

REPORTABLE (21)

STONEWELL SEARCHES (PRIVATE) LIMITED
v
**(1) STONE HOLDINGS (PRIVATE) LIMITED (2) MUTOKO
CONSORTIUM (3) MOSES CHINHENGO N.O.**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & MAKONI JA
HARARE: 8 SEPTEMBER 2020 & 26 MARCH 2020**

E.T. Matinenga, for the appellant

No appearance for the first and second respondents

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MAKONI JA:

This is an appeal against the decision of the High Court upholding an arbitral award handed down by the third respondent on 10 July 2018 in terms of which the appellant's claim was dismissed for want of prosecution and the first respondent's counter claim was granted.

BACKGROUND FACTS

Prior to January 2006 the appellant and the first and second respondents owned mines which are in close proximity situate in the Mutoko and Mudzi districts. In January 2006, the parties concluded a shareholder's agreement governing their respective shareholding in a joint venture company called Quarrying Enterprises (Pvt) Ltd (QE). As

contribution towards their shareholding to QE the parties contributed *inter alia* mining claims.

Alleging breach by the first and second respondents of the shareholder's agreement, the appellant approached the arbitral tribunal seeking an order declaring the shareholder's agreement of no force or effect, restitution of its mining claims and moveable assets it contributed to the joint venture, eviction of the first and second respondents from the mining claims and payment of damages in the sum of US\$21 693 374.

The first and second respondents resisted the claim and filed a counterclaim wherein they alleged that the appellant was in breach of the shareholders agreement. They sought an award declaring that the appellant was in breach of the shareholders agreement and that the other shareholders were entitled to cancel the agreement and acquire appellant's shareholding in accordance with the agreement. In 2015, the parties referred the dispute to arbitration before the third respondent ('arbitrator'). After various interlocutory applications and several postponements requested by the appellant, the arbitrator scheduled the final hearing on 28 May 2018.

At the commencement of the hearing, the appellant's Managing Director, Mr Smit, appeared in person and sought a further postponement. He averred that Mr *Samukange*, the appellant's counsel of choice, was unavailable to argue the matter as he was involved in elections and was not sure when he would be available. He stated that it was in the interests of justice to have appellant's legal practitioner of 20 years to represent it in the matter.

The first and second respondents opposed the postponement and argued that the appellant's right to legal representation was not absolute and proceedings could not be forestalled because of the unavailability of a particular legal practitioner. Counsel for the first and second respondents insisted that the respondents had a right to the prompt resolution of the dispute. He further indicated that the appellant had ample time to enlist the services of another legal practitioner but failed to do so.

In any event, it was submitted, it had been indicated to the appellant at the last postponement of 2 May 2018 that the respondents would make an application for the dismissal of the claim for lack of prosecution. Consequently, the respondents moved for the dismissal of the appellant's claim for want of prosecution. The arbitrator refused the postponement and proceeded with the matter.

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On 10 July 2018, the arbitrator handed down his award dismissing the appellant's claim for want of prosecution in terms of Article 25(d) of the UNCITRAL Model Law, as set out in the Arbitration Act [*Chapter 7:15*] (Model Law). This was upon a finding that the appellant was 'virtually absent' as Mr Smit, the appellant's representative, was not in a position to prosecute the appellant's case or defend the counterclaim without the assistance of a legal practitioner. The arbitrator held that the appellant's conduct exuded an unwillingness to prosecute its case as it sought to forestall the arbitration from October 2017.

After dismissing the appellant's claim, the arbitrator proceeded to deal with the respondent's counterclaim and after analysing the evidence placed before him, he upheld the counterclaim. In the result, he declared that the appellant was in breach of the shareholder's

agreement signed by the parties and that the other parties retained their right to cancel the agreement and to acquire the appellant's shareholding.

Dissatisfied with the award, the appellant approached the court *a quo* in terms of Article 34(2) of the Model Law to have the arbitral award set aside. It argued that the arbitrator violated its right to be heard by directing that the hearing proceeds despite the unavailability of the appellant's legal practitioner of choice. Thus, the appellant contended, its constitutional right to legal representation by counsel of choice had been infringed. It also stated that by imposing a date of hearing, the respondents violated its right to a fair, speedy hearing within a reasonable time before an independent judiciary. It further submitted that the arbitrator's finding that its claim was not prosecuted was contrary to the evidence and amounted to a misrepresentation of facts in order to frustrate the appellant's claim.

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In its opposing papers, the first respondent argued that the postponement was rightfully denied as the appellant's selection of a lawyer, who was known to be unavailable, had the effect of delaying indefinitely the determination of the parties' rights. It further contended that the appellant was not left without representation as it could engage counsel who represented it at the initial stages. The first respondent also indicated that the appellant had ample opportunity to regularise its affairs as it had been granted several adjournments prior to the final hearing but failed to do so. The first respondent was of the view that the appellant was abusing the arbitration proceedings as evidenced by its numerous unmeritorious applications in the High Court. Regarding the arbitrator upholding its counterclaim, the first respondent averred that the evidence against the appellants was overwhelming as it established the unrebutted fact that the appellant was in breach of the shareholders' agreement.

In response, the appellant insisted that Mr *Samukange* was well versed with the facts and issues surrounding the main case and would effect proper representation. Concerning the counterclaim, the appellant submitted that due to Mr *Samukange*'s absence, Mr Smit was incapable of addressing the technical arguments made by the respondent's counsel. However, it was highlighted that the allegations of breach were refuted by Mr Smit. The appellant also argued that the postponement sought could not be classified as an 'indefinite delay' and that it occasioned no prejudice to the respondents.

The appellant took a further point in its heads of argument that the arbitrator adopted a wrong procedure in dismissing its claim for want of prosecution wherein in terms of Article 25(c) he could make an award on the merits based on the evidence placed before him.

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The court *a quo* dismissed the application. It held that the arbitrator properly exercised his discretion in refusing a postponement, after considering the applicable principles. The court held that the appellant's right to legal representation was not absolute. It reiterated that the unsuitability of a date for a legal practitioner is not good enough reason to seek a postponement where no reason is advanced as to why other legal practitioners could not be engaged. It reasoned that the refusal of a postponement was justified considering the duration of the matter and the legitimate reasonable needs of the respondents to have the matter resolved expeditiously considering that the arbitrator had allowed another postponement on 2 May 2018 on similar grounds. The court was of the view that the appellant had ample time between 2 May 2018 and 28 May 2018 to enlist the services of other legal practitioners. It found that the appellant's right to be heard had not been breached

because Mr Smit consciously elected not to participate in the proceedings when it was indicated that there would be no postponement.

The court further held that the arbitrator properly invoked Article 25(d). It reasoned that Article 25(c) was inapplicable since the appellant was duly represented by Mr Smit who had participated in making an application for postponement although he was 'absent' for other purposes.

Aggrieved by that decision, the appellant noted an appeal to this Court on the following grounds:

GROUNDS OF APPEAL

1. "The learned judge erred in finding that the Appellant's constitutional right to a lawyer of his choice had not been infringed by the arbitral tribunal and erred in finding that Appellants insistence on being represented by a legal practitioner of his choice was unreasonable in the circumstances.
2. The learned judge erred in finding that the Appellant was obliged to retain the services of an alternative counsel in the circumstances.
3. The learned judge misdirected himself in finding that the arbitral tribunal had not breached Appellants rights in terms of s69 (4) of the Constitution in the circumstances.
4. The learned judge erred in finding it was reasonable of the arbitral tribunal to impose a date for the resumption of the hearing on the Appellant when its legal practitioner of choice had previously advised the arbitral tribunal it was not available.
5. The learned judge erred in finding that a postponement of the arbitration was not merited and reasonable in the circumstances.
6. The learned judge erred in concluding that the delay in proceedings was occasioned by Appellants remissness and hence he was not entitled to a postponement in the circumstances.
7. The learned judge misdirected himself in finding that the arbitral tribunal acted properly in proceeding without Appellant's legal practitioner.
8. The learned judge misdirected himself in finding that the arbitral tribunal was correct in proceeding under Article 25(d) of the Arbitration Act instead of Article 25(c) which required the arbitral tribunal to consider the matter on the merits.
9. The learned judge erred in finding that the Appellant was not in default on the day in question and hence that the arbitral tribunal was correct in dismissing Appellants claim for want of prosecution."

SUBMISSIONS ON APPEAL

Mr *Matinenga*, for the appellant argued that the arbitrator's undue refusal of a postponement infringed on the appellant's constitutionally guaranteed right to counsel of choice. He submitted that since a plausible explanation for the unavailability of the appellant's counsel of choice was proffered, the arbitrator's denial of postponement in the circumstances was an infraction of effective legal representation.

He also submitted that it was improper for the arbitrator to invoke Article 25(d) of the Model Law as opposed to 25(c) in disposing of the appellant's claim. He argued that such a technical approach to the matter was unwarranted as the appellant's claim and defence to the counterclaim, both of which were before the arbitrator, were not adjudicated on. He argued that by resorting to Article 25(d), the arbitrator made an order akin to a default judgment in arbitration proceedings yet such an order is the preserve of a proper court of law.

Mr *Matinenga* contended that where pleadings are closed, Article 25(d) cannot be employed.

The arbitrator is obliged to deal with the merits of the matter. Accordingly, he argued that s 25(d) applies where a defaulting party has not yet filed documents on the merits of the dispute.

Mr *Matinenga* submitted that had Mr Smit not attended the hearing, Article 25(c) would have been applicable and the arbitrator would have dealt with the matter on the papers placed before him. To that end, he argued that since Mr Smit was present at the hearing but failed to participate, there was no reason for the arbitrator to be excused from determining the merits of the matter.

Upon being asked by the court if a case had been made for the setting aside of the arbitral award on the grounds that it was contrary to public policy, Mr *Matinenga* stated that

the arbitral award was contrary to the public policy of Zimbabwe in two respects. Firstly, in that the arbitrator did not afford the appellant attendance of its legal practitioners and secondly that the arbitrator failed to determine the appellant's claim or the defence to the respondent's counter claim.

ISSUES FOR DETERMINATION

Although the appellant has raised several grounds of appeal, its case hinges on a determination of the following issues.

1. Whether or not the court *a quo* erred in holding that the arbitrator's refusal of the appellant's request for a postponement was justified.
2. Whether or not the court *a quo* erred in finding that the arbitrator properly invoked Article 25(d) of the Model Law in dealing with the appellant's claim.

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APPLICATION OF THE LAW TO THE FACTS

- 1. Whether or not the court *a quo* erred in holding that the arbitrator's refusal of the appellant's request for a postponement was justified.**

It is settled law that postponement of a matter is not a right obtainable on demand but is at the court's indulgence. As such, it involves an exercise of discretion which discretion must be exercised judicially. This position was enunciated by this Court in *Apex Holdings (Pvt) Ltd v Venetian Blinds Specialists Ltd* SC 33/15, where it was held that:

“An application for the postponement of a matter which has been set down for hearing is in the nature of an indulgence sought, the grant of which is in the discretion of the judge or court before which it is made. The applicant must therefore show that there is good cause for the postponement or that there is a likelihood of prejudice if the court refuses the indulgence being sought.”

In exercising the discretion to postpone a matter, several factors have to be considered cumulatively. In *Persadh v General Motors SA (Pty) Ltd* 2006 (1) SA 455 (SE) para 13, the

court succinctly set out the applicable legal principles when a party applies for a postponement, as follows:

“First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.” (Emphasis added)

In casu, the court *a quo* found that the arbitrator was alive to the salient factors surrounding the grant or refusal of a postponement and he applied them judicially. Having considered that the appellant's conduct sought to frustrate the arbitration proceedings by filing several unmeritorious applications, seeking several postponements, that the appellant failed to indicate when the arbitration would continue if postponed, why the legal practitioner of choice was unavailable and why other legal practitioners who had handled the matter previously could not act for the appellant, the court *a quo* held that the appellant's insistence on representation by Mr *Samukange* in the circumstances was unreasonable. The court found that the appellant had ample time to enlist the services of other legal practitioners.

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The court *a quo*'s reasoning cannot be faulted. It was a proper case to deny a postponement as the reasons for the appellant's inability to proceed had not been fully explained and postponement had been employed as a delaying tactic. Over and above that, the mere fact that a party's counsel of choice is unavailable is not a good ground upon which to grant a postponement. This position was laid out in *D' Anos v Heylon Court (Pty) Ltd* 1950 (1) SA 324 C at 335-336, where the court held that:

“...the non-availability of counsel cannot be allowed to thwart the bringing before the court of the matter in issue. In all but the rarest of cases suitable counsel will be

available. This is not the convenience of counsel; it is the reasonable convenience of the parties- and by that I mean both parties- and the requirement of getting through the court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom if indeed ever be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties." (Emphasis added)

The parties' interests must be taken into consideration. In the present case, the arbitrator further considered the respondent's interest in respect of its counterclaim which required speedy determination which could not be delayed further by the appellant who did not wish to prosecute its case. That finding cannot be impeached. In any event, it is a salutary principle of law that there should be finality in litigation. See *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C – E.

Therefore, the arbitrator's refusal of postponement was justifiable. The appellant failed to show good cause for the grant of the indulgence it sought. The arbitrator and the court *a quo* cannot be faulted for holding that the appellant had not made a good case for a further postponement of the hearing.

This leaves one issue for consideration namely:

- 2. Whether or not the court *a quo* erred in finding that the arbitrator properly invoked Article 25(d) of the Model Law in dealing with the appellant's claim.**

The appellant contends that the arbitrator and the court *a quo* ought to have found that Article 25(d) of the Model Law was inapplicable notwithstanding that it was in default. The thrust of its argument is that where pleadings are closed and all documents are before the arbitrator, the arbitrator is obliged to make a decision on the merits notwithstanding any reasons for the default.

Article 25 of the Model Law provides the course an arbitrator can take where a party is in default as follows:

“ARTICLE 25

Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause—

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;

(d) the claimant fails to prosecute his claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.” (Emphasis added)

Subsections (c) and (d) are apposite to the determination of the present case.

Under (c) an arbitrator has a discretion to consider the evidence before him and to render a ruling notwithstanding that a party is in default. However, under subs (d) the arbitrator may dismiss the claim or give directions for the speedy determination of the claim where the claimant fails to prosecute its claim. Our Article 25 is worded exactly as Article 25 of the Arbitration Act 1996 of New Zealand which provides that:

“25 Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause,—

(a) the claimant fails to communicate the statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

(b) the respondent fails to communicate the statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;

(d) the claimant fails to prosecute the claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.”

Similarly, the Arbitration Act of Kenya Chapter 49 is couched as follows:

“26. Default of a party

Unless otherwise agreed by the parties, if, without showing sufficient cause—

(a) the claimant fails to communicate his statement of claim in accordance with section 24(1), the arbitral tribunal shall terminate the arbitral proceedings;

(b) the respondent fails to communicate his statement of defence in accordance with section 24(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations;

(c) a party which fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it;

(d) the claimant fails to prosecute his claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim;

(e)...

(f)...

(g)...”

A point to note is that the UNCITRAL Model Law does not have subs (d) in its Article 25. It only has subss (a) to (c). Subsection (d) is one of the few provisions that were expressly added by the Zimbabwean legislature to the Model Law. **Judgment No. SC 22/21**

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There is a dearth of case law interpreting Article 25(d) in the stated jurisdictions. It appears that our courts have also not dealt with the import of the subsection and the powers bestowed on an arbitrator therein. However, it can be gleaned from the above that subs (d) gives the arbitrator final and definitive powers in the disposition of a claimant’s claim for lack of prosecution.

It is necessary to mention that Article 25 of the Model Law involves the exercise of a discretion by an arbitrator as to the course of action to follow in disposing of a claim before him where default has been established. That discretion may be interfered with where the primary court acts upon a wrong principle, allows extraneous or irrelevant matters to guide or affect it, mistakes the facts or does not take into account some relevant

consideration. See *Barros v Chimponda* 1999(1) ZLR 58 (S). These guidelines ought to be measured against both the arbitrator and court *a quo*'s findings.

The arbitrator invoked Article 25(d) of the Model Law having found that the appellant's conduct exhibited an unwillingness to prosecute its case. The court *a quo* also reasoned that subs (c) was inapplicable as the phrase "fails to appear" did not apply to the appellant which was represented by Mr Smit who had participated in the proceedings by seeking postponement. The question is whether, in the circumstances, the arbitrator was obliged to determine the merits of the matter. This can only be determined by ascertaining the legislative intent in promulgating the section.

This Court in *Thandikile Zulu v ZB Financial Holdings (Private) Limited* SC48/18 had this to say;

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"The rules of statutory interpretation dictate that the words of a statute shall be given their ordinary grammatical meaning unless doing so leads to an absurdity. In the case of *Venter v Rex* 1907 TS 910, INNES CJ said the following at 914-5:

"it appears to me that the principle we should adopt may be expressed somewhat in this way: that when to give plain words of a statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, as shown by the context or by such other consideration as this court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."

This approach was followed by MCNALLY JA in *Chegut Municipality v Manyara* 1996 (1) ZLR 262 (S) at 264 D-E, where he said:

"There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey v Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified as to avoid that absurdity and inconsistency, but no further'.

See also *Zimbabwe Revenue Authority & Anor v Murowa Diamonds (Pvt) Ltd*
SC 41/09 at p6.

In my view the wording employed in Article 25 (c) and (d) of the Model Law is clear and unambiguous. There is no need to resort to tools of interpretation to get the intention that motivated the enactment of the provisions.

What differentiates subs (c) from (d) is the claimant's conduct upon which the arbitrator's decision to either consider the evidence before him or to dismiss the claimant's claim respectively is based. It appears that Article 25(d) is invoked in the extreme situations where, as in *casu*, a party is present, is asked to motivate its case and fails or refuses to do so.

The party would have consciously made a decision not to participate in the proceedings. It must be borne in mind that that party would be the claimant and hence the *dominus litis* in the matter. The Article gives the arbitrator power to deal with an otherwise obstructive litigant. *In casu* the proceedings would have stalled were it not for Article 25 (d) of the Model Law and the applicant would have achieved its intended desire of having the matter moved forward. It has, therefore, the effect of terminating stale or unnecessarily protracted arbitral proceedings.

On the other hand Article 25 (c) of the Model Law is resorted to where “a party fails to appear at a hearing or to produce documents”. That is the major distinction between the two provisions. Its akin to the procedure in terms of r 238 of the High Court Rules 1971 where the court can exercise its discretion to deal with the matter on the merits. Accordingly, Mr *Matinenga*'s argument that an order by the court under Article 25(d) of the Model Law is akin to a default judgment which an arbitrator has no power to make is misplaced. His further

contention that a party has better protection under Article 25(d) is neither here nor there. If it was the intention of the legislature to give the same rights to a party who fails to appear and one who refuses to prosecute its claim it would have specifically stated so.

More importantly, the arbitrator in a detailed analysis of the appellant's conduct, since the commencement of arbitration proceedings, held that the appellant was unwilling to prosecute its case. He remarked thus:

“Without any indication from the claimant as to when the arbitration would continue if postponed; without any good enough reason why the preferred legal practitioner, Mr Samukange, was unavailable; without a date as to when he would be available; without any explanation as to why Mr Mc Gown who handled the matter on the previous occasions was unable to act for the claimant; without any explanation as to why Advocate Wood would not appear for the claimant ; and in the face of a long history of obstructive steps by the claimant in the form of requests for postponement and unmeritorious applications, I was satisfied that the claimant did not wish to prosecute its claim.” (emphasis added)

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The court *a quo* also made some pertinent observation and correctly so, when it stated:

“Mr Smit cannot be regarded as having been present for the purpose of making an application for a postponement but “absent” for other purposes.”

I find no fault in these findings by the arbitrator and court *a quo*. I can only interfere with the findings where they are grossly irrational. See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). I have not found irrationality in the above reasoning.

In any event, a high threshold has been set for setting aside arbitral awards under Article 34 on the basis that it is contrary to public policy. 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. It is in those instances where:

“...the reasoning or conclusion in an award goes beyond mere faultiness or correctness and constitutes a palpable inequity that is so far-reaching and outrageous in its defiance of logic or acceptable 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 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.” See *Zesa v Maposa* 1999 (2) ZLR (S) @ 466E

In the present case, the threshold has not been met.

DISPOSITION

I have come to the conclusion that Article 25(d) of the Model Law was properly invoked in the circumstances of this case. A finding that the appellant failed to prosecute its case empowered the arbitrator to dismiss the appellant’s claim. Consequently, in the circumstances of this case, the appellant cannot seriously argue that the arbitrator failed to determine the matter placed before him. The appellant also has not demonstrated that the arbitrator’s refusal of postponement was grossly unreasonable.

Although this would have been a proper case to award costs against the appellant this Court will not make such an order for the reason that the respondents, being in default, did not motivate a claim for costs.

In the result, I make the following order:

The appeal be and is hereby dismissed.

GUVAVA JA

I agree

UCHENA JA

I agree

Messrs. Venturas & Samukange, appellants' legal practitioners

Gill, Godlonton & Gerrans, 1st respondent's legal practitioners

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