits, 1st respondent contented that the findings of the Honourable Arbitrator are factually and legally correct on the record and there is no basis whatsoever for the setting aside of the Arbitral Award. It was strongly denied that applicant sold and 1st respondent bought individual stands. It was 1st respondent's contention that it bought the "whole subdivision" through an addendum to the Main Agreement. The effect of the Addendum was that the individual stands were to be "replaced" by a composite subdivision which was referred to as the Proposed Subdivision as per the diagram. Further, the evidence of the Surveyor one Mr Chigumete supported this position.

The Town Planner Mr Arup and the Surveyor were to take steps to complete the process of replacing the General Plan with a new plan referred to as the Subdivision Layout. Plan for the purposes of transferring a complete and undivided subdivision to the 1st respondent.

According to the 1st respondent the cancellation of GD 315 proves the formation of new contractual terms contained in the addendum to the main contract. Therefore the parties were always *ad idem* as regards the Addendum to the contract and the purchase and sale of the subdivision.

Reliance was placed on the case of *Zimbabwe Electricity Supply Authority v Maphosa* 1999 (2) ZLR 451 at page 453 where it was stated;

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

inequity and is outrageous in its defiance of logic or acceptable moral standards that public good would be injured and enforcement of the award would be offensive to ordinary and reasonable thinking Zimbabweans.

It must be shown that the award goes against the standards of logic and morality. A court will only set aside an award on the grounds of public policy where a litigant has shown more than a mere wrong statement of the law. The litigant must show the existence of some illegality or immorality which amounts to a violation of public policy which constitutes a palpable inequity. The task of setting aside an Arbitral Award is fairly onerous and the standard of proof is very high.”

The 1st respondent finally submitted that the facts on the record establish that the enforcement of the award is actually in the interests of the public in the Shurugwi area and is in fact serving good through the extension of the Shurugwi Town jurisdiction and the provision by the 1st respondent at its own expense of all the major services that have effectively created a new town.

ANALYSIS

It is trite that where points *in limine* are raised, they must be disposed of before delving into the merits. *In casu*, the applicant submitted that the entire proceedings ought to be set aside because the Arbitrator failed to keep a complete and proper record of proceedings. On his part, the Arbitrator justifies himself by saying that he was not required to keep a record of proceedings. I disagree for the simple reason that the Arbitrator knew that he was presiding over proceedings mandated by a statute which contemplates the existence of such record. In the absence of such a record it will not be possible for the High Court to scrutinize those proceedings in terms of Articles 34 and 36. Articles 24, 26 and 27 could not have been intended to result in the arbitrator taking a few notes for himself.

The clear position at law is that any tribunal whose proceedings may be challenged before another tribunal ought to keep and maintain a record of its proceedings on the basis of which the challenges may be considered. *In casu*, the arbitrator was presiding over a dispute involving huge tracts of land worth a lot of money in circumstances where at the end of the day his decision may be scrutinized by the High Court. The arbitrator was duty bound to keep a complete and proper record which speaks for itself. In the absence of such record the entire proceedings are irregular and ought to be set aside.

In *S v Chidavaenzi* HH 13-2008 it was held that the record must *ex facie* be able to inform the reader of what transpired in court without the aid of verbal explanations from the presiding officer. The rationale behind keeping a full and accurate record of proceedings in a court of law was aptly summarized by MUCHECHETERE J (as he was then) in *S v Ndebele* 1908 (2) ZLR 249 (HC) at 254 C – G in the following words;

“All courts are courts of record and are required to keep full and comprehensive records of all proceedings. The proposition is self-evident and accords with reason and justice. In *S v Besser* 1968 (1) SA 377 (SWA), the court held that a failure to keep a proper record of any proceedings or any part thereof amounted to gross irregularity cognizable under the court’s power of review as envisaged in provisions such as section 27 of the High Court Act No. 29 of 1981. In addition section 163 (4), 190 and 255 (5) of the Code compel him to record those matters mentioned in them.”

In *S v Davy* 1988 (1) ZLR 386 (S) it was held that;

“Before conceding this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says, they must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done. See *R v Sikumba* 1955 (3) SA 125 (E) at 128 E-F; *S v K* 1974 (3) SA 857 at 858 H. A failure to comply with this essential function where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction.”

In the present matter the arbitrator heard *vica voce* evidence from a number of witnesses. While I accept that arbitration proceedings are not strictly speaking “judicial proceedings” the Arbitrator made credibility findings and legal conclusions on the evidence which this court is not able to check against the verbatim recordings. I have not been referred to any authority that says an arbitrator is not required to keep a full record of proceedings. In the absence of such authority, I come to the conclusion that the Honourable Arbitrator committed an infraction warranting the setting aside of the entire proceedings including the arbitral award.

I move to deal next with the “Counter application” that was filed by the 1st respondent when it filed its opposing affidavit. This is an incompetent application for failure to comply

with rule 230 of this Court's rules. See *Sumbereru v Chirunda* 1992 (1) ZLR 240 (H) where the court stated;

“*Mr Chikumbirike* on the other hand, has argued that the respondent's opposition to an application on notice of motion is a shield not a sword, and if the application is withdrawn then the opposition falls away. I agree with *Mr Chikumbirike's* submission that in notice of motion proceedings the respondent should according to the rules of Court confine his opposition to a defence. He or she should not, in the opposing affidavit, launch an attack on the applicant and make a claim in reconvention.”

The form of a counter-application was spelt out in *Mwayera v Chivizhe* SC 16-2016 in the following terms:

“A counter-application must take the form of a court application and must be in Form 29. There was no such application filed by the fourth respondent. Instead, what was filed was an affidavit. Again contrary to the rules of court the affidavit was not in proper form. The fourth respondent filed an opposing affidavit in which reference was made to a counter-application. It was to this affidavit that a draft order was attached.

The rule is clear and unambiguous. It is also peremptory in its terms and must be complied with to the letter Rule 230 espouses a peremptory norm and must be complied with. A failure to comply with the rule cannot be considered in the absence of compliance by a litigant with any form of application. The undisputed fact is that the fourth respondent never filed any application in any form. The counter-application was, as a consequence, a non-event. The draft order attached to the opposing affidavit could not create something that never was. Consequently no relief could ensue from the same.”

Applying this principle to the facts *in casu*, I conclude that the counter-application and its accompanying draft order must be struck out with costs.

The first respondent raised a point *in limine* to the effect that it has since filed an application for dismissal for want of prosecution which is pending under HC 2805/19. It was argued that this application i.e HC 808/18 cannot be heard or dealt with until such time as the application has been concluded – See *Kimley Row Investments (Pvt) Ltd v City Bright Services (Pvt) Ltd* HH 792-15.

By the time this application was argued, HC 2085/19 had been dismissed per MOYO J. This point lacks merit and is hereby dismissed.

Quite clearly, the 1st respondent's classification of the application for review is wrong at law – see *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor* SC 30-17 where it was held that;

“The court *a quo* considered whether or not the appellant proved sufficient grounds upon which it could set aside the arbitral award as the matter before it was not an appeal or a review but that the award could only be set aside in accordance with Article 34 of the Arbitration Act 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 decisions of the arbitrator on the ground of error of law or 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.” (my emphasis)

An application in terms of Article 34 is neither an appeal nor a review. The point has no merit and is hereby dismissed.

I agree with *Mr Tavengwa* for the applicant that the award is a *brutum fulmen* because its disposition as explained earlier is incapable of enforcement. In *Nzara & Ors v Kashumba N.O & Ors* SC 18-2018 it was held that:-

“This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of Court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own.” (my emphasis)

The arbitrator's failure to grant a specific order impacts on the validity of the proceedings because of the strict requirement that the resolution of a dispute should be expressed in the operative part of the determination. In *Chetsanga's* case *supra*, the court said that;

“However, it is apparent from the judgment of the court *a quo* that it failed to determine the question stated by the parties in the following respects. Firstly, it did not articulate the answer to the question in the operative part of its judgment.” (my emphasis)

An arbitration award is contrary to public policy if it goes against a fundamental principle of law. In *Zimbabwe Electricity Supply Authority v Maphosa supra*, the principle was stated thus;

“In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award restrictively in order to preserve and recognize the basic objective of finality to all arbitrations; and to hold such defence

applicable only if some fundamental principle of the law or morality or justice is violated." (the emphasis is mine).

In the present matter the arbitrator produced the award way out of time as required by articles 31 and 33. A court has no equitable jurisdiction to dispense with strict adherence to statute. I find therefore that the production of the award outside the prescribed time frames and formalities of articles 35 negatively affects its authenticity. See *S v Makawa & Anor* 1991 (1) ZLR 142, *Gwaradzimba v C J Petron & Co. (Pty) Ltd* SC 12-16 Its authenticity and originality has not been confirmed.

Further, I agree with applicant that the award authorizes the sale of land that does not exist at law and fact in violation of a number of statutory provisions. Despite finding that there should have been a "rewriting of the contract", he went on to find that the land that the claimant purchased was the entire subdivision and not merely 1 266 of the stands in the subdivision and that the contract should be construed accordingly." The arbitrator correctly in my view found that the "agreement" had "contradicting" clauses which are very confusing and irreconcilable

In his analysis the arbitrator said;

"As has been seen, there can be no doubt that all the initial negotiations revolved around the 1 407 (1 266 + 141) stands that were shown in GD 315. The proposal for development was based on that supposition, and much of the contract was drafted accordingly. GD 315 also showed a total of 3 303 stands, this figure also features in the proposal and in the ensuing contract.

The factual situation changed completely when it was discovered that GD 315 was unworkable. It was then that the idea of a simple subdivision came up. What should have happened next was the rewriting of the contract. This should have included removing references in the contract to the 1 266 + 141 stands, and to the 3 303 stands, but seemingly the parties (or their then legal practitioners who, it must be stressed, were not their current practitioners) overlooked the fact that these were references to a situation that no longer existed. The contract in fact gives the impression that a draft order had been prepared, in accordance with the original proposal and that, when the original proposal fell away and the new arrangement had to be given effect to, the new provisions were simply added at the beginning without making the necessary follow up changes in the rest of the contract."

Later, while dealing with the question of costs, the arbitrator conceded that the agreement created considerable confusion.

As regards the applicant's argument that the award is contrary to public policy because it is absurd in its findings and interferes with the sanctity of the parties agreement, I find merit

in this argument for the reason that the agreement gives the 1st respondent the rights of first refusal over additional sales of remaining portions of the land. In finding that the agreement sells the whole land the award is rendering the provisions on the rights of first refusal migratory. The question becomes; why would the rights of first refusal be given where there is nothing left to be sold? Going by the logic of the award, this finding is rendered absurd.

A further deletion of contractual rights of first refusal by the award is that while the agreement sets aside some land for amenities and special interests, the new map or diagram or Addendum casts that away. In finding that first respondent purchased the whole land, the award is saying the agreement does not preserve any land for these special purposes. To that extend the award also interferes with the express terms of the agreement which is contrary to public policy – See *Delta Operations (Pvt) Ltd v Oregon Corp (Pvt) Ltd* SC 86-06 where the court held that;

“In the circumstances, by granting the remedy of specific performance, and, alternatively, a measure of damages falling totally outside the ambit of the contract, the arbitrator completely disregarded the contractual terms agreed upon by the parties, thereby in effect creating a new contract for them. By doing so, he violated one of the most important tenets of public policy, the sanctity of contracts.”

As JESSEL MR said in *Printing and Numerical Registering Co. v Sampson* (1875) LR 19 Eq 462 at 465:

“If there is one thing which more than any other public policy requires, it is that men of full age and competent understanding shall have utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract.” (my emphasis)

It is common cause that the agreement provides that first respondent purchased 1 266 stands. Clause 87 lists these stands side-by-side the total cost incurred by the 1st respondent in the transaction. Also the agreement says 1st respondent is to develop 3 303 stands. At the same time it says it sells and transfers the whole land i.e the entire subdivision – See the new diagram which suggests that the whole land is being sold. Now, if the land was sold as a whole, what was the purpose of clause 8.1 and 8.7 in which 1 266 stands are sold? I take the view that the award failed to deal with these substantive issues. In my view this demonstrates the confusion.

I agree with applicant's submission that the agreement" is confused, the new map adds to that confusion and the award enforces that added confusion."

Where the reasoning that founds the award and the conclusions reached are outrageous in their lack of logic, the award intolerably hurts the ordinary conception of justice and fairness in Zimbabwe. In *ZESA v Maposa* 1999 (2) ZLR 452 (S) at 465 D-E it was held:-

"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."

DISPOSITION

In casu, the award is contrary to public policy in that it casts away express terms of the agreement and foists upon the parties terms they did not agree on. It also enforces an agreement which is contrary to peremptory law. For these reasons, the award is liable to be set aside in terms of section 34 (2) (b) (ii) of the Arbitration Act for being contrary to the public policy of Zimbabwe.

In the result, it is ordered that:-

1. The application is granted with costs.
2. The arbitral award granted by the 2nd respondent regarding a dispute between applicant and first respondent over the sale of land be and is hereby set aside as it is contrary to public policy.

Mutuso, Taruvinga & Mhiribidi, applicant's legal practitioners
Kantor and Immerman c/o Coghlan & Welsh, 1st respondent's legal practitioners