(1) THE TRUSTEES FOR THE TIME BEING OF CAPS PHARMACEUTICAL TRUST
versus
CAPS HOLDINGS LIMITED
and
CAPS (PRIVATE) LIMITED
and
MINISTER OF INDUSTRY AND COMMERCE N.O.
and
A.M. EBRAHIM (HON RETIRED JUDGE) N.O.

(2) MINISTER OF INDUSTRY AND COMMERCE N.O.
versus
THE TRUSTEES FOR THE TIME BEING OF CAPS PHARMACEUTICAL TRUST
and
CAPS HOLDINGS LIMITED
and
CAPS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 23 February & 19 July 2023

Opposed Application

*Prof L Madhuku***,** for the applicant
Ms *T Tagwirei***,** for the 1st respondent
Mr *T Moyo,* for the 2nd respondent
Mr *A B C Chinake*, for the 3rd respondent

DEME J: The applicant approached this court under case number HC7138/21 seeking an order for the setting aside of the arbitral award. More particularly, the relief sought by the applicant is couched in the following way—

> "1. The application succeeds.
> 2. The arbitrator's arbitral award of 4 November 2021 be and is hereby set aside in its entirety.
> 3. The parties are left to proceed as they deem fit.

4. Any Respondents opposing this application shall bear costs of suit jointly and severally with the one paying others to be absolved."

The third respondent, under case number HC 1320/22, approached this court seeking an order for the registration of arbitral award. The relief sought by the third respondent is expressed in the following way—

"1. The arbitral award issued in favour of the Applicant against the Respondents by Honourable Retired Justice AM Ebrahim on 4th November 2021, as read with certified and authenticated award issued by the Honourable Arbitrator, Retired Justice AM Ebrahim 30 November 2021 (sic) be and is hereby registered as an order of this Honourable Court in terms of Article 35 of the Model Law (Schedule to the Arbitration Act [*Chapter 7:15*]);

2. As a consequence of such registration in terms of paragraph 1 above, the Provisional Order granted by the High Court under Judgment No HH 775/20 (Ref Case No HC6683/20) be and is hereby discharged and the 1st, 2nd and 3rd Respondents are ordered to pay the Applicant's costs in respect of that application;

3. The 1st, 2nd and 3rd Respondents are ordered to pay the Applicant's costs in respect of this matter on a legal practitioner and client scale."

For convenience purposes, I shall refer to the parties as they are under case number HC 7138/20 save as may be specified or suggested by the context. The applicant received, by way of donation, 51% of the second respondent's shares in 2011 through the shareholders agreement. This transaction shall be hereinafter called "the 2011 agreement" or the "shareholders agreement". In 2016, Mr Mutanda sold his shares for the companies to the Government of Zimbabwe. According to the third respondent, the transaction saw the Government of Zimbabwe becoming the major shareholder in the second respondent. However, the applicant is disputing this. In 2020, the third respondent appointed board members for the second respondent. The applicant disputed this and initiated the arbitration proceedings through the letter dated 10 November 2020. Part of the letter is as follows:

"In terms of clause 10.3 of the Shareholders Agreement between our client and yourself, any dispute between shareholders must be resolved through arbitration and parties must choose an arbitrator within seven (7) days of the dispute having arisen. Our client would be grateful if we could speedily and jointly appoint an arbitrator to have the aforesaid dispute(s) determined.
Please take note that if an arbitrator cannot be jointly appointed as per the said first sentence of clause 10.3.1 of the Shareholders Agreement, our clients will request that the appointment of an arbitrator be made by the Commercial Arbitration Centre in terms of the last sentence of paragraph 10.3.1 of the shareholders Agreement. If we do not hear from you or before 18th November 2020, we shall assume you are not interested in participating in terms of the first sentence of paragraph 10.3.1 and soon thereafter, our clients will invoke their right to have an

arbitrator appointed in terms of the last sentence of paragraph 10.3.1 of the shareholders agreement aforesaid."

The applicant also approached this court under case number HC 6683/20 seeking an order for interdict pending the arbitration proceedings. This court delivered the judgment under HH 775/20. The operative part of the Provisional Order for the foregoing judgment is as follows:

"IT IS ORDERED THAT
TERMS OF FINAL ORDER SOUGHT
A. That you show cause why a final order should not be made in the following terms:-
1. That the involvement of the 5th-9th Respondents in the running of the affairs of 3rd Respondent be and is hereby suspended pending the determination and final outcome of the Arbitration proceedings commenced by the Applicant against the Respondents at the Commercial Arbitration Centre.
2. The current directors as appointed by the shareholders shall continue to administer the 3rd respondent's affairs until and if duly replaced.
3. The 1st Respondent be and is hereby ordered not to make any decisions on the affairs of the 3rd Respondent without following due process.
4. 1st Respondent, to pay costs of suit on a legal practitioner and client scale.
INTERIM RELIEF SOUGHT
B. Pending confirmation or discharge of this Provisional Order, the Applicant is granted the following interim relief:
1. The 5th-9th Respondents be and are hereby interdicted from performing duties as directors of the 3rd respondent pending the court's determination on the return day on whether or not the interdict should be extended until the Arbitral tribunal makes a final determination on the dispute.
2. The 1st Respondent be and is hereby interdicted from interfering with the affairs of the 3rd Respondent and appointment of any persons as directors, employees of or consultants to the 3rd Respondent until the return day.
3. The current directors as appointed by the shareholders shall continue to administer the 3rd Respondent's affairs until the return day."

The fourth respondent on 4 November 2021 delivered the arbitral award which is being contested by the applicant. The third respondent is seeking to have the award registered for purposes of enforcement. The operative part of the arbitral award is as follows:

"Accordingly, I find for the third respondent and against the claimant and the first and second respondents. The Minister's appointments were lawful from every point of view. The costs shall be paid by the claimant and the first and second respondents jointly and severally."

The third respondent also seeks the discharge of the foregoing Provisional Order. The applicant is challenging the registration of the award on the basis of seven grounds.

Consequently, the applicant is seeking an order for the setting aside of the arbitral award founded on these seven grounds.

In its first ground, the applicant argued that the arbitral award was issued on the basis of non-existent arbitration agreement. According to the applicant, the fourth respondent claimed that the arbitration agreement came into existence six months after the arbitration proceedings had already started. It is the applicant's case that they were not aware that they were participating in the arbitration proceedings based on a different agreement. The applicant further claimed that the claimant only came to know this new agreement upon reading p 9 of the arbitral award.

According to the applicant, the fourth respondent held that the parties accepted that arbitration agreement arose as a result of the High Court decision under Judgment number HH 775/20 (Ref Case No. HC 6683/20). The applicant further alleged that the exact terms of the new arbitration agreement are not known to it. The applicant also argued that if there was a new agreement then the fourth respondent had no mandate under the new agreement. According to the applicant, the arbitral award delivered under such circumstances must be deemed to be *null* and *void*. The applicant maintained that the claimants before the fourth respondent insisted that the shareholder's agreement of 2011 was supposed to be the sole basis for the arbitration agreement. The applicant referred the court to the copy of arbitration referral letter on p 676.

The applicant averred that the fourth respondent's factual determination cannot be correct in light of the fact that the statement of claim filed by the applicant after the pre-arbitration meeting restated the correct basis of arbitration agreement which was maintained by the claimant throughout the arbitration proceedings. The applicant referred the court to the introduction contained in the claimant's statement of claim at p 259, summary of claimant's submissions at p 489.

The applicant further affirmed that a High Court ruling cannot be a subject of an arbitration process. The applicant referred the court to s 4 of the Arbitration Act [*Chapter 7:15*] (hereinafter called "the Arbitration Act") which provides as follows:

> "(1) Subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.
> (2) The following matters shall not be capable of determination by arbitration—
> (a) An agreement that is contrary to public policy; or
> (b) A dispute which, in terms of any law, may not be determined by arbitration; or

(c) A criminal case; or
(d) A matrimonial cause or a matter relating to status, unless the High Court gives leave for it to be determined by arbitration; or
(e) A matter affecting the interests of a minor or any individual under a legal disability, unless the High Court gives leave for it to be determined by arbitration; or
(f) A matter concerning a consumer contract as defined in the Consumer Contracts Act [*Chapter 8:03*], unless the consumer has by separate agreement agreed thereto.
(3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration."

The applicant further argued that a High Court order is not a dispute nor is it an agreement between the parties.

The applicant also asserted that the correct position relating to the arbitration agreement is that the claimants invoked the arbitration clause in terms of the 2011 agreement and then approached the High Court in terms of Article 9 of the Schedule to the Arbitration Act (hereinafter called "the Model Law"). It is the applicant's case that the High Court granted the interdict and endorsed the arbitral process which was already in motion. According to the applicant, the High Court did not foist an arbitration agreement on the parties. The applicant further alleged that the High Court did not appoint the arbitrator. Rather, the arbitrator was appointed in terms of Clause 10.3 of the 2011 agreement, according to the applicant's assertions. The applicant claimed that the High Court was alert to the fact that the arbitration between the parties was in terms of the 2011 agreement in its ruling. It is the applicant's view that the award has not been made in terms of the 2011 agreement. The applicant further maintained that an original or certified copy of the acceptance arbitration agreement between the parties does not exist.

The fourth respondent's ruling, according to the applicant, is silent on the sanctity of the 2011 agreement in this matter. The applicant further affirmed that the claimants sought as part of their prayer a declaration that the 2011 agreement be declared valid and extant. The court was referred to p 274 of the record. Therefore, the applicant is of the view that the fourth respondent was wrong in holding that the parties had another arbitration agreement other than the 2011 agreement. The applicant also asserted that the first and second respondent consented to the declaration that the 2011 agreement was valid and extant as sought by claimant in the statement of claim. Reference was made to pp 283 and 300, para 42 thereat. According to the applicant, the consent of first and second respondents in para 42

at p 300 resolved the shareholding structure in second respondent in terms of the 2011 agreement.

The arbitral award, according to the applicant, is silent on the evidence submitted by the claimants which supports the 2011 agreement and which proves that the claimant is the 51% shareholder in the second respondent. The evidence on record, according to the applicant, includes the share certificates, CR2 and the share register. According to the applicant, the High Court judgment recognises that on paper the applicant appears to be the majority shareholders in the second respondent who was the third respondent in the High Court matter. The applicant further claimed that the applicant has a right to have been involved in the appointment of board members to the second respondent. According to the applicant, this High Court's sentiment was ignored by the fourth respondent.

According to the applicant, the third respondent did not prove ownership of shares in the second respondent which are due to the Government. The applicant also alleged that the award must be set aside for it flies against Zimbabwe's public policy. The applicant further asserted that the other basis why the award must be set aside is that the fourth respondent did not act in terms of the 2011 agreement. The applicant maintained that the new arbitration agreement contravenes the provisions of Article 7 of the Model Law which provides that any arbitration agreement must be in writing and signed by all parties. According to the applicant, the arbitration agreement is invalid as it was never reduced into writing and was not signed by all parties. The applicant argued that once the arbitrator becomes involved in the formulation of terms of reference, the arbitrator ceases to be independent. Consequently, the fourth respondent departed from the terms of reference, according to the applicant.

The third respondent, on the contrary disputed this ground which the applicant sought to rely upon to have the arbitral award set aside. Before directly responding to the grounds raised by the applicant, the third respondent gave her own narrative of the events leading to arbitration. According to the third respondent, Mr Mutanda formerly owned the first respondent. The first respondent had many subsidiary companies including the second respondent, according to the third respondent. The third respondent further affirmed that the first respondent faced financial challenges. Mr Mutanda was no longer able to fund the first respondent and its subsidiaries, according to the third respondent. The third respondent also claimed that the Government of Zimbabwe made a decision that it was going to rescue the

first respondent and its subsidiaries. Consequently, Mr Mutanda and the Government of Zimbabwe entered into the agreement for the sale of Mr Mutanda's shares in the first respondent and its subsidiaries. The agreement shall be hereinafter called "the Mutanda agreement" or alternatively "the 2016 agreement".

According to the third respondent, the Reserve Bank of Zimbabwe was tasked to give effect to the Mutanda agreement. The third respondent affirmed that the 2016 agreement is still valid and has not been cancelled. The third respondent referred the court to p 64 of the record for further details of the Mutanda agreement.

Pursuant to the Mutanda agreement, according to the third respondent, the Government of Zimbabwe paid the purchase price in full and that the sellers had consumed the majority of the purchase price save for the two treasury bills which were due to mature at the end of 2021. After the conclusion of the 2016 agreement, the third respondent claimed that the Government of Zimbabwe successfully resuscitated the first respondent and its subsidiaries. Consequently, according to the third respondent, the companies, as a result of the resuscitation, were brought back to sound operational and financial climate.

Now turning to the third respondent's attitude towards the first ground raised by the applicant, she argued that the applicant failed to demonstrate any factual or legal basis upon which the arbitral award can be said to be contrary to public policy. The third respondent contended that Article 34(2)(b)(ii) of the model law has not been violated. The third respondent further affirmed that all interested parties were given notice to attend the meeting including Frederick Mutanda who elected not to attend the proceedings despite the fact that his interests were at the centre of the arbitration. The third respondent further submitted that Mr Mutanda received notice to attend the arbitration and evidence is on the record. The correspondence involving Mr Mutanda, according to the third respondent, has been attached to the third respondent's opposing affidavit marked Minister 3 to 2G. It is the third respondent's case that all the legal practitioners were advised of Mr Mutanda's position and the fact that Mrs Mberi (first respondent's legal practitioner) submitted documents relating to the agreement of sale of shares. The applicant also alleged that the representative of Mr Mutanda, Tendai Tagwirei, authored an e-mail attached to the third respondent's opposing affidavit marked Annexure Minister 4. According to the e-mail of Tendai Tagwirei, quoted by the third respondent, Mr Mutanda had advised Tendai Tagwirei that he was not interested

in being joined to the arbitration proceedings. The third respondent additionally claimed that Mr Mutanda's legal practitioners attended the arbitration proceedings on his behalf and produced documents on his behalf before arbitration proceedings. The third respondent maintained that the applicant which is a trust cannot purport to act on behalf of Mr Mutanda who elected not to appear before the fourth respondent.

The third respondent averred that the applicant herein was also the applicant under HH 775/20 and was the cause of the arbitration proceedings. In the circumstances, the third respondent cannot rely on Article 34(2)(b)(ii) of the model law as the judgment under HH 775/20 was a result of its own application. The alleged contravention of Article 34(2)(b)(ii) of the model law is frivolous, according to the third respondent.

The third respondent also argued that the arbitration proceedings took place pursuant to the order of the High Court. The third respondent further claimed that the arbitration process was by consensus as between the parties who appeared before the fourth respondent. According to the third respondent, through consensus, the parties agreed that the High Court order was going to shape their arbitration agreement. The third respondent asserted that the High Court judgment under HH 775/20 made a determination that the matter be referred to the independent arbitrator in order to determine the lawfulness of the third respondent's actions. It is the third respondent's averment that the fourth respondent acted in accordance with High Court judgment. The third respondent argued that the fourth respondent was appointed pursuant to the High Court judgment.

The third respondent also affirmed that the third respondent's interest in the arbitration arises from a valid sale and purchase of shares agreement which starts from page 64 of the record. The decision of the fourth respondent, according to the third respondent, cannot be said to be unreasonable or a decision that shows a failure to apply one's mind to the facts.

The third respondent denied that the arbitration agreement was supposed to be in terms of the 2011 agreement. She contended that the High Court judgment shaped the terms of reference for arbitration. Before the arbitration, the third respondent averred that she had to justify her actions in accordance with the High Court judgment. She also affirmed that the High Court judgment is binding upon all parties to the arbitration proceedings. The third respondent argued that the applicant cannot seek to exclude the Government of Zimbabwe

which has substantial interest in the matter. It is the third respondent's case that the fact that the prayer for the claimants was not granted does not invalidate the arbitral award as the fourth respondent made the decision after analysing all the evidence placed before his attention.

With respect to the applicant's argument that the arbitration agreement ought to be in writing in accordance with the provisions of Article 7 of the model law, the third respondent argued that the High Court judgment which shaped the arbitration agreement is in writing and hence the applicant's argument, according to the third respondent, is misplaced. The third respondent claimed that the fourth respondent did not create the new arbitration agreement but simply followed the directions of the High Court. She further argued that the fourth respondent acted impartially and did not descend into the arena.

It is the third respondent's case that the statement from the judgment under HH 775/20 to the effect that the applicant appeared to be the major shareholder in the second respondent who happens to be the third respondent under judgment number HH 775/20 is an obita dicta and not the ratio decidendi. According to the third respondent, the ratio decidendi of the judgment was that the dispute was to be referred to the independent arbitrator for the determination of whether the third respondent's acts are lawful in appointing the board for the second respondent.

The applicant, in its second ground, averred that the arbitral award must be set aside on the basis that the fourth respondent deviated from the terms of reference. The applicant further affirmed that deviating from the terms of reference by the fourth respondent is contrary to public policy. According to the applicant, the new arbitration agreement established by the fourth respondent had only the 2016 agreement as one of its terms of reference of which the claimants were not party to such agreement. The applicant also stated that the fourth respondent went on to determine the validity or otherwise of the Mutanda agreement. According to the applicant, this contravened the provisions of the letter of 10 November 2020 which is on p 676.

According to the applicant, the fourth respondent was supposed to determine the lawfulness of the third respondent's actions in light of the 2011 agreement and not in light of the 2016 agreement. The applicant further asserted that the 2011 agreement which contained

a pre-emption clause made it impossible for any other subsequent agreement to be valid. Reference was made to pp 491-6.

The third respondent vehemently opposed this ground. The third respondent denied that the fourth respondent created the new arbitration agreement. According to the third respondent, the arbitration was pursuant to the High Court Order. The third respondent also asserted that it was impossible for the fourth respondent to make a determination of the matter in the absence of full facts including the Mutanda agreement. It is the third respondent's case that she had onus to prove the lawfulness of her actions in light of the Mutanda agreement which saw the Government acquiring shares in the second respondent.

As its third ground for attacking the arbitral award, the applicant alleged that the remedy in the ruling that Government had shareholding in the second respondent and therefore the third respondent's appointment was lawful from every point of view was not available to the third respondent in terms of what transpired at the extraordinary general meeting. Despite lack of evidence, the applicant alleged that the fourth respondent concluded that the Government was a major shareholder in the second respondent. According to the applicant, this finding is in conflict with the public policy of Zimbabwe. It is the applicant's belief that this decision is so flawed and inequitable that to leave it as it stands would irreversibly harm sense of justice. The applicant further claimed that CAPS Manufacturing Ltd formed in 2015, is the major shareholder in the second respondent from 2011 before it was formed which finding is not based on any evidence. According to the applicant, this finding defies logic. The finding by the fourth respondent, according to the applicant, nullified the share register for the second respondent, the return of allotments (CR2) and the share certificates which were placed before the fourth respondent. It is the applicant's view that this finding constitutes a gross injustice in that the fourth respondent effectively takes away the shares of the claimant and hands them over to the CAPS Manufacturing Ltd without the consent of the claimant.

According to the applicant, there was no single document placed before the fourth respondent which attempted to prove that shares in the second respondent were transferred from any shareholder whatsoever to CAPS Manufacturing Ltd before CAPS Manufacturing Ltd was formed or after it was formed in 2015. The applicant argued that the identity of the major shareholder between 2011 and 2015 before CAPS Manufacturing Ltd was formed

remains unknown. It is the applicant's assertion that the third respondent conceded that the organogram presented to the fourth respondent is accurate. According to the applicant, the organogram shows that the applicant has been the 51 per cent shareholder in the second respondent and still remains as such. The applicant further affirmed that the same organogram shows that CAPS Manufacturing Ltd is a stand alone company not related to the second respondent. The applicant further claimed that it defies logic that any reasonable person would ignore this concession and proceed to make a finding contrary to the concession. The applicant referred the court to pp 947-952 of the record for the organogram. The applicant also referred the court to p 1475 of the record where Mr Chinake, acting on behalf of the third respondent, acknowledged the organogram.

The applicant argued that there is no contract between any agent and the second respondent for acquisition of shares on behalf of CAPS Manufacturing Ltd. The applicant further affirmed that the shareholding of Government is baseless because the purported shareholding has its genesis in a demerger or unbundling of the CAPS Holdings Ltd which never occurred as shown by the 2011 extraordinary general meeting notice which is on p 407 and minutes thereof on p 835. According to the applicant, the purported shareholding partly originated from a dividend in specie which purportedly saw CAPS Holdings Ltd shares being moved to a newly created holdings company CAPS Manufacturing Ltd through a purported share mirroring arrangement. It is the applicant's version of events that this arrangement never happened. The applicant referred, for the purposes of the extraordinary general minutes, to pp 476-483. The applicant is of the belief that CAPS Manufacturing Ltd is a standalone company and is not the holding company of the second respondent as erroneously claimed by the third respondent and as apparently confirmed by the fourth respondent in para 4 on p 8 of the ruling which is p 36 of the application. According to the applicant, it holds 51 per cent of the second respondent's shares while the balance being 49 per cent is held by the first respondent. The applicant referred the court to pp 270-271.

It is the applicant's version of events that out of 51 per cent shares for the applicant in the second respondent, 11 per cent of the shares were donated to the applicant by the first respondent while 40 per cent of the shares were donated to the applicant by Themba Trust which has never been a shareholder in the first respondent. The applicant further asserted that assuming that the fourth respondent's finding that CAPS Manufacturing Ltd received all the

shares that were formerly held by the first respondent in June 2011 as a result of the purported unbundling and dividend in specie, is unfounded as only 11 per cent of the 51 per cent shareholding of the applicant in the second respondent would be affected by the finding. According to the applicant, the Themba Trust transfer of 40 per cent of its shareholding in the second respondent to the applicant cannot be affected by any shareholding development in the first respondent and CAPS Manufacturing Ltd that allegedly led to Government's purported acquisition of shares in the second respondent. The applicant further affirmed that the arbitral award takes away more shares from the applicant than 11 per cent it received from the first respondent. According to the applicant, the arbitral award declares that only shareholders of the first respondent and unnamed minorities are the only shareholders in the second respondent thereby elbowing out the applicant as it is not a shareholder in the first respondent. The applicant further alleged that the fourth respondent violated the sanctity of contract which is rooted in public policy by failing to uphold the 2011 agreement and in particular by failing to determine that no second respondent's shares could have been sold in violation of the pre-emption rights enshrined in the shareholders agreement. According to the applicant, the fourth respondent avoided interrogating the question of how Government acquired shares in the second respondent.

The applicant alleged that the 2016 agreement is invalid due to three reasons. Firstly, the applicant alleged that there was no resolution approving the demerger or unbundling of the first respondent which was passed at the 2011 extraordinary general meeting. Secondly, the applicant further asserted that the 2011 agreement which is valid and extant contains pre-emptive rights in favour of the applicant governing the subsequent sale of shares in the second respondent. Thirdly, it is the applicant's view that if ever any agreement of sale of shares was entered into post the 2011 agreement, clearly it did not affect the shareholding of the applicant. The applicant argued that with the applicant having 51 per cent of the shares in the second respondent, it means that the Government can no longer be the major shareholder in the second respondent.

In response to the third ground, the third respondent disputed the applicant's averments. The third respondent argued that the arbitral award is not contrary to public policy. She further claimed that the award is not flawed or iniquitous. The third respondent asserted that the arbitral award was supported by facts and documents filed. With respect to

the issue of how CAPS Manufacturing Ltd formed in 2015 became a major shareholder in 2011 when it was not formed, the third respondent claimed that this could have been as a result of typing errors which does not make the arbitral award contrary to public policy. According to the third respondent, the second respondent is a subsidiary of CAPS Manufacturing Ltd which is in turn controlled by Government. The third respondent also argued that the Government of Zimbabwe effectively controls the second respondent. There has been no appropriation of the applicant's shares by Government according to the third respondent. The third respondent further maintained that the Government of Zimbabwe only acquired the interests of Mr Mutanda and his companies including any interest howsoever constituted as stated in the 2016 agreement. The third respondent denies that the organogram is the sole record of the shareholding and structure of the former CAPS Holdings Limited Company. Additionally, the third respondent argued that the documents placed before the fourth respondent are evidence that the Government is the major shareholder in the second respondent. The third respondent averred that the applicant is ignoring the evidence from the officers of the first and second respondents which confirms that the Government of Zimbabwe is the major shareholder.

The third respondent additionally claimed that the share register of the demerged companies exists together with communication from the transfer secretaries and the lawyers involved in the transactions confirming three things, firstly, that they were entered, secondly that they were executed and lastly that shares were issued to Government of Zimbabwe as a result of the Mutanda agreement. The share registers and the share certificates were consequently updated. The third respondent urged the court to take into account the correspondence between the Reserve Bank of Zimbabwe, on one hand, and the officers of the first and second respondents. The third respondent argued that the shares acquired by the applicant did not receive the blessing of the shareholders. According to the third respondent, there is no evidence from the record that suggests that the shareholders of the first respondent were in agreement with this transaction. The third respondent further maintained that the Government of Zimbabwe has been exclusively involved in the management and running of these companies for a period in excess of eight years including funding their operations on its own.

The third respondent asserted that facts from the record point to an acceptance of the purchase of the majority shareholding by the Government of Zimbabwe not only by the Applicant but also by the first and second respondents and their officers at the material time. The third respondent argued that the applicant was never elbowed from the second respondent. The third respondent further averred that the applicant, despite claiming to be the major shareholder, has not supported the company or injected any money to resuscitate any of its operations. Rather, according to the third respondent, the applicant left all this work of a major shareholder to the Government of Zimbabwe.

The third respondent, in addition, argued that the pre-emptive rights claimed by the applicant were argued before the fourth respondent and an appropriate determination was made thereafter. According to the third respondent, the Government of Zimbabwe purchased all the shares of Mr Mutanda and thereafter there were no remaining shares whether for the applicant or for the Themba Trust. The third respondent claimed that the applicant trust is no more than an alter ego of the first respondent in that its structure was created solely for the purposes of complying with certain legislation, without alienating the ultimate benefit and interest of the former CAPS Holdings Ltd shareholders in the second respondent.

With respect to the sanctity of contract for the 2011 agreement, the third respondent argued that there is sanctity of contract to in the first place in light of the 2016 agreement which was upheld by the fourth respondent. According to the third respondent, she acted in terms of the 2016 agreement in appointing the board of the second respondent. The third respondent maintained that the Government acted in terms of public policy. The Government of Zimbabwe paid value for the shares in the second respondent, according to the third respondent.

In its fourth ground, the applicant alleged that the fourth respondent granted non-existent rights to Government of Zimbabwe on the basis of a letter. According to the applicant, it was wrong for the fourth respondent to make a determination to the effect that it was based on a factual finding when the fourth respondent relied on the letters for his conclusion. The applicant affirmed that the fourth respondent's attitude of attaching great significance to the letters of Mr Majaka, on p 1070, and Mr Moyo, which is on p 1007 was irregular. The applicant additionally claimed that the two letters by Tamuka Moyo are not in conflict. The first letter of Tamuka Moyo, according to the applicant, states that the

Government is the major shareholder while the second letter states that the Government can only be entitled to 49 per cent which was held by the first respondent. It is the applicant's belief that a major shareholder is any person with at least 10 per cent of the total shares.

Further, according to the applicant, the admissions made by Mr Moyo and Mr Majaka were made in the absence of adequate information about shareholding of the Government of Zimbabwe. It is the applicant's view that the errors made in the letters must not be used to take away shares of the applicant. The applicant argued that Mr Majaka wrote the 2018 letter in his capacity as the Chief Executive Officer of the second respondent and not in his capacity as the Trustee. According to the applicant, the fourth respondent made a mistake of assuming that Mr Majaka was aware of the contents of the 2016 agreement or that he was a signatory to the 2016 agreement. The applicant further argued that Mr Majaka only had knowledge of the agreement in February 2020 when he was given copies by the representative of the Reserve Bank of Zimbabwe.

The applicant maintained that Thompson Stevenson and Associates wrote a letter, on 6 February 2020, to Tamuka Moyo highlighting that the applicant was the major shareholder in the second respondent with 51 per cent while the first respondent had 49 per cent. At the meeting held at the third respondent's office, according to the applicant, Mr Majaka stated that the applicant is the major shareholder in the second respondent. The applicant further affirmed that on 9 April 2020, Mr Majaka restated this position by way of the correspondence which is on p 671. The applicant argued that Messrs Tamuka Moyo wrote a letter to Mr Mutanda, on 23 January 2020 clarifying the shareholding in the second respondent which cured the 2016 letter which the fourth respondent regarded as significant.

The applicant additionally averred that initially Mr Majaka was of the view that the Government of Zimbabwe had acquired 49 per cent of total shares of the first respondent. However, the applicant further claimed that after reading papers placed before the fourth respondent, the applicant became aware that the Government did not acquire any share in the first respondent. According to the applicant, the fact that the second respondent's management allowed the Government to take over management of the second respondent must not be construed to mean that the Government of Zimbabwe had acquired significant shareholding in the second respondent but rather the applicant genuinely believed that the Government had acquired significant shareholding in the first respondent.

The applicant maintained that the fourth respondent ignored the letter by the Reserve Bank of Zimbabwe Governor dated 10 February 2020 where he recognised that the applicant is the major shareholder of the second respondent. Reference was made to p 697. The applicant also alleged that the letters by Mr Moyo and Mr Majaka authored in 2016 and 2018 respectively cannot be deemed to be official letters since they were not authored by the company.

The third respondent strongly resisted the applicant's fourth basis for seeking the setting aside of the arbitral award. The third respondent argued that the fourth respondent's findings were based on facts and documents placed before him. The third respondent claimed that the fourth respondent took into account the evidence placed on record that the Government of Zimbabwe has a controlling stake in the second respondent through CAPS Manufacturing Ltd. She further argued that the letters by Mr Moyo and Mr Majaka penned in 2016 and 2018 respectively were placed before the fourth respondent. According to the thrid respondent, the purported withdrawal by Mr Majaka of his admission of the actual structure is null and void as there is no affidavit from Mr Majaka explaining the position as the applicant wants to put it. According to the third respondent, Mr Majaka did not give evidence before the fourth respondent and hence the second letter cannot be deemed to be credible. The third respondent also dismissed Mr Moyo's change of position through another letter through which he purportedly sought to reverse the contents of the 2016 letter which he confirmed at the material time. The third respondent further alleged that the applicant, first respondent and the second respondent are colluding to deprive the Government of Zimbabwe of its controlling stake in the second respondent.

The third respondent argued that the subsequent letters by Mr Moyo and Mr Majaka reversing their earlier positions must be treated with a pinch of salt and urged the court to disregard them as, according to her belief, this was a latest desperate attempt to be in support of Mr Mutanda. The third respondent contended that the fourth respondent gave an opportunity to Mr Majaka to explain the inconsistency but he failed. The applicant, according to the third respondent, is now acting as the spokesperson for Mr Majaka. The fourth respondent, according to the third respondent, correctly made a factual finding based on the 2018 letter of Mr Majaka and not based on the contents of the letter penned thereafter.

The third respondent further argued that the applicant is incorporating a lot of hearsay evidence which is inadmissible especially averments in para(s) 76 up to 78 of the founding affidavit. She urged the court to disregard it.

As a fifth ground, the applicant also argued that the fourth respondent failed to apply his mind to other issues. According to the applicant, the fourth respondent failed to appreciate the impact of points raised by the first respondent relating to the cancellation of the 2016 agreement which he endorsed as valid. The fourth respondent, according to the applicant, ought to have allowed another tribunal in terms of the 2016 agreement to investigate whether Mr Mutanda cancelled the 2016 agreement as alleged. It is the applicant's case that the cancellation of the 2016 agreement by Mr Mutanda must be regarded as such until the competent authority has set aside such cancellation. The applicant, however, argued that this must never be construed as acceptance by the applicant that the arbitration agreement was in terms of the 2016 agreement.

The third respondent opposed the fifth ground of the applicant. The third respondent argued that there was no evidence placed before the fourth respondent substantiating the allegations that the Mutanda agreement was cancelled. According to the third respondent evidence was placed before the fourth respondent buttressing the fact that Mr Mutanda received full payment for his shares and that he had consumed the proceeds of the sale save for two treasury bills that were yet to mature and were due to mature in December 2021. The third respondent averred that evidence was also placed before the fourth respondent that Mr Mutanda tried to return the funds to the Government of Zimbabwe after the arbitration had started and that the Government of Zimbabwe refused to accept the money and it returned the money to him. The third respondent referred the court to Annexure Minister 5 which is a letter where the Government of Zimbabwe, represented by the Reserve Bank of Zimbabwe Governor, returned the money to Mr Mutanda. Reference was also made to Annexure Minister 6 which are e-mails from the Reserve Bank of Zimbabwe addressed to Kantor and Immerman dated 11 October 2021 showing that the funds purportedly paid were rejected.

According to the third respondent, the fourth respondent made a correct factual finding that the Mutanda agreement was not cancelled and that the first respondent and Mr Mutanda were conniving against the Government of Zimbabwe. The third respondent argued that Mr Mutanda elected not to appear before the fourth respondent despite being invited to

make his own representations and hence the applicant cannot purport to represent Mr Mutanda through this application. It is the third respondent's averment that Mr Mutanda, before the fourth respondent was represented by the first respondent's legal practitioners on record.

The third respondent also affirmed that she successfully proved why her actions for the appointment of the second respondent's board were lawful as the Government of Zimbabwe had acquired significant shareholding in the second respondent. The third respondent also argued that there was no valid cancellation of the Mutanda agreement. The third respondent further maintained that the cancellation was incompetent and invalid. The third respondent argued that the averments of the applicant in para 85 of the founding affidavit is an admission that there was an arbitration agreement which was dealing with the question of the purchase and sale agreement between the Government of Zimbabwe and Mr Mutanda.

The third respondent claimed that averments in para 87 of the founding affidavit amount to hearsay. The third respondent further contended that the fourth respondent considered all legal submission and evidence placed before his attention and hence the arbitral award was based on sound legal and factual findings. Such award, according to the third respondent can never be in violation of Zimbabwe's public policy.

By way of the sixth ground, the applicant argued that the arbitral award led to the abrogation of the applicant's property rights as enshrined in the Constitution of Zimbabwe and the same is handed to the Government which does not deserve such rights. The applicant invited this court to register its displeasure with this conduct. The applicant argued that the arbitral award violated the public policy of Zimbabwe by abrogating the applicant's property rights.

This ground was opposed by the third respondent. The third respondent argued that the Government of Zimbabwe paid for the shares that it acquired and went on to invest large sums of money in the resuscitation of the second respondent and other companies that were part of the demerged entities. The decision to resuscitate the second respondent was made in the public interest which benefited all Zimbabweans. According to the third respondent, there was no abrogation of property rights and value was paid for the shares. The third respondent

further argued that the acts of the Government of Zimbabwe were, to that extent, constitutional.

In its last ground, the applicant contended that the arbitral award does not clarify exact share structures and by so doing the award created a new dispute of shares. The applicant claimed that the fourth respondent made a finding that the claimant is the minority shareholder without specifying the exact shares for the claimant. The applicant further claimed that the fourth respondent made a finding to the effect that CAPS Manufacturing Ltd was the major shareholder of the second respondent without stipulating the precise amount of shares for CAPS Manufacturing Ltd in the second respondent. According to the applicant, there is no evidence of how and when CAPS Manufacturing Ltd became a member of the second respondent in the absence of information from the share register. According to the applicant, the award creates a dispute related to the exact shareholding.

The applicant argued that it is against the public policy of Zimbabwe to grant an arbitral award in terms of the 2016 agreement against the applicant who is not privy to the agreement. It is the applicant's case that the arbitral award ought to be set aside on this basis.

The third respondent opposed this last ground raised by the applicant. The third respondent affirmed that the extent of shareholding was not before the fourth respondent for determination. According to the third respondent, what was before the fourth respondent for determination was whether the third respondent had acted lawfully by appointing the board of the second respondent. The third respondent argued that the conclusion of the award was based on legal and factual findings correctly made by the fourth respondent. It is the third respondent's belief that the arbitral award is clear and does not require any form of interpretation. The third respondent further claimed that the arbitral award does not contravene any public policy of Zimbabwe and ought to be upheld in its entirety.

The first and second respondents did not oppose the present application for the setting aside of the arbitral award. The first and second respondents reaffirmed the position of the applicant.

The third respondent raised three points *in limine* against the present application. According to the third respondent, although the first and second respondents have the unfettered right to consent to the order sought, they are not able to do so in the manner they have done. The third respondent further argued that the only document that is required to be

filed by either the first or the second respondent for purposes of consenting to the order sought is a mere one page document. The court was referred to r 59(7) of the High Court Rules, 2021 which provides the manner in which respondents may file their opposing papers. According to the third respondent, the manner of filing affidavits which are not opposing the application is in violation of r 59(7) of the High Court Rules, 2021. The court was referred to the case of *Nelson Chamisa* v *His Excellency, the President of Zimbabwe, Emmerson Dambudzo Mnangagwa*[1].

The third respondent also raised a further point *in limine* to the effect that the purported consent by the first and second respondents is invalid for want of resolutions from the respective board of directors for the first and second respondents. The third respondent also argued that there is no evidence that the shareholders of the first and second respondents are aware of the present proceedings. In the absence of this, the third respondent prayed for an order disregarding the purported consent by the first and second respondents.

Thirdly, the third respondent also prayed for the dismissal of the application for having a defective draft order. According to the third respondent, the draft order seeks the setting aside of the arbitral award in the absence of a finding by the court that the arbitral award is contrary to public policy of any form. According to the third respondent, in the absence of such a finding, this court may not set aside the arbitral award.

I will proceed to address points *in limine* not necessarily in their order but according to their effect upon the present application. In my view, a determination on the third point *in limine* is crucial to be made first in order to make a determination of whether or not there is a proper application before this court. If the application is defective for want of compliance with principles, this may be the end of the application. It is common in our jurisdiction that a draft order remains as such subject to the directions of the court. In the case of *Jonga* v *Chabata*[2], the court postulated that:

> "the wording of an order is within the discretion of the court."

I fully associate myself with the sentiments of the court. Accordingly, this point *in limine* is dismissed.

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[1] CCZ42-18.

[2] HH276-17.

Turning to the first point *in limine*, the third respondent had argued that the first and second respondents ought to have filed their consent without necessarily filing their affidavits. I do agree with the counsel for the third respondent, Mr Chinake, that such affidavits violate the provisions of r 59(7) of the High Court Rules, 2021 which are as follows:

> "(7) The respondent shall be entitled, within the time given in the court application in accordance with subrule (6), to file a notice of opposition, together with one or more opposing affidavits."

Although r 21 of the High Court Rules, 2021 is specifically meant for action procedures, this Rule may be pertinent in roughly guiding the court as to the exact contents of the consent to judgment. Which may be filed under such state of affairs. Rule 21 provides as follows:

> "21.(1) Save in actions for relief affecting status, at any time after service of summons a defendant may consent, in whole or in part to judgment without appearing in court and such consent to judgment shall be in writing and signed by the defendant personally or by a legal practitioner who has entered appearance to defend on his or her behalf and where the defendant has personally signed a consent to judgment, his or her signature shall either be witnessed by a legal practitioner acting for such defendant and not for the plaintiff or be verified by affidavit and upon filing a consent to judgment with the registrar the plaintiff may make a chamber application for judgment and thereafter a judge may give judgment according to the consent.
>
> (2) A judgment given by consent under these rules may be set aside by the court and leave may be given to the defendant to defend, or to the plaintiff to prosecute the action and such leave shall only be given on good and sufficient cause and upon such terms as to costs and otherwise as the court considers just."

On the basis of r 21 and 59(7) of the High Court Rules, 2021, the affidavits together with Heads of Argument filed by the first and second respondents in support of the consent to judgment must be expunged from the record save for the portions where the consent is expressed. Allowing litigants to file affidavits and Heads of Argument in support of the consent to judgment may have the potential of enabling the litigants to file a fresh application which may create new issues before the court. Entertaining the papers of the first and second respondents in their state may have the effect of producing parallel applications by the first and second respondents. The application has been filed by the applicant. The court will be guided by the issues as expressed by the applicant, on one hand, and the third respondent, on the other. Accordingly, the first point *in limine* is upheld.

With respect to the second point *in limine,* the third respondent argued that the first and second respondents have no blessings of their respective shareholders and board of directors to consent to the present application. However, it is apparent that the first and second respondents appeared before the fourth respondent and this issue was never raised. Therefore, the third respondent is estopped from raising this point for the first time when in fact the third respondent had been involved in the previous litigation with the same litigants without impugning their authority to make decisions on behalf of their principals. Accordingly, this point *in limine* is dismissed.

Having disposed of the points *in limine*, I will now shift my attention to the merits of the present application. In its first ground, the applicant argued that the fourth respondent created his own new arbitration agreement which is alien to the proceedings. According to the applicant, the fourth respondent held that the parties, in pre-arbitration meeting, agreed that the High Court Judgment was going to form part of the arbitration agreement. Under judgment number HH 775/20, this court, having been approached by the parties, in its part of the judgment, remarked as follows:

> "It is also not in dispute that the applicant on papers appears to be the majority shareholders in 3rd respondent hence on paper have a right to have been involved in the appointment of the 5th to the 9th respondents as Board members for the 3rd respondent. The 1st respondent seems to suggest she was correct in unilaterally appointing the Board members without the involvement of the applicant. The correctness of the 1st respondent's decision has to be decided by an independent arbitrator. Pending the resolution of that dispute the applicant has made a clear case for the interdicting of the respondents from carrying or doing anything involving the affairs of the 3rd respondent. All the requirements for an interdict have been met."

In the arbitral award, the fourth respondent made the following observations:

> "It seems to me that there was indeed no dispute between the CAPS parties. The real dispute was between the CAPS parties and the Minister."

The fourth respondent further remarked as follows:

> "It seems to be common cause that the sole issue for determination is the correctness of the Minister's decision to appoint the directors of the board of CAPS (Pvt) Ltd."

Article 9(2) of the Model Law provides as follows:

> "(2) Upon a request in terms of paragraph 1 (1) of this article, the High Court may grant—
> (a) An order for the prevention, interim custody of sale of any goods which are the subject-matter of the dispute; or

(b) An order securing the amount in dispute or the costs of the arbitral proceedings; or
(c) An interdict or other interim order; or
(d) Any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual."

The High Court, in terms of the Model Law, has got powers to make any order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual. The High Court made a determination that the correctness of the third respondent's acts in appointing the board for the second respondent must be a subject for arbitral proceedings. This judgment is still extant. It has not been set aside. There are no pending proceedings where this decision is being challenged. Assuming that the dispute was supposed to have been determined solely on the 2011 agreement would render the arbitral award ineffectual as contemplated in Article 9(2) (d) of the Model Law. The fourth respondent rightly observed that there was no dispute between the CAPS parties. Accordingly, the first ground which the applicant seeks to rely on lacks merits. Accordingly, I dismiss this ground.

In the second ground, the applicant sought to argue that the fourth respondent deviated from the terms of reference for arbitration. It argued that the terms of reference were according to the 2011 agreement while the fourth respondent took the Mutanda agreement as the terms of reference. The applicant further contended that it was not party to the 2016 agreement and hence such a deviation is contrary to the public policy of Zimbabwe. In my view, it is very difficult if not impossible to make a determination based on the 2011 agreement. What was before the fourth respondent as amplified by the High Court judgment is whether the third respondent acted lawfully by appointing the board of the second respondent. Given the developments which happened after 2011, the fourth respondent could not definitely ignore the events that occurred thereafter. In my view, there was no deviation of any nature at all. Thus, this second ground stands dismissed.

The applicant's third ground is that the fourth respondent wrongly concluded that the third respondent's appointment of second respondent's board was lawful from every point of view by virtue of the Government's shareholding in the second respondent. The applicant further argued that the 2011 extraordinary general meeting did not endorse the transaction for the transfer of shares to the Government of Zimbabwe. I do agree with the third respondent's

averment that the organogram is not the sole document considered by the fourth respondent. In light of the 2016 agreement, the 2011 extraordinary general meeting minutes becomes irrelevant. The main argument for the third respondent was that her actions were based on the Mutanda agreement which the applicant wants to avoid. Until the applicant perceives the significance of the Mutanda agreement in the whole dispute, it would be difficult for it to appreciate why the third respondent acted in the manner that she did by appointing the second respondent's board. I also agree with the third respondent that the applicant's pre-emptive rights were correctly determined by the fourth respondent. Certainly, such rights cannot be enforced by the applicant against the third respondent who is alien to the 2011 agreement. The applicant can only enforce such pre-emptive rights against the entities and individuals who donated the shares to the applicant. In light of this, the third ground lacks merits and cannot be upheld for these reasons.

In its fourth ground, the applicant argued that the fourth respondent granted the Government of Zimbabwe some shares on the basis of letters and not on the basis of share certificates. In my view, the transaction for the acquisition of the second respondent by the Government was still in the transition at the time the parties appeared before the fourth respondent. What is clear from the documents and facts contained in the record is that at one time, there was consensus by the first and second respondents' officials especially during the period prior to 2020. From 2020, there were signs of resistance from many corners. This, definitely, was not a coincidence. This is likely to have been motivated by some hidden facts. This resistance was not evident during the times when CAPS companies were still ailing. This failed to happen during the time when the second respondent was receiving funding from the Government of Zimbabwe in order to resuscitate them. Such degree of silence must attract an inference from any reasonable person. The fourth respondent took into account the contemporaneous documents and such other facts and evidence as adduced by the parties appearing before him. In my view, the contemporaneous documents may include the Mutanda agreement, the letters by Mr Moyo and Mr Majaka authored in 2016 and 2018 respectively and such other documents. Mr Moyo's relevant portion of the letter of 2016, which is on p 1007, is as follows:

"4. The Government of Zimbabwe is now the major shareholder in our client and has mandated Reserve Bank of Zimbabwe to oversee the transaction and bring in a new investor to partner with the government. We are informed that the transaction is nearing completion and fresh capital will be injected into the company very soon.

4. In view of this development, our client requests that the Authority rescinds its decision to intend to cancel the premises licence and allow the Government of Zimbabwe time to complete the transaction and address all the concerns of the Authority."

When the circumstances may favour its situation, the second respondent, as represented by its legal practitioner, would be interested in being identified with the Government of Zimbabwe in order to avoid the cancellation of the second respondent's licence for the premises.

On p 1070, Mr Majaka's appropriate portion of the e-mail of 2018 is as follows:

"We refer to correspondence between your office and CAPS (Pvt) Ltd management regarding the issuance of compliance letter for the purposes of licensing CAPS (Pvt) Ltd pharmaceutical manufacturer.

We hereby confirm that the Government of Zimbabwe is now a shareholder in CAPS (Pvt) Ltd and Hermes Laboratories (Pvt) Ltd t/a Auto sterile. The relevant company documents such as the CR2 and share certificates are shall be (sic) issued in due course. We kindly request that you issue the compliance letter in favour of CAPS pending the finalisation of the CR2 and share certificates."

On p 671, Mr Majaka attempted to reverse the 2018 letter in the following manner:

"1. The shareholders of CAPS (Private) Ltd are CAPS Pharmaceuticals Trust with 10 710 000 shares (51%) and caps Manufacturing Ltd, formerly CAPS Holdings Ltd with 10 290 000 shares (49%) making a total of 21 000 000 ordinary shares which represents the entire issued share capital of CAPS (Private) Ltd. The Government of Zimbabwe does not hold any share in CAPS Private Limited but in CAPS Manufacturing where it holds 30 877 931 shares representing 68.15% of the entire issued share capital of CAPS Manufacturing Limited."

Mr Moyo's letter of 23 January 2020 attempted to reverse his earlier position of 2016. In this letter, Mr Moyo referred to the CR2 of 10 November 2011. Most of his information was largely based on the events of 2011 and 2012. He also referred to the resolution of 2011 which transferred 11% of the first respondent's shares in the second respondent to the applicant. He also referred to the Deed of Trust of 2011 which was amended in 2012. This created the applicant which was provided with the majority control of the trust fund and trust assets, according to the letter authored by Mr Moyo. The position of Mr Moyo would have been relevant if the arbitration agreement was exclusively in terms of the 2011 agreement.

Thus, in my view, the fourth respondent was not wrong in not giving significant weight to the letter of Mr Moyo of 23 January 2020.

Subsequent attempts by Mr Moyo and Mr Majaka to withdraw their letters of 2016 and 2018 can only be construed as an afterthought. From the record, there is no evidence that suggests that Mr Moyo and Mr Majaka were under duress when they jotted the two letters. Mr Moyo and Mr Majaka are professionals in their respective fields who are expected to be fully aware of the consequences of the letters which they wrote. Further, the amount of time which they took to reverse their earlier positions will also attract adverse inference against their deeds. Under normal circumstances, a reasonable person would have promptly taken practical steps to correct this position.

Mr Majaka's letter of 2018 must have greater significance especially in light of the fact that at the time of penning the 2018 letter, he was the Chief Executive Officer of the second respondent, the company with the shares that are at the centre of the dispute. The only inference that can be drawn from the Chief Executive Officer's letter is that the fourth respondent ought to have, as he rightly did, attached greater weight to such evidence furnished by the head of the second respondent's secretariat who is expected, under all circumstances, to be in touch with all developments of the share transfers. It is clear from the applicant that the same person wore two hats. The first hat for Mr Majaka was that of being the Chief Executive Officer of the second respondent while the second hat was that of being a registered pharmacist. When he was expressing his views putting on the second hat, Mr Majaka chose to contradict himself and purported to reverse his earlier position. The evidence of Mr Moyo who acted as the second respondent's legal practitioner at the material time would be of substantial value. Definitely, the fourth respondent cannot be faulted for attaching greater significance to the two letters of 2016 and 2018 in the context of the Mutanda agreement. In light of this, the fourth respondent did not solely act on the basis of the two letters. Rather, he considered the evidence in totality.

The applicant argued that the fourth respondent did not attach greater significance to the letter of the Reserve Bank of Zimbabwe Governor of 10 February 2020. Before analysing its contents, it is crucial to mention that the letter on the record seems to be incomplete as only one page of the letter is attached to the record. The page which must contain the

signature is missing. This one page, which appears to be the first page of the letter does not support the applicant's case. The relevant portion of the letter is as follows:

> "the sale of shares agreement that you duly signed on 25 June 2016 was for the sale of the entire shareholding in CAPS (Pvt) Ltd by Fred Mutanda Family Trust, directly or indirectly through its investment companies or other entities or individuals (including but not limited to Fredex Financial Services (Pvt) Ltd, FCM Investments (Pvt) Ltd, New Africa Nominees (Pvt) Ltd, IH Nominees (Pvt) Ltd, Frederick Charles Mtandah and Gloostone Investments (Pvt) Ltd. The agreed purchase price was paid in full."

No other interpretation may be made in favour of the Applicant from the Governor's letter. Consequently, I find no merit in the fourth ground.

The applicant, in its fifth ground, challenged the fourth respondent for ignoring what it called "other issues". However, after going through the relevant paragraphs, it is clear the only issue that is emphasised is whether or not the Mutanda agreement was cancelled. It has not been disputed that Mr Mutanda volunteered not to appear before the fourth respondent despite the fact that he was invited to attend such proceedings. In my view, the applicant cannot purport to be a spokesperson of the person who defaulted. A decision was made in his absence and Mr Mutanda is bound by such decision in light of the fact that he wilfully refrained from attending the arbitral proceedings. Any amount of collusion between the applicant and Mr Mutanda cannot be ruled out under such circumstances. Based on this score, the fifth ground is hereby dismissed.

In its sixth ground, the applicant argued that the arbitral award led to the appropriation of the applicant's shares. What is apparent is that the Government of Zimbabwe paid value for shares that it acquired. The evidence was placed before the fourth respondent who concluded that the agreement of sale for the shares was valid. I see no abrogation of property rights under such circumstances. Accordingly, the sixth ground is dismissed for lack of merits.

In its last ground the applicant argued that the arbitral award created a new dispute of share structure. According to the applicant, the parties are no longer aware of their extent of shares in the second respondent. What was before the fourth respondent was whether or not the third respondent had acted lawfully by appointing the board for the second respondent. The fourth respondent may be wrong in not specifying the extent of shares due to each party to the proceedings. However, this does not warrant the setting aside of the arbitral award. It may be an appealable ground but this ground may not lead to the setting aside of the arbitral

award. The evidence placed before the fourth respondent substantiated that the Government of Zimbabwe does have controlling stake in the second respondent. Resultantly, this last ground lacks merits and must be dismissed on that basis.

The law relating to the setting aside of the arbitral award is enshrined in the Model Law. Article 34 of the Model Law provides as follows:

> "(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.
>
> (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) Breach of the rules of natural justice occurred in connection with the making of the award."

GUBBAY CJ, as he then was, in the case of *Zesa* v *Maposa*[3] propounded as follows:

> "An arbitral 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."

In *casu*, the applicant sought to challenge the findings of the fourth respondent on the basis of what it believed to be erroneous findings on questions of facts and law. According to the case of *ZESA* v *Maposa* (*supra*) such wrong findings, where available must not be the basis for the setting aside of the arbitral award. The wrong findings must be contrary to public policy. Further, in the case of *Zimbabwe Educational Scientific Social Cultural Workers Union* v *Welfare Educational Institutions Employers Association*[4], the Supreme Court quoted with approval the case of *ZESA* v *Maposa* (*supra)*, and remarked as follows:

> "What public policy entails has been subject to judicial comment. In *ZESA v Maposa* it was held that:
>
> 'An award would be contrary to public policy if –
>
> (a) It was induced by fraud or corruption;
>
> (b) A breach of natural justice occurred. The substantive effect of an award may also make it contrary to public policy, if, for example, it endorsed the breakup of a marriage or some criminal act.
>
> It was held, further, that 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 recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. 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. 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

[3] 1999 (2) ZLR 452 (S). At 466E

[4] SC11/13.

> 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 consequences apply 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.'"

It is apparent that the threshold of being contrary to public policy is very high. It is evident that the courts restrictively construe the public policy defence in order to bring finality to litigation. In *casu*, the applicant did not raise the allegations of fraud or corruption as some of the grounds for the setting aside of the arbitral award. I am failing to find any breach of principles of natural justice by the fourth respondent. The substantive effect of the arbitral award is not contrary to any public policy, in my view. It is my considered opinion that the arbitration award does not violate any principle of morality. The court is of the view that there is no:

> "palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards".

The effect of the arbitral award is that it brings the dispute between or among the parties to an irrevocable end save in instances where the arbitration law provides for appeal mechanisms. Butler and Finsen "*Arbitration in South Africa; Law & Practice*" at p 271 postulated as follows:

> "The most important legal consequence of a valid final award is that it brings the dispute between the parties to an irrevocable end; the arbitrator's decision is final and there is no appeal to the courts. For better or worse, the parties must live with the award, unless the arbitration agreement provides for a right of appeal to another arbitral tribunal. The issues determined by the arbitrator become *res judicata* and neither party may reopen those issues in a fresh arbitration or court action".

The power of this court is severely restricted when hearing the application of this nature. In *Net One Cellular (Pvt) Ltd* v *Communications and Allied Services Workers Union of Zimbabwe & Anor*[5], CHIDYAUSIKU CJ at p 5 of the cyclostyled judgment stated as follows:

> "A proper reading of Article 34 of the Arbitration Act, in my view, reveals that it prescribes the power of the High Court in relation to the setting aside of arbitration awards. A litigant who wishes to set aside an arbitral award by way of an application to the High Court has to satisfy the stringent requirements of Article 34 of the Arbitration Act."

[5] SC-89-05

Public policy may be violated where there is evidence of palpable inequity, gross irrationality, moral turpitude or resultant grave injustice that can be detected from the award itself. In the case of *OK Zimbabwe Ltd* v *Ardmbare (Pvt) Ltd*[6], the Supreme Court made the following remarks:

> "However, I am unable to discern any palpable inequity, gross irrationality, moral turpitude or resultant grave injustice, either in the procedure adopted by the arbitrator or in his substantive findings on the merits of the matter, so as to warrant the setting aside of the impugned award."

The applicant is required to demonstrate not only inequity, irrationality or injustice. The applicant has to display that arbitral award amounted to palpable inequity, gross irrationality and grave injustice for the award to be contrary to public policy. In my view, there is no palpable inequity, gross irrationality, moral turpitude or resultant grave injustice arising from the proceedings or substantive findings of the fourth respondent. Consequently, the application under case number HC 7138/21 must be dismissed with costs on an ordinary scale. Costs ordinarily follow the outcome.

The third respondent filed the application under case number HC 1320/22 for registration of the arbitral award under the terms specified in the draft order, the content of which has been generated before. In the absence of any other ground that warrants the setting aside of the arbitral award, I see no reason why the award must not be registered. Most of the issues raised by the respondents under case number HC 1320/22 have been addressed before when the court was determining the grounds for the setting aside of the arbitral award. However, there are points *in limine* which the respondents under case number HC 1320/22 raised against the application therein.

The third respondent under case number HC 1320/22 had raised the point *in limine* to the effect that the applicant under case number HC 1320/22 acted in violation of s 114 (4)(b) of the Constitution which confers upon the Attorney-General the function:

> "to represent the Government in civil and constitutional proceedings;"

There is nothing in this provision which prohibits the Attorney-General from instructing the other lawyers for purposes of ensuring that the provisions of s 114(4) (b) of the Constitution is realised. Accordingly, this point *in limine* is meritless and must be dismissed.

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[6] SC55/17.

The first and second respondents under case number 1320/22 raised a point *in limine* to the effect that application for registration of the award can only be done where the applicant has produced the arbitration agreement between or among the parties. This issue was the first issue by the applicant under case number HC 7138/21 as the ground for the setting aside of the award. I have already expressed a determination upon this point before and this point *in limine* is equally dismissed.

The first respondent under case number HC 1320/22 raised a point *in limine* against the registration of the arbitral award. The first respondent argued that the applicant under case number HC 1320/22 introduced new evidence in the answering affidavit contrary to the rules. According to the first respondent, the applicant presented new evidence in terms of the letters annexed to the answering affidavit. The first respondent prayed for expunging of paragraphs 6/12 of the answering affidavit and reference thereto in the Applicant's Heads. The applicant under case number HC 1320/22 in para(s) 6/12 of her answering affidavit had highlighted that Mr Mutanda was in the process of being paid his last payments arising from the remaining two treasury bills. According to the applicant, Mr Mutanda had presented the treasury bills for payment. The applicant attached to the answering affidavit the letter signed by Mr Mutanda part of which is as follows:

> "As per our discussion yesterday, I therefore, formally request you as my bankers to follow up with the Reserve Bank of Zimbabwe with regards to these funds. I have indicated to you that the funds are proceeds of my CAPS transaction with government."

The issue of the outstanding treasury bills has been mentioned before when the applicant who was the third respondent under case number HC 7138/21 was responding to the grounds for the setting aside of the arbitral award. Now that the two cases have been consolidated, this is no longer new evidence. It is part of the record that Mr Mutanda had outstanding treasury bills which were yet to mature at the time when the applicant filed her opposing affidavit as the third respondent under case number HC 7138/21. The evidence under case number HC 7138/21 was stated in the third respondent's opposing affidavit filed on 24 December 2021 well before the filing of the answering affidavit under case number HC 1320/22 which was subsequently filed on 1 April 2022. In the result, the purported new evidence is not new information that was introduced. This was the relevant update of what happened to the outstanding treasury bills. Accordingly, this point *in limine* lacks merits and must be dismissed.

In terms of the draft order, the third respondent also sought that the provisional order issued under HH 775/20 be discharged. I see no reason why the provisional order must remain in force. The provisional order, in my view, has served its purpose. It is no longer necessary in the circumstances.

The third respondent had prayed for costs on an attorney and client scale. There is no basis for such costs. Costs on an ordinary scale are reasonably sufficient under the circumstances. The application must, consequently, be granted with consequential amendments thereto.

Accordingly, it is ordered that:

(a) The application under case number HC 7138/21 be and is hereby dismissed with costs.

(b) The application under case number HC 1320/22 be and is hereby granted.

(c) The arbitral award issued in favour of the applicant against the respondents by Honourable Retired Justice AM Ebrahim on 4 November 2021, as read with certified and authenticated award issued by the Honourable Arbitrator, Retired Justice AM Ebrahim on 30 November 2021 be and is hereby registered as an order of this Honourable Court in terms of Article 35 of the Model Law;

(d) As a consequence of such registration in terms of paragraph 1 above, the Provisional Order granted by the High Court under Judgment number HH 775/20 (Ref case number HC 6683/20) be and is hereby discharged and the first, second and third respondents are ordered to pay the applicant's costs in respect of that application;

(e) The first, second and third respondents are ordered to pay the applicant's costs in respect of this matter on an ordinary scale.

Thompson Stevenson and Associates, applicant's legal practitioners
Mberi Tagwirei and Associates, first respondent's legal practitioners
Tamuka Moyo Attorneys, second respondent's legal practitioners
Kantor and Immerman, third respondent's legal practitioners