ZIMBABWE BASE METALS MINING (PVT) LTD

Versus

DAMO RESOURCES (PVT) LTD

And

KEVIN TERRY N.O

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 4 June & 5 December 2024

Opposed application

L.Madhuku for applicant
T. Mandizvidza for first respondent
No appearance for second respondent

CHILIMBE J

BACKGROUND

[1] This is an application in terms of article 34 of the Arbitration Act [Chapter 7:15] for the setting aside of an arbitral award handed down by second respond on 8 February 2024. Applicant seeks vacation of the award on the grounds that it is in conflict with the public policy of Zimbabwe as defined in Article 34 (2) (b) (ii) of the Arbitration Act.

[2] The dispute emanates from a failed mining joint venture. The parties intended to exploit minerals variously cited as lithium, beryllium, spodamene, lepidolite and feldspar. The locations being Augusta and Mistress Mines in the Domboshava area near Harare. The quest ended in disagreement. The resultant dispute was referred to second respondent, ("the Arbitrator") who ruled in favour of first respondent, prompting present application.

THE JOINT VENTURE BETWEEN APPLICANT AND FIRST RESPONDENT.

[3] The dispute was triggered by applicant`s repudiation, on 23 July 2023, of the parties contract as shall be seen hereunder. The second respondent, was thus required to establish the parties` respective contractual rights in resolving the dispute placed before him. In that regard,

the award will be considered, in the light of criticisms raised against it, from the contractual interpretation perspective. For that reason, I will pause intermittently to comment or set out the contractual terms as I recount the background to the dispute.

[4] The background goes thus; -both applicant ("ZBM") and respondent ("Damo") are locally incorporated. There are indications though, that Damo may have peregrine parentage. ZBM held seven mining blocks in the said Domboshava area known as; -

1. Augustus 3
2. Augustus 4
3. Mistress 2 (Registration No. 15100BM),
4. Felspar (Registration No. 13415BM),
5. Mistress 3 (Registration No.6832BM),
6. Mistress 4 (Registration No. 6972BM) and
7. Mistress (Registration No. 6621BM).

[5] These miming claims drew Damo`s interest. Engagements ensued between Damo and ZBM. The two parties aspired to establish a joint venture (JV). Under that JV, ZBM was to avail its mining claims Augustus 3 and Augustus 42- and Damo the capital to work them. An entity was to be registered as the joint venture special purpose vehicle (SPV) with each party holding 50% shareholding therein. These aspirations were reduced to writing in three agreements *concluded in sequence*.

[6] The effect of these agreements one upon the other was not specifically raised by the parties before the Arbitrator nor under the present application. But the details on whether the agreements (i) amended, replaced and superseded each other and extent thereof, or (ii) existed in tandem are intrinsic to the determination of issues presented before the Arbitrator and this court. I will revert to this aspect in my conclusions in succeeding paragraphs. These agreements were; -

	TITLE OF AGREEMENT	DATE OF SIGNATURE	REFERENCE IN THIS JUDGMENT	PARTIES THERETO & REPS/SIGNATORIES
1.	Joint Venture Term Sheet	09/09/2022	"the Term Sheet".	i. ZBM (G. Sithole) ii. Damo (M. Yong)
2.	Joint Venture Agreement and Shareholder Agreement	09/09/ 2022	"the JVSHA"	i. ZBM (G. Sithole) ii. Damo (M. Yong)

3.	Amendment and Restatement Agreement to the Joint Venture Agreement and Shareholder Agreement,	15/02/2023	"the Amendment Agreement	i. ZBM (G. Sithole) ii. Damo (M. Yong)
4.	Settlement Agreement	070/6/2023	"Settlement Agreement"	i. Damo (M. Yong) ii. ZBM (G. Sithole) iii. Venus (M. Maponga)

[7] Three conditions precedent were stipulated in the Term Sheet. These were (i) clause 2 (a) on payment of US$500,000 by Damo within 30 days of 9 September 2022, (ii) clause 2(b) execution of the JVSHA, and (iii) clause 2(c), formation of a JV company to be known as Zimbabwe Damo Mistress (Pvt) Ltd ("ZDM"). ZBM was to transfer its two mining claims Augustus 3 and Augustus 4 to ZDM.

[8] These conditions precedent and registration of the joint- venture special purpose vehicle (JV-SPV) formed the crux of the dispute before the Arbitrator and in these proceedings. That aside, the JVSHA was executed on the same day as the Term Sheet; -9 September 2022. ZBM was represented by Mr. Gillen Sithole, the deponent to the founding and answering affidavit herein.

[9] Likewise, Mr. Mark Khong Yoong Yong who deposed to the opposing affidavit, represented Damo. No provision was made for ZDM to sign although it was indicated in the recitals as a "party". Possibly for the reason that ZDM was not in existence then. It never in fact, came to be incorporated. Some key provisions in the JVSHA include clause 3 on conditions precedent, clauses 27 and 29 on "whole agreement" and "non-variation" as well as clause 28 on "non-waiver".

[10] Clause 3.4 and 3.5 in particular, restated the condition precedent. Also necessary to note is that by its clause 27, the JVSHA superseded and replaced all previous pacts. Including, presumably-the Term Sheet upon whose parchment the proverbial ink was barely dry. But as stated, I will address this aspect in concluding this judgment. On 15 February 2023, the JVSHA was updated into the Amendment Agreement.

[11] This agreement recognised the restrictions in the JVSHA`s whole agreement [27] non-variation [29] and clauses. Only clauses 2.1 and 11.1 was interfered with. By clause 1.1 and 2.1, the Variation Agreement increased ZBM`s contribution to the JV-SPV by adding thereto,

the rest of its mining blocks (3 to 7 in paragraph [4] above). By clause 4, all other clauses of the JVSHA were retained as intact.

[12] That aside, the Variation Agreement now indicated the JV -SPV not as ZDM, but as Venus Mining and Exploration Company (Pvt) Ltd ("Venus"). Four months later on 7 June 2023, yet another agreement was signed by the parties. Styled the "Settlement Agreement", it now included Venus as a party. Unlike in the JVSHA where JDM was unrepresented, this time one Tashinga Maponga signed on behalf of Venus.

[13] The Settlement Agreement recorded in the recitals, the difficulties and misunderstandings that had impeded the JV. The parties expressed commitment to realign their JV quest. ZBM also confirmed that Damo had fulfilled its obligation to pay the commitment fees due. The transfer of the rest of the mining blocks to Venus was also recorded.

[14] Noteworthy are paragraph 9; and items A and D in the recitals which recorded the need to *"…operate in a mutually beneficial and peaceful manner within the Zimbabwe Defence Forces (sic) who are responsible for the cantonment area in which the mining claims are situated."* Whilst clause 1 of the Settlement Agreement reaffirmed validity of the JVSHA, clause 8 thereof suggested that the Settlement Agreement was now the exclusive record of the parties` agreement. This again speaking to the effect of one agreement upon the others raised above.

THE ARBITRAL PROCEEDINGS

[15] The zeal and earnestness expressed in the Settlement Agreement failed to rescue the JV. On 21 July 2023, ZBM addressed a letter to Damo purporting to cancel "the contract". The reasons furnished were (i) Damo`s alleged failure to pay the commitment fee of US$500,000 within 30 days of 9 September 2022, automatically terminated the contract in terms of clause 3.5. In the alternative, ZBM argued that (ii) Damo`s unilateral imposition of Venus, contrary to the terms of the parties` agreement, constituted a repudiation. Which rendered the contract incapable of fulfilment because the parties` contemplation to form a JV company-JDM-had become irredeemably frustrated.

[16] On 11 August 2023, just two months down, Damo initiated arbitration proceedings in terms of clause 26 of the JVSHA. This effort resulted in appointment of second respondent as the arbitral tribunal on 18 September 2023. But before that date, ZBM instituted, on 18 August 2023, proceedings in the High Court under case number HC 5441/23. It cited and sought the ejectment of Venus from mining claims Augustus 3 and Augustus 4.

[17] The pre-arbitration formalities were duly observed. Damo -as claimant-prayed for specific performance in the form delivery to it, of the 6 mining blocks. It claimed as an alternative, an amount of US$8,500,000 as damages for breach of contract. ZBM raised a preliminary point objecting to the exercise of jurisdiction by the Arbitrator. The objection thereof being a specie of *lis pendens* regarding HC 5441/23. On the merits, ZBM resisted Damo`s cause and counter-claimed for an order declaring the JVSHA as invalid or alternatively, confirmation of its cancellation.

[20] The award and parties` respective claims, defences, replications and submissions were attached to the present application. What was missing was the actual record of proceedings before the Arbitrator. Especially the oral evidence presented plus exchanges. The submissions I referred to were all in writing. Counsel are indicated therein as Mr. *Masiya* for Claimant and Mr. *Madhuku* for Respondent. That aside, the issues for determination oscillated around the following heads (paraphrased from claimant`s closing submissions); -

Whether or not the Joint Venture Agreement [JVSHA] is valid.

[21] Damo contended that there was no question of the JVSHA`s validity. The commitment fee of US$500,000 had been duly paid in terms of clause 3.4 of the JVSHA as read with clause 1. (d) of the Term Sheet. Damo gave the following reasons as proof of payment; -

i. Mr. Sithole himself, JBM`s witness had admitted that fulfilment under cross examination during the hearing before the arbitrator. Such emphatic and unequivocal admissions obviated the need for Damo to furnish proof of payment.
ii. Execution of the Amendment Agreement and Settlement Agreement amounted to an admission that the fee had been paid. In support, Damo`s counsel cited authorities on admissions and bare denials including *Mabaso v Felix* 1981 (3) SA 865 and *MIPF v DAB Marketing (Pvt) Ltd* SC 25-12, and among others.
iii. Execution of those agreements also constituted a waiver. As such, ZBM was estopped from seeking to pursue rights which it had waived. The decision of *Barclays Bank of Zimbabwe Limited v Binga Products (Pvt) Ltd* 1985 (3) SA 1041 (ZS) was also referred to in support.
iv. The Settlement Agreement was extant and binding on the parties. Attempts by ZBM to evade the obligations flowing therefrom by alleging duress were

laughable. The requirements sustaining such a defence were not fulfilled as per *Morbiman Investments (Pvt) Ltd v Hashmon Matemera* HH 391-18.

[22] In response, ZBM insisted that despite the ample opportunity it had, and the ease with which it could have done so, Damo failed to produce an iota of proof that it had paid the US$500,000 commitment fee within 30 days of 9 September 2022. This amount was substantial. Proof of payment ought to have been readily available. Damo had failed to pay this fee. Damo, according to Mr. *Madhuku*, had only managed to pay a paltry US$50,000 and in dribs and drabs at that. Such failure meant that Damo faltered, as claimant in the arbitral proceedings, to discharge the burden of proof incumbent upon it. The decision of *Nyahondo v Hokonya* 1997(2) ZLR 457(S) was cited in support by Mr. *Madhuku* for ZBM.

[23] On that basis, argued counsel, the matter ought to end there. There was material breach of contract on the part of Damo. Such breach released ZBM from obligation. It also disentitled Damo from any rights due to it as may have been contemplated under the agreement, so went counsel`s submissions.

Whether or not Venus is the parties` JV company as contemplated in the JVSHA.

[24] Mr. *Masiya* for Damo argued before the Arbitrator that ZBM`s Mr. Sithole admitted under oath -both during the arbitral proceedings as well as in HC 5441/23- that Venus was the JV-SPV. This confirmation was, per Mr. *Masiya*, dispositive of the argument. Additionally, stated counsel, ZBM seconded their share of directors to Venus as further confirmation of Venus`s status as the JV-SPV per clause 10.3 of the JVSHA.

[25] In any event, argued Mr *Masiya*, a proper interpretation of the relevant contractual clauses disclosed that appointment of Venus as the JV-SPV was consistent with the relevant terms being; -

i. Clause 1 (a) of the Term Sheet provided that "The parties shall establish a joint venture company (Zimbabwe Damo Mistress "ZDM" **or any other name as agreed by the parties**-hereinafter referred to as "the Company")
ii. Clause 5.3 of the JVSHA similarly stated that "The name of the company shall be Zimbabwe Damo Mistress (Pvt) Ltd (**unless if the Parties agree otherwise**)."

[26] Mr. *Madhuku* challenged the correctness of his colleague`s interpretation of clauses 1(a) and 5.3 respectively. Those provisions merely related to a choice of name rather than choice of

party, he contended. The imposition of Venus, an entity in which Damo had an interest, was inconsistent with the agreement. The provisions relating to establishment of the JV company thus remained unfulfilled.

Whether or not Damo should be ordered to transfer the 5 blocks to the JV-SPV ***and*** *Whether or not such an order would be competent*

[27] Mr. *Masiya* took the position that specific performance was a perfectly competent remedy under the circumstances. Firstly, Damo had discharged all its obligations under the contract. Secondly, specific performance was the most appropriate remedy given the existence of the JV-SPV in which both parties were now officially and legally bound as shareholders.

[28] Thirdly, performance was possible; -the outstanding mining claims could be easily transferred to Venus. Mr. *Masiya* cited for the Arbitrator, the old decision of *Farmers Corp Society (Reg) v Berry* 1912 AD 343, *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A), and *International Trading (Pvt) Ltd v Nestle Zimbabwe Limited* 1993 (1) ZLR 21 (H). The authorities dealt with the proper exercise of discretion in awarding specific performance as the innocent party`s remedy for breach.

[29] Finally, Mr. *Masiya* drew the Arbitrator`s attention to the oft-cited guidance by PATEL JA (as he then was) in *Kundai Magodora & Ors v Christian Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403. The Arbitrator`s duty was to interpret and implement the parties` contract rather than make one for them.

[30] Mr. *Madhuku*'s response was to the effect that one party could not mount arbitral proceedings seeking the transfer of assets, not for itself, but for a third party. And a third party not even before the tribunal for that matter. He urged the Arbitrator to recognise, in the exercise of his discretion, the severely deteriorated relationship between the parties. Specific performance would force two hostile parties to reside in a joint venture. Rather restore the status quo ante, argued Mr. *Madhuku*. Related to this observation was the failure by claimant to prove its alternative claim for damages in the sum of US$8,500,000.

[31] It was an established position at law that a party claiming damages was required to prove them (*Ruturi v Heritage Clothing (Pvt) Ltd* 1994(2) ZLR 374 at 380B-F). And that the award of damages had to be preceded by a reasoned calculation or estimation of loss (*Aaron`s Whale Rock Trust v Murray & Roberts & Anor* 1992(1) SA 652 at 655.)

Whether or not the parties` agreement constituted a ***stipulatio alteri***

[32] Mr. *Masiya* raised three main argument in disputing that the "cocktail of agreements" constituted a *stipulatio alteri*-or contract for the benefit of a third party. In his own words, counsel submitted confidently that "There is no single provision in the parties series of agreements which provides for any benefit whatsoever accruing to the parties` joint venture company, Venus.

[33] Secondly, counsel submitted that the contract was for the benefit of the principals -Damo and ZBM- rather than Venus. The dividend policy confirmed who was to enjoy the profits generated by the JV-SPV. Thirdly and in any event, Venus stood ready, according to counsel, to ratify the agreement in the event that it indeed turned out to contain beneficiary stipulations.

[34] Counsel cited this court`s decision in *Charlene Hewat & Anor v Brim Investments (Pvt) Ltd & 3 Ors* HH 503-16. Per contra, Mr. *Madhuku* cited the recent High Court decision of *Matrix Reality (Private) Limited v Trustees for the Time Being of Tongogara Community Share Ownership Trus*t HH 247-18. Mr. *Madhuku* submitted that the three agreements constituted a clear *stipulatio alteri*. They were concluded for the benefit of Venus. As such, in the absence of Venus`s acceptance of same, the stipulations fell away.

THE ARBITRATOR`S FINDINGS

[35] Confronted with these issues and arguments, the Arbitrator determined the matter as follows; -he dismissed the preliminary objection on jurisdiction. The basis thereof being that (i) he was properly seized with the matter in terms of an arbitral agreement and (ii) Article 8 (2) of the Arbitration Act permitted him to proceed and dispose of the matter.

[36] He also drew comfort, on the first point, in this court`s decision of *Bitumat Ltd v Multicomm Ltd*, 2000(1) ZLR 637 (H). The Arbitrator was further persuaded by the fact that arbitral proceedings preceded issuance of summons in the High Court under HC 5441/23. The High Court matter also involved a different party-Venus the JV-SPV rather than Damo

[37] On the merits, the Arbitrator rejected ZBM`s argument that the agreement was of no force and effect. He was unpersuaded by ZBM`s contention that (i) the condition precedent in clause 3.5 of the JVSHA was unfulfilled by failure of Damo to pay the commitment fee of US$500,000. He was also not moved by the argument that (ii) The JV-SPV (ZDM) was never in fact incorporated.

[38] In essence, the Arbitrator followed the reasoning in Damo`s arguments. He concluded that had there been breach of the condition precedent, ZDM would not have executed the subsequent JVSHA, the Amendment Agreement and the Settlement agreement. He was further convinced by Mr. Sithole's confirmations under oath in HC 5441/23.

[39] Equally, the same Mr. Sithole's tepid attempt to raise the defence of duress during the arbitral proceedings fortified the Arbitrator`s view that ZBM had no real challenge to mount. Additionally, the Arbitrator accepted Damo`s argument that ZBM had waived its rights by continuing under the agreement.

[40] The secondment by ZDM of its quota of board appointments in Venus was also noted in that regard by the Arbitrator. He also found it fitting to order the remedy of specific performance per the dictum of ROBINSON J (not PATEL JA) at page 37 in the *Intercontinental Trading* case.

[41] On the *stipulation alteri*, the Arbitrator found as follows; - "The beneficial owners of the legal entity are the parties themselves not a third party as envisaged for the application of the *stipulatio alteri*." The Arbitrator dismissed ZBM`s counter claim on the basis that it had not been persisted with and that in any event, the findings on the claimant`s case discharged the counter claim.

[42] The Arbitrator outrightly rejected Damo`s alternative claim of damages at US$8,500,000 as unsubstantiated. Based on these findings, the Arbitrator handed down the following award; -

1. Respondent to transfer five (5) mining claims namely Mistress 2(Registration No. 15100BM), Felspar (Registration No. 13415BM), Mistress 3(Registration No.6832BM), Mistress 4 (Registration No. 6972BM) and Mistress (Registration No. 6621BM) to Venus Mining and Exploration Company (Private)Limited, with immediate effect, failing which the Sheriff of the High Court of Zimbabwe or his/her designated agent to take the necessary steps to effect the said transfer of the mining claims.
2. Costs in this matter are awarded to the Claimant

THE APPLICANT`S COMPLAINTS AGAINST THE AWARD: THE APPLICABLE LAW

THE 5 GROUNDS

[43] In the present application, ZBM impugn the Arbitrator`s award under five heads or argument. These points basically mirror the issues raised, argued and determined by the Arbitrator. Which means the matters have been largely traversed and authorities cited. Except that they are now being trained as attacks against the arbitral award. For completeness, I list them hereunder; -

1. The arbitrator acted contrary to the public policy of Zimbabwe by specifically refusing to stay the arbitration proceedings pending determination of HC 5441/23.
2. The 1st Respondent was granted the relief it was seeking merely for the asking. The 1st Respondent did not discharge the evidential onus that was on its shoulders in that it did not prove any of the essential elements of the contract it sought to enforce.
3. The JVA Company contemplated in the agreement had not been established. The 1st Respondent placed no evidence to prove that the use of a company known as Venus Mining and Exploration Company (Private) Limited had been meant to replace the JVA Company contemplated in the agreement.
4. It is not competent for the arbitral award to grant an order of transfer of the mining claims to a third party that was not before the arbitrator.
5. As an alternative to the fourth ground above, even if it were to be accepted (which is not) that a third party not before a tribunal may be granted transfer of property, the third party in question had not satisfied the requirements of a *stipulatio alteri*.

THE LAW

[44] Counsel from both sides were fully aligned on the applicable legal principles. Each cited a wealth of authorities dealing with applications to set aside an arbitral award in terms of Article 34 (2) (b) of the Arbitration Act. Mr. *Mandizvidza* who appeared for first respondent Damo referred (as did his counterpart) to the remarks of GUBBAY CJ in *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) where he held at [at page 466E-H] that; -

> "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."

[45] The guidance in *Zesa v Maphosa* offers an unfailingly relevant starting point. It is a firm reminder that Article 34 (2) proceedings are neither an appeal nor review. Nor are they meant to be a meticulous fault-finding scrutiny of an arbitrator`s award. The dictum in *Zesa v Maphosa* further underscores the legal principles at the root of arbitral proceedings as set out in Article 5 of the Arbitration Act to the effect that; -

5.1 Extent of court intervention

In matters governed by this Model Law, no court shall intervene except where so provided in this Model Law.

[46] Learned authors Kanokanga & Kanokanga[1] make the following observation generally on court involvement in arbitral matters, and specifically on the import of Article 5 (1) of the Arbitration Act; -

"Principle of minimal judicial interference.

The law on arbitration in Zimbabwe is now governed by the Act, which takes into account the principle of minimal judicial interference as reflected in Article 5. One of the fundamental reasons for the adoption of the Model Law in Zimbabwe was to reduce significantly the extent of intervention of the courts in the arbitral process?

[47] This latitude delivered by the Arbitration Act to arbitration process is telling. It reflects an extension of the doctrine of freedom and sanctity of contract from the realm of commercial relationships to the quasi-judicial resolution of disputes issuing therefrom. The parties are granted the freedom not just to contract in trade, but also to contract in dispute resolution. All that being superintended over by the Arbitration Act and peripherally-the High Court.

[48] But that latitude invites a corresponding responsibility. The process must assure the jurisdiction that public policy is not offended. *Zesa v Maphosa* has been faithfully followed

[1] At page 52 of their work-Unicitral Model Law on International Commercial Arbitration Juta ,2022

and further articulated in the jurisdiction. I was referred to the following authorities whose guidance is consistent on the point made in *Zesa* v *Maphosa; -*

> *Peruke Investments (Private) Limited v Willoughby`s Investments (Private) Limited* 2015(1) ZLR 491(S) at 499H-500A; *Stonewell Searches (Private) Limited v Stone Holdings (Private) Limited & Others* SC 22-21 at p.15; *Ropa v Rosemart Investments (Pvt) Ltd & Anor* 2006 (2) ZLR 283 (S) 286B D; *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S) at 85 B-E; *Alliance Insurance v Imperial Plastics (Pvt) Ltd & Anor* SC 30-17 at p 11; and *ZESA Holdings Limited v Clovegate & Anor*, HH 386-20.

[49] In *TN Harlequin Luxaire Ltd & Anor v Quest Motors Manufacturing (Pvt) Ltd* 2018(1) ZLR 652(S) MAKARAU JA (as she then was) expressed the issue of an award against the doctrine of public policy in the following persuasive terms [in paragraphs at para 40]; -

> "An award is not contrary to public policy merely because the reasoning of the arbitrator is wrong in fact or in law. For an award to be viewed as being offending against public policy on the basis of an alleged error on the part of an arbitrator, the proven error must go beyond mere faultiness or incorrectness to constitute a palpable departure from justice. It must make justice and one`s sense of justice spin on its head. It must be so outrageous in its defiance of logic or moral standards that a sensible and fair-minded person viewing the award would consider that it has the effect of intolerably hurting the conception of justice in the jurisdiction."

Striking is the imagery and forceful the message in the Supreme Court`s dictum in *TN Harlequin.* With that standard in mind, I proceed to examine the Arbitrator's award. As observed at commencement of this judgment, the Arbitrator embarked on an exercise to determine the parties' rights and obligations based on contract.

[50] That enterprise involved an interpretation of the contractual terms. The attacks and defence against and in favour of the award amount to a commentary of how the Arbitrator unravelled the contractual terms. The Arbitrator`s task entailed traversing a key territory of our legal system; -freedom and sanctity of contract. It being a territory too, whose landscape is well-

defined by public policy. To that end, I draw the following reminder sounded in *Book v Davidson* 1988(1) ZLR 365(S) at 378-379[2]:

> "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the 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 ... to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, prima facie at all events, contrary to the interests of any and every country."

APPLICATION OF THE LAW: THE 5 GROUNDS

Refusal to stay the arbitration proceedings pending determination of HC 5441/23.

[51] The Arbitrator correctly observed that the matter was before him by virtue of the parties` agreement. It was a matter of contract as set out in the arbitration agreement clause 26 of the JVSHA pact. He found support in this court`s decision in *Bitumat Ltd v Multicomm Ltd,* 2000(1) ZLR 637 (H).

[52] I take note that the objection was predicated on the need to defend the proper administration of justice. The courts abhor a duplicity of proceedings hence the principle of the need for finality to litigation (See *Ndebele v Ncube* 1992(1) ZLR 288(S); *Bleat Enterprises (Pvt) Ltd & Anor v Chikura & 3 Ors* HB 200-23)

[53] I may opine that firstly, whilst courts oversee it, the administration of justice is neither their exclusive preserve nor sole responsibility. Litigants and legal practitioners alike all play a role in ensuring that the process remains free from confusion and clutter. They do so by properly identifying their substantive rights and selecting the most feasible adjectival route to relief. Where duplication-by design or coincidence- occurs, mature engagement by protagonists will significantly help in restoring rationality of process.

[54] Coming to the present dispute, my view is that ZBM had a duty to pursue the appropriate relief within the procedural confines of the Arbitration Act.] Articles 8 (1), 9 and 13 of the Act

[2]The court cited with approval, the remarks of Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 by saying at p 465:

create provision for a party to approach this court in pursuit of a stay of arbitral proceedings. On this point, it is my view too, that ZBM ought to have raised as an objection at commencement, (for what it was worth), the non -joinder of Venus as a party to the arbitral proceedings. I found, as stated hereunder, the subsequent arguments on *stipulatio alteri* rather misplaced.

[55] My second observation is that Article 8 (2) was incorrectly relied upon by the Arbitrator in refusing the application for a stay of proceedings. Article 8 (2) applies where a stay of the same proceedings pending before an arbitral tribunal is sought in the High Court. The matter before the High Court in HC 5441/23 was neither the same one before the Arbitrator, nor was it for that matter, an application for stay of arbitral proceedings. This error will however, not impact the validity of the Arbitrator`s rejection of the jurisdictional challenge.

The 1st Respondent was granted the relief it was seeking merely for the asking

[56] If one is to ignore the effect for now, of the successive agreements on the lifespan of the other, one matter stands out as key. The Term Sheet by clause 3. (d), and the JVSHA by clause 3.4 and 3.1 respectively created a firm condition precedent. Damo was obliged to pay US$500,000 within 30 days of 9 September 2022. I do not believe the import of this provision was fully appreciated by Damo and the Arbitrator. Clauses 3.4 and 3.5 in the JVSHA on conditions precedent provided as follows; -

> "3.4 The payment of the commitment fee as per the Term Sheet being paid by DAMO to ZBM within 30 days of the signing of the Term Sheet.
>
> 3.5 If all the conditions are not fulfilled by the date specified therefor or such later date as may be agreed by the parties in writing or the Long Stop Date, this Agreement shall be of no force or effect and no party shall have any claim against the other of them for anything done hereunder, save for any antecedent breach of the Non-Disclosure Agreement, Term Sheet or any other applicable agreement that may be signed by the Parties.

[57] The parties had a contract (or contracts) which spelt out specific terms, conditions and obligations. The condition precedent in the Term Sheet and JVSHA had the effect of automatically terminating the contract. It would have been the simplest of tasks for Damo to furnish proof of payment. The tortuous submissions by Mr. *Masiya* before the arbitral tribunal as evidencing proof of payment were with respect, completely off the mark. What was required

was proof of fulfilment of a critical term of the contract. Evidence rather than argument was at stake. There was absolutely no need to wander far and wide in seeking to prove that US$500,000 was indeed paid in terms of the agreement.

[58] The question arises as to why was Damo so incorrigibly recalcitrant when it came to furnishing proof of payment? Reliance was placed on subsequent agreements. It was argued by Damo and observed by the Arbitrator that surely had ZBM had not been paid, why would it have proceeded to execute the agreements? Firstly, unfortunately this statement is a question not proof of payment of US$500,000. Secondly, the effect of the agreements one upon the other was not considered in relying upon that conclusion. It was also argued before the Arbitrator and herein that ZBM waived their rights to the payment.

[59] Again, this argument ignores the complexities arising from the validity and effect of the subsequent agreements. I must also draw attention to the fact that the decisions on waiver cited before the Arbitrator were inapplicable to the facts. Cases like *Barclays Bank v Binga Products* dealt with instances in which a party irrevocably waived the option to pursue certain rights in the courts.

[60] Further, it escaped the parties` and Arbitrator's attention that the JVSHA had a non-waiver clause 27. In terms of this clause, relaxation or non-pursuit of rights was specifically excluded as a waiver. My view is that greater attention ought to have been paid to the sequential agreements, their impact upon each other and the contractual clauses at play. These matters were never considered by the Arbitrator in determining, as a matter of public policy, the obligation to hold parties to their terms observed in *Book v Davidson*.

[61] In dealing with the application before me, I am guided by the qualifier to Article 34 (2) (b) (ii) under which the application has been brought. This qualifier is set out in Article 34 (5). Essentially, 34 (5) re-asserts the wideness of the principle of public policy. Which places a heavy obligation and wide (but not limitless) discretion in examining the contractual provisions governing the parties` relationships. Article 34(5) states that; -

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

[62] It would be unconscionable for a tribunal to overlook critical provisions in agreements between parties such as conditions precedent that carry automatic termination triggers. The result was to invest a party with mining blocks carrying a cornucopia of mineral wealth. All in

the absence of unequivocal confirmation that the agreed consideration had been paid. The amount in question was not trivial. I would agree with Mr. *Madhuku* that on the finding that no evidence was furnished that the condition precedent was met, was an error beyond mere faultiness.

The JVA Company contemplated in the agreement had not been established

[63] The answer to this question must emerge from the contracts. The Term Sheet made provision, in clause 1 (a), for creation of a JV-SPV as a condition precedent. The JV-SPV was to be named ZDM "or any other name agreed by the parties". The JVSHA also provided for the creation of a JV-SPV in clause 1.8 as well as the recitals which listed ZDM as a party. Similarly, it again stipulated in clause 5.1 that the name of the JV-SPV would, unless the parties decided otherwise, be ZDM.

[64] The Amendment Agreement introduced Venus, not ZDM, as the JV-SPV under paragraph (b) of the recitals. This introduction was a departure from the both the Term Sheet and JVSHA. The latter agreement in particular, locked all its provisions and barred any amendment save that undertaken in terms of the whole agreement [27] and non-variation [29] clauses.

[65] The Amendment Agreement did not approach the introduction of Venus as it did the variation of clause 11.1 of the JVSHA. The latter amendment was made in terms of the whole agreement and non-variation clauses in the JVSHA. I find that the introduction of Venus as the JV-SPV contemplated under the conditions precedent was inconsistent with the Term Sheet and JVSHA -especially the latter.

[66] Next came the Settlement Agreement. This pact now included Venus as a party. The same Venus whose introduction I have just noted as having been irregular. Further, I found as unsustainable, the argument by Mr. *Masiya* before the Arbitrator that the Venus`s introduction was permitted by clause 1 (a) of the Term Sheet. Clause 1 (a) indeed dealt with change of a name rather than party.

[67] As reiterated during the course of this judgment, the finer sequential effect of the agreements was not discussed. The Term Sheet was superseded by the JVSHA. What then became the effect? In my view, the anchor agreement was the JVSHA.Only 2 of its provisions were amended by the Amendment Agreement. Clause 1.1 of the JVSHA was amended to incorporate the Amendment Agreement as part of the JVSHA.

[68] Clause 11.1 was similarly amended to increase the mining claims. The challenge arises from the Settlement Agreement. It was a separate agreement from the JVSHA. It was concluded by 3 parties ZBM, Damo and Venus. It did not advert to clauses 27 and 29 in the JVSHA. Neither did it target any clauses in the JVSHA for amendment. The Deed of Settlement saw the parties (including Venus) "irrevocably confirm" that the JVSHA was still valid and binding.

[69] Again the question arises as to the effect? My conclusion once again, is that the inclusion of Venus inconsistent with the JVSHA.As such, clause the condition 1.8 regarding establishment of a JV-SPV was not fulfilled. I amy state that this condition formed a cornerstone of the parties` transaction. The JV-SPV was neither a mere contractual nicety nor formality. It was the very heart of the relationship.

The third party in question had not satisfied the requirements of a ***stipulatio alteri***

[70] With respect, I carry the view that applicant took both the Arbitrator and this court on a diversionary course with this argument. To begin with, as already noted above, ZBM ought to have raised the non-citation of Venus as an issue before the Arbitrator-before or at commencement.

[71] Secondly, I see no impediment to a shareholder taking legal steps to coerce its hostile partner to honour the terms of their shareholder agreements. That is what Damo sought to do; -enforce the terms of the contract. Venus, as a separate entity could properly receive shareholder injections of cash, value and other right or benefit. Venus was not before the Arbitrator. It did not seek to enforce any rights under its shareholders agreement. The basis of *stipulatio alteri* requirements arising are difficult to identify.

[72] Had it not been for the defects related above, I would not have otherwise impugned the Arbitrator`s finding that specific performance could be competently ordered as a remedy. That matter was within his discretion and there is no cause to interfere with it. So too was he correct in rejecting the alternative claim for damages.

DISPOSITION

[73] In conclusion, I find that the arbitral tribunal issued an award of the basis of a contract that (a) had lapsed by virtue of non-fulfilment of conditions precedent being (i) payment of consideration and (ii) incorporation of the JV-SPV. As (b), the contract was invalid by virtue of

its stipulations having been unprocedurally set out and (c), the exact nature of the contractual terms was clouded by various amendments.

[74] The tribunal missed these key issues and instead made findings that were incorrect in law and fact. It focussed on matters tangential to the material terms of the contract. The award cannot in that regard, be permitted to stand. The errors distorted the identification of the parties` rights and obligations under the contract. Such distortion in turn, conflicted with the public policy requirement to uphold the freedom and sanctity of contract. Can it be said that justice retained its worthy balance in an award obtained without due interpretation of clear and critical terms of a contract? An award which, due to such errors, delivered to claimant,50% ownership in swathe of mining claims worth about US$500,000? Without proving not just payment of a single penny for them, but fulfilment of a strict contractual obligation?

[75] Finally, I address failure by ZBM to file an answering affidavit. Mr. *Mandizvidza* raised issue with failure by ZBM to file an answering affidavit. Citing *Nyamayaro vs Chitaunhike N.O. & Another* HH 700-22, counsel argued that failure by ZBM to file an answering affidavit had to be taken as an admission of all the factual averments raised by Damo in opposition. Mr. *Madhuku'*s response was that the opposing affidavit raised no material issues of an evidentiary nature. The deponent dwelt almost entirely on legal contentions. These, according to counsel, required an answer, not via affidavit but in submissions.

[76] A survey of the opposing affidavit lends support to the observations by counsel. By and large, the opposing affidavit of Mr. Yong extensively dwelt on legal commentary. MAKARAU JP (as she then was) held in that there must be a purpose to the answering affidavit in *Loveness Serengedo v Eric Cable N.O* HH 32-08.

COSTS

[77] The prayers for punitive costs from both sides can at best be described at token. No firm reasons based on established principles were furnished to support such costs. In that regard, ordinary costs should follow the successful party.

It is hereby ordered that; -

1. The application for the setting aside of the arbitral award be and is hereby granted.
2. The award handed down by the second respondent on 8 February 2024, in arbitral proceedings between the applicant and respondent, be and is hereby set aside.

3. First respondent pays the costs of this application.

Lovemore Madhuku Lawyers- applicant`s legal practitioners
Masiya-Sheshe and Associates -first respondent`s legal practitioners

[CHILIMBE J___5/12/24]