FBC HOLDINGS LIMITED
Versus
ZIMBABWE NANTONG INTERNATIONAL (PVT) LTD
And
GEDION MUKOROMBINDO N.O

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 31 October,15 November 2023 and 28 August 2024

Opposed application for setting aside an arbitral award

T. Magwaliba- for applicant
R. Mabwe -for first respondent
No appearance for second respondent

CHILIMBE J

BACKGROUND

[1] After a selective tender process, applicant ("FBC") awarded a US$24,867,340,0228 contract for the construction of its head office in Borrowdale, Harare, to first respondent ("Zimbabwe Nantong"). A principal term of the contract was that payment of the United States Dollar (USD) contract price would be made in the local currency- "ZWL". The contract documentation carried two sets of exchange rate formulas applicable to the USD-ZWL conversion concerned.

[2] These formulas were expressed as follows;-(i) "The Bills of Quantities will be priced in USD and payments will be made in ZWL equivalent" and (ii) "The payment to the contractor will be made in ZWL at the ruling RBZ[1] Auction Rate". These two currency conversion formulas generated irreconcilable interpretation differences between FBC and Zimbabwe Nantong.

[3] FBC contended that the second exchange rate formula represented the legal and correct articulation of the first. Zimbabwe Nantong on the other hand, rejected the second formula -

[1] Reserve Bank of Zimbabwe

calling it an unprocedural variation unilaterally inserted into the contract by FBC. In that respect, Zimbabwe Nantong insisted on interpreting the first formula in a manner that delivered what it considered a flexible and rational exchange rate between the USD and ZWL to guarantee project viability.

[4] FBC in response, dismissed Zimbabwe Nantong`s allegations of impropriety. It also alleged that the exchange rate proposition suggested by Zimbabwe Nantong involved unacceptable parallel market arrangements. The below excerpts exemplify the parties` respective reasoning on the exchange rate; -

> Zimbabwe Nantong; - "The tender documents clearly state "*The Bills of Quantities will be priced in USD and payments will be made in ZWL equivalent.*ZNI [Zimbabwe Nantong] is not part of how FBC raises this contract value, whether it is at the auction system or other means. The currency in the contract price is legal tender in the country. If FBC decided to pay the Contractor in ZWL, the payment must enable the equivalent value to be realised and the contract performed".[2]
>
> FBC; - "It is common cause that in terms of the Exchange Control Directive RV 176/2020 attached hereto marked Annexure "J", the only recognised rate at which the United States Dollar can be exchanged for the Zimbabwe Dollar notwithstanding the value of the Contract Price upon conversion is the average weighted auction rate ("Auction Rate"). The courts of law have confirmed this position."[3]

[5] Because of the differences, Zimbabwe Nantong declined to commence works on site, insisting that the issue of payment be first resolved. This decision prompted FBC to cancel the contract alleging default. Zimbabwe Nantong countered by rejecting the purported cancellation and declared FBC`s conduct as repudiation. The two questions of- (a) what currency conversion formula to apply, and (b) whether there was unilateral variation of contractual terms- formed core of the dispute subsequently referred to second respondent ("the Arbitrator") for resolution. And it is my view that these self-same two main issues should largely guide the disposal of the present application.

[6] In that regard, FBC now seeks the vacation of the Arbitrator's award in terms of Articles 34 (2) (b) (ii) and (5) (b) of the Arbitration Act [Chapter 7:15] ("the Act"). FBC contends

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[2] See page 6 of Zimbabwe Nantong`s Statement of Claim at page 337 of the bundle.
[3] See paragraph 8.2.3 of FBC`s Statement of Defence at page 260 of the bundle.

that the award offends the public policy of Zimbabwe in that the arbitral proceedings were an effrontery to the rules of natural justice.FBC set out the alleged violation of the rules of natural justice under the following heads; -

1) The Arbitrator made findings and conclusions of fact when he was not qualified to assess and determine with authority the validity of the allegations made by the 1st Respondent against Applicant.
2) The Arbitrator failed to apply his mind to the facts and evidence and made conclusions on the facts that are so divorced from the facts and evidence that no reasonable person applying his mind could have arrived at them.
3) The Arbitrator made contradictory findings of fact that no reasonable person applying his mind could have made.
4) The Arbitrator made findings on issues that had not been placed before him.
5) The Arbitrator made an award for damages in the absence of any evidence to support such award.
6) The Arbitrator made an award for damages in foreign currency without sanctioning payment in Zimbabwe Dollars at the prevailing interbank rate.
7) The Arbitrator granted the relief sought by the 1st Respondent in the alternative despite finding in favour of the 1st Respondent in the main.

[7] Zimbabwe Nantong resisted the application. It supported the arbitral award, arguing that it was a sound decision correctly procured through a valid arbitral process. The Arbitrator has elected not to participate in the proceedings and no substantive relief is sought against him.

THE DISPUTE

[8] The fuller details of the dispute are that sometime in 2021, FBC flighted a tender for the construction of a four-storey block to house its head office on stand 41477 in Borrowdale, Harare. Zimbabwe Nantong`s bid, at the noted contract price of US$24,867,340,02, was successful.

[9] The parties proceeded to execute a contract titled “Agreement and Schedule of Conditions Building Contract” in August 2021.I shall return to this contract shortly. But before commencement of works, the parties disagreed on the formula for converting the USD pricing to ZWL. As noted above, Zimbabwe Nantong insisted, in essence for payment in USD or at an exchange rate agreeable to them, whilst FBC proffered payment based on the

RBZ Auction Rate. A series of meetings and exchange of letters followed. These protracted negotiations failed to rescue the contract. I will dwell to some length on these engagements for the following reasons; -

[11] I am mindful of the need to adopt a restricted approach in this Article 34 application based as it is, on considerations of public policy. The applicable authorities are more fully discussed further below. Consequently, my duty is to observe what transpired and resolve the dispute without unduly obtruding. In the same vein, the contestations constituting this application require a fuller understanding of the engagements between the parties as the core issues in this dispute derive from such. Thirdly, in the process of recounting the parties` said extended consultations, certain matters raised in argument in the present application will be disposed of.

[12] The consultations concerned went thus; -after disagreement on the rate as noted above, FBC cancelled the contract by written notice dated 15 October 2021. Zimbabwe Nantong rejected the purported cancellation as invalid. A dispute ensued. In terms of clause 25 of the agreement, the parties referred the dispute for resolution by arbitration on 17 May 2022 before the Arbitrator. The Arbitrator rendered his award on 8 September 2022. In essence FBC was ordered to pay Zimbabwe Nantong an amount of US$967,200 as “indirect loss” for wrongful cancellation of the contract.

ENGAGEMENTS BEFORE, DURING AND AFTER EXECUTION OF THE CONTRACT

[13] I now return to the parties` pre-arbitration consultations. But before doing so, I must mention that the 4 copious volumes constituting the bundle of papers in this application added up to a formidable thousand-plus pages. Granted, the contract bills of quantities comprised a fair chunk of that, but even discounting those, the bundle filed before the court remained unjustifiably large.

[14] As a general observation, voluminous pleadings with duplicitous attachments are discouraged by the rules of court. They are also quite unsuited to the efficiencies envisaged and demanded by the IECMS electronic case management system. This however, becomes but a matter for the Registrar to address, aided by rule 48 as read with rules 18 and 19 of the High Court of Zimbabwe (Commercial Division) Rules SI 123/20 (“the Commercial Court Rules”) and of course, guided by the Judge/s.

[15] Returning to the parties` engagements; - the correspondence and meeting records formed the compendium of annexures A13 to A119 to the founding affidavit. This extended and well-documented parley opened with FBC` letter of intent dated 27 July 2021 communicating the offer to award the contract to Zimbabwe Nantong following tender evaluations. The offer was followed by a site meeting on 30 July 2021.

[16] According to the minutes, this meeting covered introductory and compliance preliminaries. These included COVID 19 protocols, a profile and history and of the Zimbabwe Nantong, the language barrier as well as project designs among others. Noteworthy is the confirmation by FBC that the contract would be drafted and shared with Zimbabwe Nantong for signature. It was also stated during the meeting that the contract would be based on the conditions in the tender. Further, the Architect, Mr. Gura[4] indicated that FBC`s position was that the contract be signed by the parties first and that "...any addendums can then be considered."[5]

[17] On 2 August 2021 by Zimbabwe Nantong formally responded to the tender award offer under cover of a letter from its Managing Director a Mr Ling Jinxiang. In that letter, Mr. Jinxiang drew FBC`s attention to the following, among other matters[6]; -

> "According to the spirit of the meeting held on site on 30 July 2021 participated by the client, the consultants team and us, the contract addendum need (sic) to be deliberated and agreed upon to cover any issues outside the standard contract. In respect of the continual inflation and exchange rate depreciation, there will be many unforeseen and unpredictable situations as time elapses. In order to control the project cost, prevent the budget from derailing because of potential economic losses, treat both contracting parties in a fair manner in the case of loss in value caused by the inflation and guarantee a smooth performance of the contract works, we hereby propose the following to be added as the contract addendum;"

[18] Mr. Jinxiang` s letter proceeded to lay out four further items as proposed additions to the contract. These dealt with (1) Advance Payment, (2) Material Prepurchase, (3) Retention and

[4] The Architect Mr. Gura took the role of project coordinator.
[5] Item 2.15 of the minutes of 30 July 2021.
[6] Although the Arbitrator made a finding of fact in paragraph 10.3.1 of his award that this letter and the other dated 24 August 2021 were not delivered, such ruling constitutes an inexplicable conclusion unsupportable by the facts. First, there is ample evidence that the letters came to FBC`s attention and secondly, several other letters conveying the same message were written. In that respect, I would overrule the Arbitrator`s factual finding.

(4) Equitable Compensation. As regards the last, the letter stated set out the following proposals and currency conversion formula; -

> "4. Equitable Compensation to Maintain Value. The currency of this contract will be United States dollar and payment will be made in ZWL via RTGS at the prevailing interbank rate. As the time elapses and the gap between interbank rate and parallel market rate increases due to inflation and the exchange control regulations, the Client will compensate the contractor the loss of value arising thereof in respect of the Contractor`s P&Gs and Measured Works so as to maintain value." [underlined for emphasis].
>
> "Below is the formula: Pn= (PGn + QTn) x [(Lo +(b ÷a) – 1] = (PGn +QTn) x (Lo/Ln÷1.5046-1)"

[19] We need not interrogate the detailed import of the above formula. But it is essential to note that components; - "a"; "b"; "Ln" and "Lo" of that formula variously represented different interbank and parallel ("black") market currency exchange rate propositions between the USD and ZWL. That aside, it is common cause that the "Agreement and Schedule of Conditions Building Contract" was signed between 16 and 20 August 2021.Zimbabwe Nantong signed the document first before sending same over to FBC who returned the contractor`s copy after signature.

[20] Zimbabwe Nantong received this signed copy under cover of a letter dated 20 August 2021.On 25 August 2021, the parties and project consultants held a meeting at the site. It was recorded in the meeting minutes that the "Building contract" had been signed by both parties. Clause 5, the contract came in four parts being; -

a) This (main) Agreement and Schedule of Conditions of Building Contract
b) Signed Prints of Drawings
c) Signed Specifications and,
d) Signed Priced Bills of Quantities and Form of Tender

[21] The contract period was confirmed as spanning the period 23 August 2021, being the date of commencement of works, and 30 June 2023 as the handover date. The last item recorded in the meeting minutes went thus; -

> "Nantong advised the meeting that they would write to the architect on their proposals with regards to fixing the contract price in USD.Mr Ngoro advised the contractor that the team was there to administer the contract however if the contractor has proposals these can be made but the client has the right to either accept or decline." [again, underlined for emphasis]

In clause 2 of this agreement lies one of the two kernels to the dispute. The clause provided as follows;

> "The Employer will pay the Contractor the sum of TWENTY-FOUR MILLION EIGHT HUNDRED AND SIXTY-SEVEN THOUSAND THREE HUNDRED FORTY UNITED STATES DOLLARS AND TWO CENTS US ($24,867,340,02) (hereinafter referred to as "the Contract Sum") or other sum as shall become payable hereunder at the times and in the manner specified in the said Conditions. THE PAYMENT TO THE CONTRACTOR WILL BE MADE IN ZWL AT THE RULING RBZ AUCTION RATE."

[22] The part in the above excerpt appearing in lower-case was printed, whilst the phraseology in upper-case was inserted on dotted lines in handwriting. On 26 August 2021, Zimbabwe Nantong addressed a letter quite similar to its earlier one of 2 August 2021. In the latter communication, Zimbabwe Nantong proffered further value-preservation proposals including; -

1. Fixed Price. In respect of the Contractor`s P&Gs[7] and Measured Works, we are offering 10% discount on such sums and our mutual client is expected to pay us in United States dollar. For avoidance of doubt, the estimated Builder`s work amount is USD11,331,707,99 and after discount it will be USD 10,200,000,00, excluding the contingencies. We are going to fix the contract rates and only claim for adjustments of the contract amount that relate to measurements and variations to do with the Builder`s work. We are also going to renounce claim for escalations on material and labour as well as claim for value preserving compensation."

2. Alternatively, we will renounce claim for value-preserving compensation of the Contractor`s P&Gs and Measured Works. Forty percent (40%) of such sums, that

[7] "Preliminary & General" being Section 4 of the Tender Documents or Part (d) of the contract documentation see further discussion in paragraphs 81-82.

is a total of USD4,532,638,20 is expected to be paid in United States dollar and the remaining sixty percent (60%) can be paid locally in ZWL.Escalations on material and labour shall be paid for and so shall the adjustments of the contract amount that related to measurements and variations to do with Builder`s work." [underlined for emphasis]

[23] FBC did not accede to these proposals. Before the Arbitrator and in the present application, FBC maintained that the proposals tendered by Zimbabwe Nantong were untenable invitations to dabble in the black market, something which it could not do as a "bank"[8]. FBC also considered the proposals as attempts by Zimbabwe Nantong to evade the pricing formula fixed by, and forming the terms of the contract. Apart from that, the letter did not advert to clause 2 of the contract. Further letters dated 3 and 7 September 2021 persisted with the need for the parties to execute an addendum incorporating the pricing proposals.

[24] None of these letters referred to the insertion in clause 2. The question of clause 2`s wording was finally raised during the meeting of 9 September 2021 where the Zimbabwe Nantong indicated that the pricing in the contract differed from that in the Bills of Quantities. The issue was tabled as a discrepancy rather than complaint of an irregularity. On in a letter dated 13 September 2021 was the question of unilateral insertion of clause 2 formally raised by Zimbabwe Nantong.

[25] On 22 September 2021 the parties met "To discuss "mutual termination". This event was followed by FBC issuing a formal notification of what it considered a default in terms of clause 23 (a) (ii). On 24 September 2021, the Architect issued a similar notice to the effect that Zimbabwe Nantong`s failure to mobilise and commence works on site constituted a breach in terms of clause 23 (a) (ii). Zimbabwe Nantong protested strongly in a response dated 5 October 2021 in which it placed the following among other matters on record; -

i) "You will recall from our past correspondences and interractions that we have raised our concerns and sentiments regarding material aspects of the parties` performance of the contract. We have been engaging yourself and FBC bank on these concerns and this is an ongoing exercise, to state that we are in default in the light of this ongoing process of negotiation which you are part of and privy

[8] From its papers, applicant is not a bank but a bank holding company

to is a misstatement and we respectfully would like to place this sentiment on record."

ii) "Due to our macro-economic environment, we sought *and obtained* certain assurances from yourself and the Client regarding the manner in which the project payments would be made."

iii) "A contract award intent meeting was held at the site in the morning of 30 July 2021 with the Client and relevant Consultants in attendance, we suggested that an addendum shall be put in place to cover issues that are outside the standard contract. Although the minutes of Main Contractor`s Introduction did not fully capture our statements on additional clauses, it rightly minuted that the contract was going to be based on the conditions of tender and any addendum can then be considered. As a matter of fact, we sent you on 2 August 2021 our draft for the additional clauses for onward transmission to the Quantity Surveyor. You replied that the addendum issue can be negotiated with Client after signing of the contract. On the morning of 24 August 2021 you held a meeting with the QS and you that we can first negotiate with Client for payment in US dollar and if the Client cannot pay in US dollar, the parties would devise lawful means to carry out the contract whilst maintaining the contractor`s value. It was on the strength of these assurances that we collected the standard contract from the Consultants, signed it and gave it back to your team for onward transmission to the Client for signing. On 24 August 2021 the consultants returned one copy of the contract bearing Client`s signature to us"

iv) "Much to our surprise, a statement saying *The payment to the Contractor will be made in ZWL at the ruling RBZ auction rate* was added after Clause 2 under the header Contract Sum on page 2 of the contract. This statement was not originally part of the document we signed and therefore does not form part of the contract. It was, for all intents and purposes, a unilateral addition. This forms the nub of the ongoing negotiations between the parties." [underlined and italicised for emphasis and itemised for ease of reference];

[26]. Meanwhile, the Project Architect Mr. Gura quizzed Mr. Mukuyu the Quantity Surveyor to explain Zimbabwe Nantong`s allegation that clause 2 had been unilaterally inserted into the contract. Mr Mukuyu, who had been responsible for compiling the documentation (as agent of FBC) spiritedly disputed any such malfeasance in a letter dated 13 October 2021.

[27] FBC still remained unpersuaded by the further protestations in Zimbabwe Nantong`s letter of 5 October 2021.On 15 October 2021, it issued the formal termination of the contract. Zimbabwe Nantong meanwhile raised the stakes and demanded payment either in USD or at an exchange rate acceptable to them (see letter dated 3 November 2021) stating that; -

> "The simple facts are that you accepted and signed a contract sum of USD24,867,340.02 (Twenty-Four Million Eight Hundred and Sixty-Seven Thousand Three Hundred Forty United States Dollars and Two Cents).The contractor as he is doing the works will need to be paid in the currency of the contract sum, which is legal tender in the country .If you have decided to pay the Contractor in any other currency apart from the accepted tender and contract sum, the conversion thereto SHOULD NOT make it impossible for us to perform our side of the contract." [Underlined for emphasis].

[28] By a further letter dated 15 November 2021, FBC vehemently denied the alleged dishonest and unilateral variation of the contract. It maintained that this condition was agreed on between the parties stating as follows;

> "For the record, we take exception to your insinuations that we might have interfered with the contract ex post facto by inserting a provision which was hitherto not in the terms and conditions of the contract.
>
> We note, however, that this claim is just (sic) red herring in view of your consistent wrong assertions that payment of the contract price could be made other than in terms of the laws of Zimbabwe. This dubious allegation is a feeble attempt to give the impression that we could possibly have agreed to enter into an illegal arrangement with you for payment to be made outside the applicable legal parameters"

REFERRAL TO ARBITRATION

[29] And so after about five months of talking, negotiations finally broke down in November 2021.They broke down because each party remained obdurate to the other`s proposed method of payment. As stated, the parties then resorted to arbitration. The arbitration agreement was set out in clause 25 of the main agreement and conditions. Clause 25 is too lengthy to

reproduce in full here. But it materially provided that any dispute or difference regarding "… the construction of the Contract or as to any matter or thing arising thereunder" was to be referred to arbitration for resolution, and that; -

> "The Arbitrator shall have the power to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him …"

[30] Despite a diligent search, the bundle did not yield the specific letter or documenting fixing the Arbitrator`s formal appointment. But by letter dated 4 May 2022, the Arbitrator accepted mandate and proceeded therein, to map out the pre-arbitration process. It is common cause that the Arbitrator was furnished with the four-part contract (agreement and conditions, signed prints of drawings, signed bills of quantities, and tender documents) and the same bundle of correspondence, and minutes of meetings referred to in paragraph 11 above.

[31] The bundle placed before the Arbitrator was further updated and ventilated. A flurry of pre-arbitration correspondence was exchanged between the Arbitrator on one hand, and FBC and Zimbabwe Nantong`s legal practitioners (being Dube Manikai and Hwacha- "DMH" and Rusinahama-Rabvukwa and Associates- "RRA" respectively) on the other. I list part of the correspondence; -

1) 2 June 2022 DMH to Arbitrator
2) 4 July 2022 Arbitrator to RRA
3) 4 July 2022 Arbitrator to DMH
4) 15 July 2022 Arbitrator to RRA
5) 20 July 2022 DMH to Arbitrator
6) 21 July 2022 RRA to Arbitrator
7) 22 July 2022 Arbitrator to RRA
8) 22 July 2022 Arbitrator to RRA
9) 22 July 2022 Arbitrator to DMH
10) 27 July 2022 DMH to Arbitrator
11) 28 July 28 Arbitrator to DMH
12) 1 August 2022 RRA to Arbitrator
13) 4 August 2022 Arbitrator to RRA
14) 19 August 2022 DMH to Arbitrator

[32] In the letter dated 27 July 2022 addressed by DMH to the Arbitrator, FBC communicated a request to the Arbitrator for an oral hearing. The Arbitrator acknowledged the request by a response dated 28 July 2022, but deferred a ruling on it. The answer to that request is not on record but the fact is that the oral hearing was eventually not convened. FBC criticised the

Arbitrator, in the present application, alleging that his refusal to facilitate an oral hearing constituted a violation of Article 24 (1) of the Act.

[33] I may promptly dispense of this issue and overrule it as non-sustainable. This for reason that the Arbitrator was within the province of his mandate to decline an oral hearing. In his acceptance of appointment letter, he had indicated that *"The arbitration shall be by way of documents, however oral presentations may be requested by the Arbitrator in the event that any clarification is requires*.". The further legal authority for this conclusion derives from *Walenn Holdings v Pty (Ltd v Lloyd & Anor* 1996 (2) ZLR (H) 383 where the court held that parties are obliged to adhere, in the absence of lawful or consensual/waiver to amend the agreed arbitral procedure.

THE ISSUES FLAGGED FOR ARBITRATION

[34] I now come to the submissions made before the Arbitrator. Zimbabwe Nantong (as "Claimant") and FBC (as "Respondent") filed each their statement of claim and response respectively. The four (4) issues listed below were framed for resolution, with Zimbabwe Nantong crafting the first two, and FBC the last two. The issues being; -

1) Whether FBC Holdings Limited unilaterally varied the contract and effect of such unilateral variation.
2) Whether or not the contract between the parties was cancelled and if so, whether Claimant is entitled to compensation.
3) Whether or not the contract price was payable in Zimbabwean dollars at the mid Auction rate of the Reserve Bank of Zimbabwe applicable from time to time, or at the parallel market rate.
4) Whether or not the Contractor breached the Building Contract by failing to commence construction at the Premises on 31 August 2021.

[35] I may observe at this juncture that the above four (4) issues can in fact be further condensed into two main pillars. Issues 1 and 3 focus on the applicable contract pricing currency, whilst issues 2 and 4 deal with breach and termination of the contract. Based on the same issues, Zimbabwe Nantong sought the following relief ;-(i) that FBC had unilaterally varied the contract by inserting thereto, the currency clause, (ii) that its cancellation of the contract was invalid and that (iii) it be held to the terms of the contract. In the alternative,

Zimbabwe Nantong claimed damages for breach of contract calculated at 10% of the contract price of US$24,867,340,02 plus ancillary direct expenses.

[36] FBC, in response, attacked the competency of Zimbabwe Nantong`s prayer before the Arbitrator. It claimed (i) dismissal of Zimbabwe Nantong`s claim, (ii) confirmation of cancellation of the contract and (iii) legal costs. The Arbitrator paraphrased all these issues in paragraph 3.0 of his award under the section titled "Synopsis of the Dispute".

[37] Under paragraph 5.0 headed "Issues Submitted for Determination by Arbitration Process", the Arbitrator further restated these same issues. He noted, in that regard, that Zimbabwe Nantong had raised unilateral variation, validity of cancellation and specific performance. Similarly, the Arbitrator recorded, in the next paragraph 5.1, that FBC had flagged seven (7) issues in which it; -

i) Attacked the relief sought as incompetent at law, denied having unilaterally varied the contract and put Zimbabwe Nantong to the strict proof thereof,
ii) Insisted that cancellation of the contract was in according to the terms of the contract,
iii) Objected to what it perceived as a request ultimately driving the arbitral tribunal to create a contract for the parties,
iv) Resisted what it believed what an attempt to force contract payment terms favourable to Zimbabwe Nantong,
v) Dismissed the prayer for damages as "irregular and unsustainable" and that it had "no basis at law".

[38] There was a further rendition of the same issues under paragraph 13.0 titled "Arbitrator`s Determinations". An examination of the various descriptions of the issues for arbitration as well as relief prayed for under paragraphs 5.0, 5.1 and 13.0 of the award points to four persuasive conclusions that (i) the Arbitrator was clear on the mandate he was seized with, that (ii) as a corollary, the parties had circumscribed the matters they needed the Arbitrator to address, (iii) that the nature of the dispute and relief sought required interpreting the parties` respective rights and obligations under the contract, and finally that (iv) the dispute devolved to legal issues.

THE ARBITRAL AWARD

[39] The Arbitrator rendered a 36-page award in which he set out his reasoning and final determination of the parties` respective prayers. I must comment that the award is properly indexed and sequentially paragraphed in a systematic if not meticulously disciplined format. The award captured matters ranging from preliminaries such as pre-arbitral consultations, submissions and documentation, correspondence exchanged, contracts and appendices. It then proceeded to address the issues under contest. In conclusion, the Arbitrator found FBC to have breached the contract between the parties and ordered, in paragraph 16 of the award dated 8 September 2022 as follows; -

> "16.01 Relief sought by the Claimant is presented as follows: -
>
> Compensation for direct cost of USD5,200,00 in respect of erection of a temporary guard house and indirect loss being 10% of the contract sum of US$24,867,340.02.
>
> The above translates to: -
>
> 'Indirect loss-10% of USD24,867,340.02 =USD2,486,734.00
> Plus 'Direct Loss' Cabin erection on site = USD 5,500.00
> **Total** **USD2,491,934,00**
>
> 16.02 The Arbitrator has read, considered and carefully taken note of the written statements and back up information of the cases as submitted by the Claimant and the Respondent.
>
> The Arbitrator awards and directs that, in this arbitration; -
>
> The Respondent shall within 30 days after the parties have taken up this award, pay to the Claimant USD967,000.00 for 'Indirect Loss plus USD200,00 for log cabin (sic) TOTAL SUM OF USD967,200.00
> Computation of the above amount is on Appendix pages 'AA' and AA2 attached hereto."

THE HEADS OF ARGUMENT

[40] As stated earlier, FBC was dissatisfied with the outcome. Its six (6) grounds of protest against the award were further elaborated in the founding and answering affidavits, as well as the heads of argument. In each instance, the factual and legal contestations were marked with considerable detail. I will revert to the fuller substance of the arguments below.

[41] But this wealth of detail, especially in the heads of argument, drew strong protest from Zimbabwe Nantong that FBC`s heads were insufferably prolix. Reference was made in that

regard, to the remarks of DUBE J (as she then was) in *The Milton Gardens Association v Mupanguri-Mupanguri & 4 Ors* HH 94-16 where she observed as follows at page 5; -

> "I must make observations concerning the heads of argument filed on behalf of the applicants in this matter. These stretch up to 127 pages. Heads of argument are meant to be simply that. The purpose of heads of argument is to set out briefly the main heads of argument and are by no means a platform to set out fully one's arguments. Heads of argument are required to be drawn up in a clear and concise manner. It is inappropriate to file voluminous papers and expect the other party as well the court to plough through such a voluminous pile of papers and still be able to make sense out of them. What these heads contain is basically every fact and argument concerning this matter. This is most inappropriate. In fact, this is an abuse of court process. This style of drafting heads of argument and conduct ought to be discouraged. The eventual consequence of such conduct results in delays in delivery of the judgment concerned. Litigants who bombard the court with voluminous papers and information deserve to be penalized even if they are eventually successful in the litigation. This sort of conduct deserves censure by this courts. Worse still, where they lose the application, they deserve to be mulcted with an order of costs on a punitive scale. I find support for this proposition in the case of *Banda* v *Pitluk* 1993 (2) ZR 60 @ 64 (H) where the court held that a litigant who places a lot of matter in a 449 application cannot get their costs even if they are successful."[9]

[42] By way of comment, I note that this application was filed on 10 November 2022 as an HC reference in the General Division under the High Court Rules SI 202/21.Unlike the General Division Rules, the rule 36 (7) of the Commercial Court Rules require heads of argument to comply with the following standards; -

> (7) Heads of argument filed before the court shall comply with all of the following requirements—
>
> (a) be no more than ten pages long, and;

[9] See also *Zimbabwe Homeless Peoples Federation & Ors v Minister of Local Government & National Housing* SC 78-21

(b) not contain any factual averments or repetition of the averments made in the affidavits filed of record, and;

(c) be restricted to the presentation of a short summary of the party's case on the facts and at law accompanied by the correct citation of the relevant pages of the record, case law or other legal writings relied on including the specific page and section references relied upon.

[43] FBC`s heads of argument are 30 pages long-three times longer than limit set in the Commercial Court Rules. The matter was however, not persisted with on behalf of Zimbabwe Nantong during oral submissions. Nor was the complaint escalated as a specific issue on breach of rules which invited the court to ruling. Other than drawing attention to the requirements of rule 36 (7) on heads of argument as I have already done, I am inclined to let the matter lie.

THE LAW

[44] FBC`s attacks on the arbitral award and process derive from Article 34 (1) (b) (ii) and Article 34 (5) which I set out below; -

(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)……

(b) the *High Court* finds, that—
the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe;
(i)……
(ii)the award is in conflict with the public policy of Zimbabwe.
(3) …….
(4) ……
(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) …….
(b) a breach of the rules of natural justice occurred in connection with the making of the award.

[45] The starting point in this analysis is a seemingly innocuous provision in the Arbitration Act. Article 5 provides that "*In matters governed by this Model Law, no court shall intervene except where so provided in this Model Law."* In that respect, the law is clear on both the standard, as well as test to apply in examining whether or not the Arbitrator failed to resolve the issues placed before him according to established principles of natural justice[10]. More particularly, since it has been contended that the Arbitrator failed to apply the correct substantive and procedural principles of law and that such failure went beyond "mere faultiness".

[46] The parties before me- in the papers, written and oral submissions were alive as to the nature of the present proceedings; - namely to establish if the Arbitrator erred at all, and if he did, the degree of any such faultiness. I may mention too, that respective counsel did adequate justice to the task at hand and drew my attention to the relevant law. Both Mr *Magwaliba* for FBC, and Ms *Mabwe* for Zimbabwe Nantong, relied on the Supreme Court decision of *ZESA v Maposa* 1999 (2) ZLR 452 (S) where it held at 464 D that; -

> "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.
>
> The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."

[47] The above guidance of GUBBAY CJ in *ZESA v Maposa* has been consistently followed in this jurisdiction. To the extent that countless elaborations have been further issued by the Superior Courts. The guidance confirms the courts` commitment to the supporting the arbitral process and purpose as a speedy, convenient and

[10] In *Biti & Anor v Minister of Justice & Anor* SC 10-02 cited at page 6 with approval the remarks of TUCKER LJ in *Russell v Duke of Norfolk & Ors* [1949] 1 All ER 109 (CA) at 188E, when he said: 'The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

voluntary alternative dispute resolution facility. GARWE JA (as he then was) stated as follows in *Provincial Superior, Jesuit Province of Zimbabwe v Kamoto & Ors* 2007 (2) ZLR 8 (S) at 13 C-D held; -

> "*ZESA v Maposa* supra is authority for the proposition 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, a court would not be justified in setting aside the award. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far-reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same 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 above."

[48] As such the term "*… a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards*" is not but a pejorative slur aimed at bad arbitral proceedings. It is as much a reminder directed at those who, after willingly submitting to the jurisdiction of an arbitral tribunal, subsequently turn hostile to the process. A reminder that an invidiously arduous task awaits their quest to upset arbitral process on the basis that it offends public policy.

[49] This is because, public policy will be restrictively applied by the courts and so an applicant must, so to speak, thrust its sharpest spear into the task in seeking to meet the stringent requirements under Article 34 of the Act. That party must place sufficient facts to dissuade the court from registering an award because to do so would amount to making justice turn on its head to quote MAKARAU J (as she then was) `s famous words in *Pamire & Ors* v *Dumbutshena N O & Anor* 2001 (1) 123 (H).

[50] Which brings in the next question; - if not by an appeal or review procedure, how then shall the court seized with an Article 34 application conduct the examination of whether or not the arbitral award met required standard? Mr. *Magwaliba* submitted that the court cannot, in essence, avoid the facilities employed by the appeal court in considering an impugned arbitral award. But what it must not do is to merely limit itself, as the appellate court will, to the determination of whether or not there was misdirection in the lower tribunal. The court

seized with an Article 34 application must go further and apply the standard defined in *ZESA v Maposa* and similar authorities.

[51] This concept finds support in the approach commonly taken (see *Husaihwevhu & 2 Ors v UZ- USF Collaborative Research Programme* HH 237-10, Delta *Operations* (*Pvt*) *Ltd* v *Origen Corporation* (*Pvt*) *Ltd).* More specifically, MALABA DCJ (as he then was) addressed this point by articulating the concept of a "restricted appeal" in *Alliance Insurance v Imperial Plastics (Pvt) Limited & Anor* SC 30/17 [at page 5]; -

> "The courts therefore cannot interfere with the arbitral award except on the grounds outlined in Article 34(2). An application brought before the Court under this provision is, in essence, *a restricted appeal* and the applicant should prove the grounds set out in order to succeed in its application." [underlined and italicised for emphasis.

ARGUMENTS BEFORE THE COURT

[52] In the main, Mr. *Magwaliba* identified the various aspects of the arbitral award which in his view, demonstrated the palpably flawed reasoning of the Arbitrator. Counsel submitted that the award reflected the confusion, contradiction, and inexplicable conclusions that characterised the proceedings in violation of the principles of natural justice. In particular, the Arbitrator ignored matters directed to him for a decision and instead, proceeded to deal with those matters not so placed before him. I will not tick through each of these for the reason that it is not necessary to do so given the principles that must guide the present inquiry.

[53] Counsel submitted that at the base of it all, placed before the Arbitrator was a contract whose interpretation of the parties` respective rights demanded application of the relevant principles of contract law. The technical engineering and building construction matters in the contract did not obviate the need to resort to legal principles to resolve the dispute. Nor did the special capabilities and qualification of the Arbitrator absolve him from that obligation. Instead, as an expert arbiter, he was expected to bring and infuse into the law, his expertise so as to help unravel the legal principles necessary to address the dispute.

[54] Continuing, Mr *Magwaliba* attacked the Arbitrator's finding - that FBC unilaterally varied the contract, - as a flawed conclusion not backed by fact. Additionally, counsel also drew attention, to the Arbitrator`s finding, in paragraph 13.02.32-that FBC ought to have

acceded to Zimbabwe Nantong`s request for an addendum to deal with the dispute over exchange rates. Counsel submitted that by doing so, the Arbitrator purported to create a contract for the parties.

[55] Regarding the damages awarded to Zimbabwe Nantong by the Arbitrator, Mr. *Magwaliba* submitted that such award was not supported by any evidence in the form of receipts or proof of expenditure. Nor was the submission that it drew from the contract supportable in the sense that the amount of awarded by the Arbitrator was not 10% of the contract price.

[56] Ms *Mabwe* in response, commenced by urging the court to dismiss the application for lack of cause of action. The grounds of complaint show that FBC ought to have sought a vacation of the award in terms of Article 34 (2) (b) (iii) of the Act. This provision related to those arbitral tribunals that wrongly dealt with matters not placed before them or outside the parties` contemplation. Further, counsel reiterated the established position that public policy was a restricted defence whose onerous requirements had not been met by FBC.

[57] Counsel also argued that FBC essentially attacked, in the present application, the reasoning rather the final determination of the Arbitrator. On the authority of *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (S), counsel submitted that such approach was incorrect. In addition, Ms *Mabwe* contended that FBC`s challenge to the Arbitrator`s qualifications and methodology during the arbitral proceedings were equally misplaced. Clause 25 of the contract set out the arbitration agreement in sufficiently wide terms as to grant the Arbitrator unfettered scope in his mandate.

[58] On that point as well, the Arbitrator was a special adjudicator whose selection had been based on his technical skills and background as a quantity surveyor. In that respect his capabilities suited the “technical nuances” issuing from the parties` construction contract. The Arbitrator had applied his mind properly to the matters before him, and set out such reasoning comprehensively in the award. His finding that FBC had unilaterally varied the contract by inserting a currency conversion not agreed on by the parties-could not be faulted, so submitted counsel.

[59] Similarly, counsel dismissed FBC`s claim that Zimbabwe Nantong had breached the contract by failing to mobilise on the set date. Counsel drew attention to the requirement [page 4-21 of Bill No.1] for Zimbabwe Nantong, in conjunction with the Architect, to compile the Critical Path Project Schedule or programme of works prior to commencement. This programme could not be crafted prior to conclusion of the addendum setting out additional terms resolving payment discrepancies. In that respect, FBC`s cancellation, against that handicap, amounted to wrongful repudiation which the Arbitrator recognised and corrected by an award of damages.

[60] The damages subsequently awarded by the Arbitrator were preceded by a reasoned assessment based on formulas set out in the Appendix found on page 15 of the Agreement and Schedule of Conditions of Building Contract. Counsel also justified the US$967,200.00 monetary award on the basis that the Supreme Court decision of *Breastplate Service (Pvt) Ltd v Cambria Africa PLC* SC 66-20 permitted parties to structure payment arrangements based on the USD.

[61] Ms *Mabwe* argued that the averment by FBC`s counsel that the Arbitrator professed incapacity in the disclaimer ignored the true context in which such statement was made. Overally, Ms *Mabwe* submitted that an objective assessment of the award betrayed no breach of the rules of natural and thus public policy. Counsel also reiterated that the Arbitrator had taken into account the correspondence between the parties which showed a clear case of waiver and novation.

[62] In response, Mr *Magwaliba* took the view that the application was correctly mounted and properly before the court. A proper reading of Article 34 (5) showed that it was sufficiently wide to scope in the very provisions of Article 34 (2) (b) (iii). On the argument that *Chidyausiku v Nyakabambo* exposed the present application as improper, Mr. *Magwaliba* distinguished that decision as one concerned with appeals rather than arbitral tribunals. Similarly, counsel submitted that *Breastplate Service (Pvt) Ltd v Cambria Africa PLC* (supra) was inapplicable as it dealt with foreign obligations.

[63] Mr. *Magwaliba* further submitted that the parties` extensive consultations amounted to nothing more than protracted negotiations at the instance or persistence of Zimbabwe

Nantong. At no stage during these consultations, did FBC ever acquiesce to Zimbabwe Nantong`s proposals. So the position argued by counsel for Zimbabwe Nantong that FBC waived its rights and novated the contract were without substance. Counsel urged the court to recognise that between the parties was a validly executed and binding contract whose terms were clear. Zimbabwe Nantong breached the terms thereof, and FBC was within its right to cancel the contract as it eventually did.

ANALYSIS OF THE ARGUMENTS

No valid cause of action

[64] I will examine the above arguments together with the rest of the contestations and issues relevant to the conclusion of this matter. I start with the validity of cause of action and competency of the present application. I find that the applicant FBC has a demonstrable causa under Article 34 on the grounds raised. In doing so I reiterate the guidance in *Alliance Insurance v Imperial Plastics (Pvt) Limited & Anor* (supra) that present application must take the form of a restricted appeal. On that basis, FBC is within right to attack both the reasons as well as determination of the Arbitrator. I am also in agreement with Mr. *Magwaliba* that the considerations of public policy are wide enough to address the matters provided for in Article 34 (2) (b) (iii).

[65] Further, in in *Rio Zim Limited & Anor v Maranatha Ferrochrome (Pvt) Ltd & Anor* SC 30-22, the court held that a determination resolutive of the dispute brought by the parties was an award. And in terms of Article 34, a party can have recourse against an award. In any event, the Supreme Court`s clarification of the point in *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* SC 43-13 settles the matter where it held thus at page 12; -

> "It seems to me that the principle that comes out in the case of *Chidyausiku v Nyakabambo* is not always fully appreciated, even amongst lawyers. That case is not authority for the proposition that in an appeal one should not attack the reasons for the order. What that case says is that an appeal should be directed at the order and not simply the reasons. Quite clearly if the intention is not to have the order

> interfered with in any way, then no purpose would be achieved by attacking the reasons thereof. It goes without saying that in order to attack the order made one must attack the reasoning process leading to the order. In other words in order to attack the order made, one must attack the findings made that justify the order made."

The issues before the Arbitrator

[66] I also deal with the averment that FBC is precluded from attacking the qualifications and methodology of the Arbitrator and the proceedings he conducted because of the ambit of clause 25-the arbitral agreement. This conclusion cannot be correct. To begin with, the arbitration agreement clause 25 does not in fact extend limitless arbitral authority. Its purview is certainly broad, but definitely not limitless. Secondly, clause 25 does in fact carry conditions and limitations in its very wording being "….to determine all matters in dispute which shall be submitted to him". This conclusion also draws support from the guidance in Walenn *Construction v Lloyd & Anor* (supra).

[67] Thirdly, I did refer in the aforegoing paragraphs, to the spate of pre-arbitration communication exchanged between the Arbitrator and the parties. These letters had the effect of narrowing down the matters for determination. And beyond that, were the parties` submissions and Arbitrator`s summaries of matters to be resolved which clearly show that the proceedings were not meant to be open ended. The Arbitrator`s "unfettered authority" was definitively trammelled by the ambit described by issues placed before him to resolve.

[68] On that basis, the proceedings before him should be evaluated against such mandate to establish the complaints of violation of rules of natural justice made under the present application. In the same vein, the argument by Ms *Mabwe* suggesting that the technical nature of the underlying contract and the similar expertise of the Arbitrator buttressed the Arbitrator`s unfettered scope to address the dispute, cannot sustain. Mr. *Magwaliba*` s observations on that aspect were not only correct but supported by the very nature of the issues flagged by the parties for resolution.

[69] It must be remembered that the Arbitrator was seized with the duty to interpret each party`s rights under the contract. That task required, as stated by FBC`s counsel, deployment of legal principles ahead of the Arbitrator`s skills as a quantity surveyor. The award itself shows that the Arbitrator did in the main, grapple with contractual terms, their interpretation,

performance, breach as well as damages. In all those endeavours, it was the legal rather than engineering or technical analysis that ran to the fore. Even the computations preceding award of damages were but a contractual interpretation of the appendix to Bill No.1.

[70] Again on the same point, I do not believe that Mr. *Magwaliba'* s criticism of the Arbitrator`s omission of the question of damages as an issue to be determined, becomes material. I did dwell above, on the various perspectives from which the issues were framed and reframed by both the parties and the Arbitrator. Essentially, those issues oscillated around the alleged unilateral variation of the contract as well as consequences thereof. Which consequences included interpretation of the applicable exchange rate as well as breach of contract and resultant damages.

The Arbitrator`s "Disclaimer".

[71] I now come to the disclaimer. By right, any party appearing before an arbitral tribunal would at best be curious, and at worst- possibly alarmed by the below quoted statement in paragraph 13.02.34 of the award. Especially coming as it did, after resolution of a core aspect of the dispute; -

> "Disclaimer-The Arbitrator is a Quantity Surveyor by profession and is therefore not qualified to assess and determine with authority on the validity of the above allegation. It is for that reason that the Arbitrator; assessed the issue strictly in the context of the differences between the wording in the Agreement as well as the absence of an addendum No.2 and the implications thereof-because that is palpable"

[72] I will avoid being sidetracked into the subjective intricacies necessary to establish the exact meaning of that statement. What is relevant however, is an objective examination of the Arbitrator`s decision on the issue immediately preceding this disclaimer. The issue in question being the alleged unilateral variation of the contract by FBC. This being an issue is central to the resolution of the present application. In fact to accentuate the materiality of this point, Mr. Ling Jinxiang correctly termed is as *the nub of the matter"*. I now proceed to the said nub.

The nub of the matter-unilateral variation of contract

[73] The Arbitrator resolved the question of whether or not FBC unilaterally varied the contract in the following terms; -first, he recognised that the contract documents applied

different wording to describe the exchange rate formulae governing payment provisions. Next, he concluded that these differences in words amounted to differences in meaning. He then proceeded to determine that in the face of such discrepancies, the wording in part (d) of the contract held precedence ahead of the rest. Based on the existence of such differences, the Arbitrator then ruled that FBC had inserted clause 2 into the contract behind Zimbabwe Nantong`s back.

[74] By carrying out a purely by a desktop analysis of the contractual terms, the Arbitrator was able to resolve the hotly contested allegation by Zimbabwe Nantong that when they [Zimbabwe Nantong] signed the contract, the wording in clause 2 was not there. And that the wording was dishonestly inserted into the contract by FBC after Zimbabwe Nantong had signed it. This factual finding, as argued by Mr. Magwaliba is difficult to understand. The Project Quantity Surveyor Mr. Mukuyu, who was responsible for compiling the documents, dismissed any such allegations and in the most vehement of terms.

[75] It must be remembered that the issue here was not so much that FBC inserted the wording concerned into the contract which differed from that previously agreed on between the parties (and recorded in the tender documents). The point is that FBC is accused of having shared a document with different terms to Zimbabwe Nantong to extract their signature. But thereafter, FBC is accused of subsequently adding some wording to the contract after Zimbabwe Nantong had signed it. From Zimbabwe Nantong`s subsequent protests, they in fact checked and satisfied themselves that in as far as clause 2 was concerned, there was no wording inconsistent with their agreement on payment terms-only to be surprised by the said unlawful insertion afterwards.

[76] The opinion expressed by the Arbitrator in paragraph 13.02.17 that if FBC had been sincere they ought to have alerted Zimbabwe Nantong is too far-fetched to found a sustainable inference. An inference that excluded all other possible conclusions-including the one that Zimbabwe Nantong`s accusations were unfounded. In the simplest terms, such opinion amounted to conjecture. The burden and standard of proof in civil matters are matters of well-established law (see *Masomera NO v Hwemende & 11 Ors* SC 6-21, *ZUPCO Ltd v Pakhorse Services (Pvt) Ltd* SC 13-17 and the authorities referred to therein).

[77] There was nothing on record to support the averment that FBC illegally inserted the clause complained of into the contract. If anything, significant credibility issues arise from

Zimbabwe Nantong`s allegations that the wording was surreptitiously inserted. FBC traversed these issues extensively in its Statement of Defence before the Arbitrator and I see no need to repeat them.[11] In that regard, the Arbitrator`s finding of fact that FBC inserted the disputed wording in the contract after Zimbabwe Nantong had executed it are unfounded, and I am therefore released to overrule them.

A contract for the parties?

[78] Next, is the finding by the Arbitrator that, despite the existence of a signed contract and FBC`s disputations, the parties were obliged to execute an addendum to the main contract. This conclusion constitutes the judicial taboo of a tribunal making a contract for the parties. This position was articulated in *Cuthbert Dube v PSMA & Anor* SC 5-22 where the Supreme Court upheld this court`s reasoning in the following terms [at pages 16-17]; -

> "The court *a quo* further found that equally disturbing is that the arbitrator`s conduct was tantamount to making a contract for the parties which neither he nor any court or tribunal can do as a matter of law. It remarked as follows: "Making contracts for parties is not the duty of an adjudicating authority. An adjudicating authority deals with disputes arising from contracts or indeed interprets terms of contract where parties need interpretation of the terms thereof in the context of disputes between them. They do not make contracts for parties. In the *Kundai Magodora case* (above) at 403 C-D the Supreme Court stated as follows: 'In principle, it is not open to courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted even if they are shown to be onerous or oppressive."
>
> As is appositely cautioned by Christie: *The Law of Contract in South Africa* (5 ed.) at p. 366: "The fundamental rule that the court may not make a contract for the parties is a salutary one, the principle of which has probably never been seriously questioned. It is unthinkable that the courts should not only tell the parties what they ought to have done but then make them do it by enforcing the court's idea of what the contract ought to have been.""

What was the correct applicable currency exchange formula?

[11] See the entirety of paragraph 8 of the Statement of Defence at pages 264-270 of the bundle.

[79] The question of which of the above two (2) formulas to apply formed the genesis of the dispute. This matter was spiritedly contested before the Arbitrator, as it has been raised in the papers now before me. For completeness, I set out the formulas once again being; - (i) "*The Bills of Quantities will be priced in USD and payments will be made in ZWL equivalent"* and; - (ii) *"the payment to the contractor will be made in ZWL at the ruling RBZ Auction Rate."* The Arbitrator dismissed the former and upheld the latter proposition.

[80] The Arbitrator relied on the contractual clause conflict-resolution provision in the contract to answer the question. According to the Arbitrator`s interpretation of that provision, since the former rate appeared in a provision that was inconsistent with the one providing for the latter, the latter formula therefore prevailed. FBC attacked this finding as "grossly unreasonable" and set out basis for such in paragraphs 26.7.1 and 26.7.2. of the founding affidavit. Zimbabwe Nantong on the hand, supported the finding and stated thus in paragraph 21.8 of their opposing affidavit; -

> "In terms of Bill No.1 to the tender documents which applied to the articles of agreement, and conditions of contract provides (sic) that in case of inconsistency the terms set out in the Bill will prevail over terms set out in the contract documents. Thus the Arbitrator correctly found that the inconsistency in the wording of the payment terms could only be resolved in favour of that which was in the tender documents."

[81] On that basis, I turn to examine the conflict resolution clause itself. In doing so, I must examine the parties` contract in greater detail. As noted above, the contract is made up of 4 parts (a) to (d). The conflict resolution clause in question appears in the preamble to the Bill No.1 titled "Preliminary and General" ("P&Gs"). I will set out the wording shortly. Suffice to say, Bill No.1 forms part of the compendium of tender documents filed as Annexure H to the founding papers.

[82] The tender documents are made up on eleven (11) different "Sections". Bill No.1 on P&Gs forms Section Four of the tender documents. The P&Gs effectively represent the contractor`s bread and butter in the contract. They are structured in 3 parts; firstly clauses

appearing from pages 4-1 to 4-24. These clauses deal with various items ranging from labour, site facilities, insurance and materials to tax. The second part is an appendix appearing on page 4-25, then lastly, the actual bills. These "bills" are a series of schedules bearing the work to be done and price thereof. The bills add up to "$24,867,340,02".

[83] These are the very bills referred to in the line "*The Bills of Quantities are to be priced in USD and payments will be made in ZWL*" in clause 13 of Section One of the tender documents. Clause 13 of Section One of the tender documents precedes the conflict resolution clause which appears in Section Four of the same bundle of tender documents. The other contested pricing reference of *"The payment to the contractor will be made in ZWL via RTGS at the prevailing interbank rate"* is found in clause 2 of the (main) part (a), being the separate Agreement and Schedule of Conditions of Building Contract. Against this background I now come to the conflict resolution clause in the preamble to the P&Gs at page 4-1 itself which went thus; -

> "In the case of inconsistency the terms ***hereinafter*** set out will prevail over the terms and conditions set out in the ***form*** hereinbefore referred to."

[84] According to the above provision, the term "form" refers to the Agreement and Schedule of Conditions of Building Contract or part (a) of the contract documents set. The question is; -does this provision therefore resolve the inconsistency between the formula (i) ""*The Bills of Quantities will be priced in USD and payments will be made in ZWL equivalent*" found in Section One of the tender documents which are part (d), and the formula (ii) *"The payment to the contractor will be made in ZWL via RTGS at the prevailing interbank rate"* found in Schedule of Conditions of Building Contract?

[85] The answer to that question must be in the negative. This is because formula (i) above is not a term appearing "hereinafter" the preamble to the P&Gs. It is a term set out in Section One of the tender documents, which precedes the said conflict resolution clause in Section Four. Accordingly, the conflict resolution clause does not in fact harmonise the two formulas which the Arbitrator considered inconsistent. Which means that the Arbitrator`s ruling to give precedence to *"payable in ZWL"* over *"in ZWL via the RTGS at the prevailing bank rate"* was erroneous. And with error, again the Arbitrator set off on a wrong course.

[86] In any event, just to sense-check the Arbitrator's currency formula resolution ruling (and therefore ascertain the level of its "faultiness"), one may ask the following question; - so after discounting the exchange rate based on the RBZ Auction rate, how then did the Arbitrator interpret the formula; - *The Bills of Quantities will be priced in USD and payments will be made in ZWL equivalent*? What rate did he deem as applicable?

[87] He obviously sidestepped, as he had done earlier, addressing the question as to whether formula 2 was in fact, not simply the expression of formula 1. Namely that to say *paid in ZWL* meant *paid in ZWL at the RBZ Auction Rate*. Unstuck by lack of a tangible formula to apply to the term paid in ZWL, the Arbitrator unsurprisingly proceeded to grant USD denominated monetary damages to Zimbabwe Nantong.

[88] This finding was so despite the fact that first the basis of the award, being the formula set out in the Appendix to Bill No.1 prescribed payment of "*Liquidated and ascertained damages: USD4,500 per day to be paid at ZWL equivalent*. And secondly that the arbitral award being based as it was USD, defeated the Arbitrator`s earlier conclusion that the USD pricing would be settled in ZWL.In the result, the Arbitrator founded his subsequent findings on this flawed premise.

DISPOSITION

[89] In disposing of this matter, I draw the following summary. The matter before the Arbitrator was concerned, at its very heart, with breach of contract and the consequences or remedies thereof. This issue in turn entailed the interpretation of the parties` rights and obligation under the contract. The contract obviously being defined in terms of our law as a private arrangement between two or more parties in the pursuit of lawful objects whose terms will be respected and upheld by the courts. (See *Magodora v Care International* 2014 (1) ZLR 397 (S)). Faced with this responsibility to determine the parties` said rights, the Arbitrator made a number of incorrect findings.

[90] Firstly he incorrectly concluded that FBC unlawfully rescinded the contract. Secondly, he ruled, again erroneously, on the correct formula to apply based on the conflict resolution

clause. Thirdly, the Arbitrator, having discounted one formula for another still avoided making a decision on the specific meaning of the exchange rate which he had ruled as applicable. In between, the Arbitrator glided over and ignored established principles of contract law being the parole evidence rule, the caveat subscriptor rule and the principle of illegality in contract. He then proceeded to attempt making a contract for the parties. He crowned it all by awarding a purely USD monetary award where even by his own reasoning, the contract price was payable in ZWL.

[91] In that respect, the Arbitrator`s misdirection on the issue of unilateral variation of the contract triggered a chain of fatal errors which paradoxically traded the status of the guilty and innocent parties to a contract. In the end, the award absolved a party who refused to take up work because it demanded payment at a black-market exchange rate. In the same respect, the award punished the innocent party who had simply insisted on adhering to the terms of the contract. These various aspects of arbitral misdirection intruded core aspects of public policy.

[92] Aspects ranging from sanctity of contract to natural justice requirements relating to the standard and attention pre-requisite to matters of evidence, reasoning and fairness. In the same vein, such procedural and substantive inconsistencies delivered an award whose result cannot, on the basis of fairness, be permitted to stand. The award is unsupportable and warrants the court`s interference. In that respect, FBC therefore qualifies for the relief sought.

Some didactic observations in conclusion

[93] It would be remiss to conclude this matter without commenting on the difficulties generated by currency conflicts in contracts. The discernible predilection, (justified or not) for the USD, is the cause of many commercial disputes coming before the court. I had occasion to opine, *en passant* in *Magic Software (Pvt) Ltd v Nedbank Limited* HH 274-24 and *Silvia Salakian v Sue Bellini* HH 209-24 on the same issue.

[94] Accordingly, - the underlying economic considerations acknowledged-the sooner the market on one hand, and regulators on the other, combine to clear up residual currency

contradictions, the better for the jurisdiction. The courts, I believe have done, and continue to do their part in addressing currency conflicts[12].

It is hereby ordered; -

1. That the application for the setting aside of the arbitral award be and is hereby granted with costs.
2. That the arbitral award handed down on 8 September 2022 by the arbitrator G. Mukorombindo be and is hereby set aside.

Dube, Manikai and Hwacha- applicant`s legal practitioners.
Rusinahama-Rabvukwa Attorneys- first respondent`s legal practitioners.

[CHILIMBE J__28/8/24]

[12] See the seminal decisions on the subject including *Zambezi Gas Zimbabwe (Pvt) Ltd v N R Barber (Pvt) Ltd* 2020 (1) ZLR 138 (S); *Breastplate Service (Pvt) Ltd v Cambria Africa PLC* SC 66 /20; *Mushayakurara v Zimbabwe Leaf Tobacco (Private) Limited* SC 108-21 and *Stone & Anor v CABS & 2 Ors* CCZ.