

DISTRIBUTABLE: (18)

NATIONAL SOCIAL SECURITY AUTHORITY
V
(1) HOUSING COOPERATION ZIMBABWE (PRIVATE) LIMITED
(2) PETER CARNEGIE LLOYD N.O

**SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, UCHENA JA & CHATUKUTA JA
HARARE: 13 SEPTEMBER 2021**

Adv. Mpofu, for the appellant

Adv. Tivadar, for respondents

MAVANGIRA JA: After hearing the parties on 13 September 2021, we gave our judgment on the matter *extempore*. Our written reasons for judgment have now been requested by the respondent's legal practitioners. Hereunder appears the judgment that was handed down *extempore* on 13 September 2021.

This is the unanimous decision of this Court. This is an appeal against the whole judgment of the High Court dismissing an application for the setting aside of an arbitral award and granting an application for registration of that award. At the commencement of proceedings, appellant's counsel made an application for the amendment of the appellant's grounds of appeal. We granted the application and indicated that our reasons would be part of the main judgment.

The following are our reasons:

Adv Tivadar, for the first respondent, opposed the application on the basis that a written application should have been made in terms of r 39 of the Supreme Court Rules.

Adv. Mpofo's application was made in terms of r 41 which specifically provides for an oral application to amend grounds of appeal. It states as follows:

“41. Power to allow amendment.

The court may upon application by notice or upon oral application by counsel during the course of any hearing allow, upon such terms as it may think fit to impose, amendment of the grounds of appeal or of any pleadings or other document and may similarly permit a party to appear or be represented notwithstanding any declaration in terms of r 50 to the effect that the party does not intend to appear or be represented.”

It is a primary rule of interpretation that a statute should be construed within context. Rule 39 does not override r 41. It applies to applications in general. The opposition to the application was ill-conceived because oral applications are allowed in terms of r 41. We thus found the first respondent's only basis for opposing the application to be without merit and granted the application.

The dispute in this matter arose from a contractual agreement in the form of a bespoke housing offtake agreement between the appellant and the first respondent in terms of which the respondent was to build 8 000 housing units for purchase by the appellant. The appellant paid a deposit of US\$16 million. The respondent thereafter cancelled the agreement and claimed damages in the sum of US\$56 842 364.00. The dispute was referred to the arbitrator for arbitration. The arbitrator awarded the first respondent damages in the amended sum of US\$30 million. The first respondent applied for the registration by the High Court of the arbitral award. The appellant counter applied for the setting aside of the award.

The court *a quo* granted the first respondent's application for registration and dismissed the appellant's counter application. The appellant appealed to this Court. In its amended first ground of appeal, the appellant submitted that the first respondent did not attach to its application in the court *a quo* an authenticated arbitral award as required by Article 35(2) of the Arbitration Act, [*Chapter 7:15*].

In their submissions, counsel for the parties argued over the meaning of the word 'authenticate'. Adv. *Mpofu*, for the appellant, argued that the award issued by the arbitrator has to be authenticated before it can be used for purposes of registration. Adv. *Tivadar* on the other hand, argued that the award is authenticated when the arbitrator signs it before furnishing it to the parties.

In our view, to authenticate means to confirm or verify that the existing award is the one issued to the parties by the arbitrator. Authentication does not take place on the signing of the award, authentication is endorsed on the signed original award.

In respect of the dismissal of the application for the setting aside of the award, Adv. *Mpofu* argued that the court *a quo* did not make a determination on the issue. He submitted that it is a gross irregularity.

Adv. *Tivadar* referred us to pp. 1117 – 1120 of the record. He submitted that the court *a quo* determined the issue on those pages. A reading of those pages does not support his submissions because the court *a quo* merely referred to the submissions by the parties and to the arbitrator's findings without itself pronouncing its own decision on that issue. It is trite

that failure to determine an issue ventilated before the court is a gross irregularity warranting the setting aside of a court's decision.

In the result; the decision of the court *a quo* in respect of registration of the award and dismissal of the application to set aside the award has to be set aside and the matter remitted to the court *a quo* before a different Judge for a hearing *de novo*.

Accordingly it is ordered as follows:-

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside.
3. The matter is remitted to the court *a quo* for hearing *de novo* before a different Judge.

UCHENA JA : I agree

CHATUKUTA JA: I agree

Mawere Sibanda, applicant's legal practitioners
Zigomo Legal Practitioners, 1st respondent's legal practitioners
The Hon Peter Lloyd, 2nd respondent's legal practitioners